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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Revision of the Commission's Program Carriage Rules	)	MB Docket No. 11-131
	)	
Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage	)	MB Docket No. 07-42

SECOND REPORT AND ORDER IN MB DOCKET NO. 07-42 AND NOTICE OF PROPOSED RULEMAKING IN MB DOCKET NO. 11-131

Adopted: July 29, 2011 **Released: August 1, 2011**

Comment Date: [60 days after date of publication in the Federal Register]
Reply Comment Date: [90 days after date of publication in the Federal Register]

By the Commission: Commissioners Copps and Clyburn issuing separate statements; Commissioner McDowell dissenting in part and issuing a statement.

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I. INTRODUCTION

1. In 1993, the Commission adopted rules implementing a provision of the 1992 Cable Act[1] pertaining to carriage of video programming vendors by multichannel video programming distributors ("MVPDs") intended to benefit consumers by promoting competition and diversity in the video programming and video distribution markets (the "program carriage" rules).[2] As required by Congress, these rules allow for the filing of complaints with the Commission alleging that an MVPD has (i) required a financial interest in a video programming vendor's program service as a condition for carriage;[3] (ii) coerced a video programming vendor to provide, or retaliated against a vendor for failing to provide, exclusive rights as a condition of carriage;[4] or (iii) unreasonably restrained the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage.[5] Congress specifically directed the Commission to provide for "expedited review" of these complaints and to provide for appropriate penalties and remedies for any violations.[6] Programming vendors have complained that the Commission's procedures for addressing program carriage complaints have hindered the filing of legitimate complaints and have failed to provide for the expedited review envisioned by Congress.

2. In this *Second Report and Order* in MB Docket No. 07-42,[7] we take initial steps to improve our procedures for addressing program carriage complaints by[8]:

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[1] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); *see also* 47 U.S.C. § 536.

[2] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642 (1993) ("*1993 Program Carriage Order*"); *see also Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994) ("*1994 Program Carriage Order*"). The Commission's program carriage rules are set forth at 47 C.F.R. §§ 76.1300 - 76.1302.

[3] *See* 47 C.F.R. § 76.1301(a); *see also* 47 U.S.C. § 536(a)(1).

[4] *See* 47 C.F.R. § 76.1301(b); *see also* 47 U.S.C. § 536(a)(2).

[5] *See* 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C. § 536(a)(3).

[6] *See* 47 U.S.C. § 536(a)(4).

[7] The initial *Notice of Proposed Rulemaking* in MB Docket No. 07-42 was released in June 2007 and pertains to both program carriage and leased access issues. *See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage,* MB Docket No. 07-42, Notice of Proposed Rule Making, 22 FCC Rcd 11222 (2007) ("*Program Carriage NPRM*"). The Commission released a *Report and Order and Further Notice of Proposed Rulemaking* in this docket in February 2008 pertaining only to leased access issues.
(continued....)

- Codifying in our rules what a program carriage complainant must demonstrate in its complaint to establish a *prima facie* case of a program carriage violation;
- Providing the defendant with 60 days (rather than the current 30 days) to file an answer to a program carriage complaint;
- Establishing deadlines for action by the Media Bureau and Administrative Law Judges ("ALJ") when acting on program carriage complaints; and
- Establishing procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.

3. In the *Notice of Proposed Rulemaking* in MB Docket No. 11-131, we seek comment on the following proposed revisions to or clarifications of our program carriage rules, which are intended to further improve our procedures and to advance the goals of the program carriage statute:

- Modifying the program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the rules;
- Revising discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery is conducted, including expanded discovery procedures (also known as party-to-party discovery) and an automatic document production process, to ensure fairness to all parties while also ensuring compliance with the expedited resolution deadlines adopted in the *Second Report and Order* in MB Docket No. 07-42;
- Permitting the award of damages in program carriage cases;
- Providing the Media Bureau or ALJ with the discretion to order parties to submit their best "final offer" for the rates, terms, and conditions for the programming at issue in a complaint proceeding to assist in crafting a remedy;
- Clarifying the rule that delays the effectiveness of a mandatory carriage remedy until it is upheld by the Commission on review, including codifying a requirement that the defendant MVPD must make an evidentiary showing to the Media Bureau or an ALJ as to whether a mandatory carriage remedy would result in deletion of other programming;
- Codifying in our rules that retaliation by an MVPD against a programming vendor for filing a program carriage complaint is actionable as a potential form of discrimination on the basis of affiliation and adopting other measures to address retaliation;

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See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, Report and Order, 23 FCC Rcd 2909 (2008), *stayed by United Church of Christ, et al. v. FCC,* No. 08-3245 (6th Cir. 2008).

[8] The new procedures adopted in the *Second Report and Order* do not apply to program carriage complaints that are currently pending or to program carriage complaints that are filed before the effective date of the new procedures adopted herein. *See The Tennis Channel Inc. v. Comcast Cable Communications, LLC,* MB Docket No. 10-204, File No. CSR-8258-P (filed January 5, 2010); *Bloomberg, L.P. v. Comcast Cable Communications, LLC,* MB Docket No. 11-104 (filed June 13, 2011).

- Adopting a rule that requires a vertically integrated MVPD to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD;
- Clarifying that the discrimination provision precludes a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD; and
- Codifying in our rules which party bears the burden of proof in program carriage discrimination cases.

We also invite commenters to suggest any other changes to our program carriage rules that would improve our procedures and promote the goals of the program carriage statute.

II. BACKGROUND

4. In the 1992 Cable Act, Congress sought to promote competition and diversity in the video distribution market as well as in the market for video programming carried by cable operators and other MVPDs. Congress expressed concern that the market power held by cable operators would adversely impact programming vendors, noting that "programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system."[9] Congress also explained that increased vertical integration in the cable industry could harm programming vendors because it gives cable operators "the incentive and ability to favor their affiliated programmers."[10] Congress concluded that this harm to programming vendors could adversely affect both competition[11] and diversity[12] in the video

[9] S. Rep. No. 102-92 (1991), at 24, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1157; *see also id.* ("[T]he Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors."); H.R. Rep. No. 102-628 (1992), at 41 ("Submissions to the Committee also suggest that some vertically integrated MSOs have agreed to carry a programming service only in exchange for an ownership interest in the service.").

[10] 1992 Cable Act § 2(a)(5) ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."); *see also* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("vertical integration gives cable operators the incentive and ability to favor their affiliated programming services"); *see id.* ("For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers."); H.R. Rep. No. 102-628 (1992), at 41 ("Submissions to the Committee allege that some cable operators favor programming services in which they have an interest, denying system access to programmers affiliated with rival MSOs and discriminating against rival programming services with regard to price, channel positioning, and promotion.").

[11] *See* S. Rep. No. 102-92 (1991), at 25-26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158-59 ("Because of the trend toward vertical integration, cable operators now have a clear vested interest in the competitive success of some of the programming services seeking access through their conduit."); H.R. Rep. No. 102-628 (1992), at 41 ("[T]he Committee received testimony that vertically integrated operators have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services."); *see also* 47 U.S.C. § 536(a)(3) (requiring the Commission to adopt regulations prohibiting discrimination on the basis of affiliation that has "the effect of . . . unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly"); *1993 Program Carriage Order*, 9 FCC Rcd at 2643, ¶ 2 ("Congress concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems. Cable operators or programmers that compete with the vertically integrated entities may suffer harm to the extent that they do not receive such favorable terms.").

programming market, as well as hinder competition in the video distribution market.[13]

5. To address these concerns, Congress passed Section 616 of the Communications Act of 1934, as amended (the "Act"), which directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[14] Congress mandated that these regulations shall include provisions prohibiting a cable operator or other MVPD from engaging in three types of conduct: (i) "requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems" (the "financial interest" provision);[15] (ii) "coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other [MVPDs] as a condition of carriage on a system" (the "exclusivity" provision);[16] and (iii) "engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors" (the "discrimination" provision).[17] Section 616 also directs the Commission to (i) "provide for expedited review of any complaints made by a video programming vendor pursuant to" Section 616;[18] (ii) "provide for appropriate penalties and remedies for violations of [Section 616], including carriage";[19] and (iii) "provide penalties to be assessed against any person filing a frivolous complaint pursuant to" Section 616.[20]

6. In the *1993 Program Carriage Order*, the Commission implemented Section 616 by adopting procedures for the review of program carriage complaints as well as penalties and remedies.[21] In doing so, the Commission explained that its rules were intended to prohibit the activities specified by Congress "without unduly interfering with legitimate negotiating practices between [MVPDs] and

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[12] *See* H.R. Rep. No. 102-628 (1992), at 41 ("The Committee received testimony that vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services.").

[13] In addition to promoting competition and diversity in the video programming market, the Commission has explained that the program carriage provision of the 1992 Cable Act is also intended to promote competition in the video distribution market by ensuring that MVPDs have access to programming. *See 1994 Program Carriage Order*, 9 FCC Rcd at 4419, ¶ 28 ("[I]n passing Section 616, Congress was concerned with the effect a cable operator's market power would have both on programmers and on competing MVPDs . . . ."); *see also* S. Rep. No. 102-92 (1991), at 23, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1156 ("In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.").

[14] 47 U.S.C. § 536. A "video programming vendor" is defined as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b).

[15] 47 U.S.C. § 536(a)(1); *see also* 47 C.F.R. § 76.1301(a).

[16] 47 U.S.C. § 536(a)(2); *see also* 47 C.F.R. § 76.1301(b).

[17] 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c).

[18] 47 U.S.C. § 536(a)(4).

[19] 47 U.S.C. § 536(a)(5).

[20] 47 U.S.C. § 536(a)(6).

[21] *See 1993 Program Carriage Order*, 9 FCC Rcd 2642 (1993); *see also 1994 Program Carriage Order*, 9 FCC Rcd 4415 (1994).

programming vendors."[22] The Commission's procedures generally provide for resolution of a program carriage complaint in one of four ways: (i) if the Media Bureau determines that the complainant has not made a *prima facie* showing in its complaint of a violation of the program carriage rules, the Media Bureau will dismiss the complaint;[23] (ii) if the Media Bureau determines that the complainant has made a *prima facie* showing and the record is sufficient to resolve the complaint, the Media Bureau will rule on the merits of the complaint based on the pleadings without discovery;[24] (iii) if the Media Bureau determines that the complainant has made a *prima facie* showing but the record is not sufficient to resolve the complaint, the Media Bureau will outline procedures for discovery before proceeding to rule on the merits of the complaint;[25] and (iv) if the Media Bureau determines that the complainant has made a *prima facie* showing but the disposition of the complaint or discrete issues raised in the complaint will require resolution of factual disputes in an adjudicatory hearing or extensive discovery, the Media Bureau will refer the proceeding or discrete issues arising in the proceeding for an adjudicatory hearing before an ALJ.[26] The Commission decided that appropriate relief for violations of the program carriage rules would be determined on a case-by-case basis, and could include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.[27]

7. In June 2007, the Commission released the *Program Carriage NPRM* seeking comment on revisions to the Commission's program carriage rules and complaint procedures.[28] The Commission sought comment on whether and how the processes for resolving program carriage complaints should be modified;[29] whether the elements of a *prima facie* case should be clarified;[30] whether the deadline for resolving the program carriage complaint at issue in the *MASN I HDO* or a similar deadline should apply

[22] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2643, ¶ 1.

[23] *See id.* at 2655, ¶ 31.

[24] *See id.* at 2652, ¶ 23 and 2655, ¶ 31; *see also* 47 C.F.R. § 76.1302(c), (d), (e).

[25] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶¶ 31-33; *see also* 47 C.F.R. § 76.7(f).

[26] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34; *see also* 47 C.F.R. § 76.7(g)(1). In cases referred to an ALJ, the parties have ten days after the Media Bureau's *prima facie* determination to elect whether to attempt to resolve their dispute through Alternative Dispute Resolution ("ADR"). *See* 47 C.F.R. § 76.7(g)(2); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34.

[27] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2653, ¶ 26. Eleven program carriage complaints have been filed in the approximately two decades since Congress passed Section 616 in the 1992 Cable Act, two of which are currently pending before an ALJ or the Media Bureau. *See The Tennis Channel Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149 (MB 2010) ("*Tennis Channel HDO*"); *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104 (filed June 13, 2011). In addition, the Commission has resolved on the merits a program carriage claim arising through the program carriage arbitration condition applicable to Regional Sports Networks ("RSNs") adopted in the *Adelphia Order*. *See TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783 (MB 2008), *reversed by* Memorandum Opinion and Order, 25 FCC Rcd 18099 (2010) ("*MASN v. Time Warner Cable*"), *appeal pending sub nom. TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC*, No. 11-1151 (4th Cir.).

[28] *See Program Carriage NPRM*, 22 FCC Rcd 11222 (2007).

[29] *See id.* at 11227, ¶ 14.

[30] *See id.*

to all program carriage complaints;[31] and whether additional rules are necessary to protect programming vendors from potential retaliation for filing a program carriage complaint.[32]

III. SECOND REPORT AND ORDER IN MB DOCKET NO. 07-42

8. As discussed below, the record reflects that our current program carriage procedures are ineffective and in need of reform.[33] Among other concerns, programming vendors and other commenters cite uncertainty concerning the evidence a complainant must provide to establish a *prima facie* case,[34]

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[31] *See id.* at 11227, ¶ 15; *see also TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8995, ¶ 13 (MB 2006) ("*MASN I HDO*"). In the *MASN I HDO*, the ALJ was required to issue a recommended decision on a program carriage complaint within 45 days. *See MASN I HDO*, 21 FCC Rcd at 8995, ¶ 13.

[32] *See Program Carriage NPRM*, 22 FCC Rcd at 11227, ¶ 16.

[33] *See Ex Parte* Reply Comments of HDNet (June 2, 2010) at 6 ("A right without an effective remedy is like having no right at all. Today, neither MVPDs nor independent programmers have reason to think that a possible statutory violation will be redressed by the FCC in a timely and effective manner."); Comments of Black Television News Channel, LLC at 4 ("BTNC Comments"); Comments of National Alliance of Media Arts and Culture *et al.* at 18-19 ("NAMAC Comments"); Comments of NFL Enterprises LLC at 6-8 ("NFL Enterprises Comments"); Comments of The America Channel at 9-11 ("TAC Comments"); Reply Comments of Crown Media Holdings, Inc. at 10-11 ("Hallmark Channel Reply"); Reply Comments of HDNet at 1 ("HDNet Reply"); Reply Comments of National Alliance of Media Arts and Culture *et al.* at 18-19 ("NAMAC Reply"); Reply Comments of NFL Enterprises LLC at 5-6 ("NFL Enterprises Reply"); Reply Comments of WealthTV at 1-2 ("WealthTV Reply"); *see also* Letter from Stephen A. Weiswasser, Counsel for the Outdoor Channel, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 16, 2007) at 2 ("Outdoor Channel Nov. 16 2007 *Ex Parte* Letter"); Letter from Larry F. Darby, American Consumer Institute, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007) at 14 ("ACI Nov. 20 2007 *Ex Parte* Letter"); Letter from David S. Turetsky, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007) at 1-2 ("HDNet Nov. 20 2007 *Ex Parte* Letter"); Letter from Kathleen Wallman, Counsel for National Association of Independent Networks ("NAIN"), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 5, 2008), Attachment ("NAIN June 5 2008 *Ex Parte* Letter"); Letter from John Lawson, Executive Vice President, ION Media Networks, to Kevin J. Martin, Chairman, FCC, MB Docket No. 07-42 (Dec. 11, 2008), Attachment at 1 ("ION Dec. 11 2008 *Ex Parte* Letter"). Members of Congress have also expressed concern with the program carriage complaint process. *See* Letter from Kathleen Wallman, Counsel for WealthTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Aug. 4, 2008) ("WealthTV Aug. 4 2008 *Ex Parte* Letter") (attaching Letter from U.S. Sen. Kay Bailey Hutchison to Kevin J. Martin, Chairman, FCC (July 27, 2008) at 1 (expressing continued concern that "the existing dispute resolution processes are not encouraging the timely resolution of these disputes or providing the proper incentives for the parties to negotiate terms")); *id.* (attaching Letter from U.S. Sen. Amy Klobuchar to Kevin J. Martin, Chairman, FCC (July 24, 2008) at 1 ("Without an effective and timely FCC process to decide complaints . . . the integrity of any safeguards against program carriage discrimination is undermined.")); Letter from David S. Turetsky, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 22, 2008) ("HDNet July 22 2008 *Ex Parte* Letter") (attaching Letter from U.S. Sen. Herb Kohl to Kevin J. Martin, Chairman, FCC (June 23, 2008) at 2 (urging the Commission "to strengthen the program carriage rules and to simplify and make more efficient the process by which program carriage complaints are adjudicated")); *id.* (attaching Letter from U.S. Reps. Gene Green, Mike Doyle, and Charles Gonzalez to Kevin J. Martin, Chairman, FCC (June 30, 2008) at 1-2 ("The current complaint process is not as efficient as it could be . . . . [W]e urge you to provide more effective remedies and streamline the complaint process . . . .")).

[34] *See* TAC Comments at 10; NAMAC Reply at 18-19; WealthTV Reply at 1; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1; Letter from Harold Feld, Counsel for NAMAC *et al.*, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (May 2, 2008) at 1 ("NAMAC May 2 2008 *Ex Parte* Letter").

unpredictable delays in the Commission's resolution of complaints,[35] and fear of retaliation[36] as impeding the filing of legitimate program carriage complaints. While MVPDs contend that the limited number of program carriage complaints filed to date demonstrates that the current procedures are working and that rule changes are not necessary,[37] programming vendors contend that the lack of complaints is a direct result of our inadequate procedures, not a lack of program carriage claims.[38] As discussed below, we take initial steps to improve these procedures by: (i) codifying in our rules what a program carriage complainant must demonstrate in its complaint to establish a *prima facie* case of a program carriage violation; (ii) providing the defendant with 60 days (rather than the current 30 days) to file an answer to a program carriage complaint; (iii) establishing deadlines for action by the Media Bureau and an ALJ when acting on program carriage complaints; and (iv) establishing procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.

A. *Prima Facie* Case

9. In the *1993 Program Carriage Order*, the Commission described the evidence a program carriage complainant must provide in its complaint to establish a *prima facie* case.[39] Among other things, the Commission stated that the "complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an authorized representative or agent of the complaining programming vendor) setting forth the basis for the complainant's allegations."[40] The Commission also emphasized that the complaint "may not merely reflect conjecture or allegations based only on

[35] *See* Letter from Jonathan D. Blake, Counsel for the National Football League, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 5, 2009) at 2 ("Based on the experience in the now-settled NFL Network/ Comcast hearing, the NFL believes that the Commission's processes are too slow . . . ."); BTNC Comments at 4; TAC Comments at 9; Letter from David S. Turetsky, Counsel for HDNet, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 16, 2010), at 5 ("HDNet June 16 2010 *Ex Parte* Letter"); *see also* NAMAC Comments at 18; HDNet Reply at 1; NFL Enterprises Reply at 8; WealthTV Reply at 1; ION Dec. 11 2008 *Ex Parte* Letter, Attachment at 1; NAIN June 5 2008 *Ex Parte Letter*, Attachment at 1.

[36] *See* BTNC Comments at 4; NAMAC Comments at 18-19; NFL Enterprises Comments at 8 n.28; NFL Enterprises Reply at 6; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1.

[37] *See* Comments of Comcast Corporation at 27, 33 ("Comcast Comments"); Comments of the National Cable and Telecommunications Association at 14-15 ("NCTA Comments"); Comments of Time Warner Cable Inc. at 27-29 ("TWC Comments"); Reply Comments of Comcast Corporation at 21-23 ("Comcast Reply"); Reply Comments of the National Cable and Telecommunications Association at 18-19 ("NCTA Reply"); Reply Comments of Time Warner Cable Inc. at 2-3 ("TWC Reply"); Reply Comments of Verizon at 9-10 ("Verizon Reply").

[38] *See* Letter from Stephen A. Weiswasser, Counsel for the Hallmark Channel, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 6, 2007) at 1-2 ("[T]he absence of complaints under the existing program carriage regime is not evidence of lack of discrimination, but, to the contrary, a reflection of the difficulties presented to independents by the high burdens of going forward under the existing rules and the prospects for retaliation by MVPDs.") ("Hallmark Channel Nov. 6 2007 *Ex Parte* Letter"); *see also* BTNC Comments at 4 (citing fear of retaliation, unpredictable cost and delay, and uncertainty regarding evidence required and adequacy of relief as reasons for why few program carriage complaints have been filed to date); Hallmark Channel Reply at 11 ("[I]t 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.").

[39] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29 (footnotes omitted).

[40] *See id.*

information and belief.'"[41] The record reflects that programming vendors are uncertain as to what evidence must be provided in a complaint to meet the *prima facie* requirement.[42] The National Association of Independent Networks ("NAIN"), for example, notes that our rules do not contain a definition of what constitutes a *prima facie* case and that this lack of clarity impedes programming vendors from asserting their program carriage rights through the complaint process.[43]

10. While one commenter notes that the *prima facie* step is not required by the statute and urges the Commission to eliminate this step entirely,[44] we believe that retaining this requirement is important to dispose promptly of frivolous complaints and to ensure that only legitimate complaints proceed to further evidentiary proceedings. We agree, however, that clarifying what is required to establish a *prima facie* case and codifying these requirements in our rules will help to reduce uncertainty regarding the *prima facie* requirement. In the following paragraphs, we clarify the requirements for establishing a *prima facie* case.

11. As an initial matter, all complaints alleging a violation of any of the program carriage rules (*i.e.*, the financial interest, exclusivity, or discrimination provisions) must contain evidence that (i) the complainant is a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's rules or an MVPD as defined in Section 602(13) of the Act and Section 76.1300(d) of the Commission's rules;[45] and (ii) the defendant is an MVPD as defined in Section 602(13)

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[41] *See 1994 Program Carriage Order*, 9 FCC Rcd at 4420, ¶ 33.

[42] *See* TAC Comments at 10 ("[T]here are no clear guidelines on what constitutes a *prima facie* case of discrimination."); NAMAC Reply at 18-19 ("[T]he current *prima facie* case requirement actively prevents the Commission from fulfilling the statutory command to resolve complaints 'expeditiously.' Similarly, evidence in the record from independent programmers demonstrates that the *prima facie* case requirement may dissuade independent programmers from bringing genuine complaints due to confusion over the appropriate standard . . . ."); WealthTV Reply at 1 ("It is critical for independent programmers to know exactly what kind of evidence, and how much evidence, they need to present to move forward with a complaint."); *see also* HDNet July 22 2008 *Ex Parte* Letter (attaching Letter from U.S. Reps. Gene Green, Mike Doyle, and Charles Gonzalez to Kevin J. Martin, Chairman, FCC (June 30, 2008) at 2 (urging the Commission to adopt a "better defined and more reasonable definition of a *prima facie* case"); NAMAC May 2 2008 *Ex Parte* Letter at 1 ("If the Commission elects to retain the *prima facie* screen, the Commission must clarify what applicants must prove to meet this burden . . . .").

[43] *See* NAIN June 5 2008 *Ex Parte* Letter, Attachment ("Currently, there is no definition in the rules of what constitutes a *prima facie* case. Consequently, defendants argue their own versions of the standard to try to get independent programmers' complaints dismissed. This lack of clarity is a problem for independent programmers who are in litigation before the Commission, and for programmers who are contemplating litigation to vindicate their rights.").

[44] *See* NAMAC Reply at 18 ("[T]he Commission adopted the requirement to establish a *prima facie* case solely on the basis of its own initiative. . . . [N]othing in Section 616 requires the Commission to use a *prima facie* case requirement to limit the number of potentially frivolous complaints.").

[45] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29; *see also* 47 U.S.C. §§ 522(13), 536(b); 47 C.F.R. § 76.1300(d), (e). In the *1994 Program Carriage Order*, the Commission amended the program carriage rules to allow MVPDs, in addition to video programming vendors, to file complaints alleging a violation of the program carriage rules. *See 1994 Program Carriage Order*, 9 FCC Rcd at 4418-20, ¶¶ 24-33. The Commission expressed concern that a video programming vendor that had been coerced into granting anticompetitive concessions, including exclusivity, to a cable operator might be dissuaded from filing a program carriage complaint based on fears of alienating the cable operator. *See id.* at 4416, ¶ 10 and 4420, ¶¶ 30-31. Accordingly, the Commission amended its rules to provide MVPDs aggrieved by a violation of Section 616 to file a program carriage complaint with the Commission. *See id.* at 4415, ¶ 3 and 4418-19, ¶ 24.

of the Act and Section 76.1300(d) of the Commission's rules.[46] We note that, as originally adopted in the *1993 Program Carriage Order*, the Commission's rules provided that a complaint must contain the "address and telephone number of the complainant, the type of multichannel video programming distributor *that describes the defendant*, and the address and telephone number of the defendant."[47] In 1999, the Commission reorganized the Part 76 pleading and complaint process rules and, in the course of doing so, amended this rule to require the complaint to contain the "type of multichannel video programming distributor *that describes complainant*, the address and telephone number of the complainant, and the address and telephone number of each defendant."[48] We find this revised language confusing because it fails to reflect that a program carriage complainant can be either an MVPD or a video programming vendor.[49] We amend this rule to clarify that the complaint must specify "whether the complainant is a multichannel video programming distributor or video programming vendor, and, in the case of a multichannel video programming distributor, identify the type of multichannel video programming distributor, the address and telephone number of the complainant, what type of multichannel video programming distributor the defendant is, and the address and telephone number of each defendant."[50]

12. Evidence supporting a program carriage claim may be based on an explicit or implicit threat.[51] In complaints alleging a violation of the exclusivity or financial interest provisions, the complaint must contain direct evidence (either documentary or testimonial) supporting the facts underlying the claim. For example, a complainant alleging that an MVPD has coerced a programming vendor to grant exclusive carriage rights or required a financial interest in a program service must provide documentary evidence, such as an email from the defendant MVPD, documenting the prohibited action, or an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting the alleged violation of the program carriage rules.

13. For complaints alleging a violation of the discrimination provision, however, direct evidence supporting a claim that the defendant MVPD discriminated "on the basis of affiliation or non-affiliation" is sufficient to establish this element of a *prima facie* case but is not required. For example, an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the programming vendor because it is not affiliated with the MVPD will generally be sufficient to establish this element of a *prima facie* case. However, such documentary evidence is highly unlikely to be

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[46] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29; *see also* 47 U.S.C. § 522(13); 47 C.F.R. § 76.1300(d).

[47] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2665, Appendix D (47 C.F.R. § 76.1302(c)(1)(ii)). This rule now appears at Section 76.1302(c)(1).

[48] *See 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules,* Report and Order, 14 FCC Rcd 418, 440, Appendix A (1999) ("*1998 Biennial Regulatory Review Order*"); *see also* 47 C.F.R. § 76.1302(c)(1).

[49] *See supra* n.45.

[50] *See infra*, Appendix B (47 C.F.R. § 76.1302(c)(1)).

[51] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2650, ¶ 18 ("[W]e reject TCI's suggestion that we should require evidence of explicit threats, because we believe that actual threats may not always comprise a necessary condition for a finding of coercion. Requiring such evidence would establish an unreasonably high burden of proof that could undermine the intent of Section 616 by allowing multichannel distributors to engage in bad faith negotiations that apparently would not violate the statute and our regulations simply because explicit threats were not made during such negotiations. In contrast, we believe that Section 616(a)(2) was intended to prohibit implicit as well as explicit behavior that amounts to 'coercion.'").

available to a programming vendor in advance of discovery, and may not exist at all.[52] In addition, an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting a claim that a representative of the defendant MVPD informed the vendor that the MVPD took an adverse carriage action because the vendor is not affiliated with the MVPD will generally be sufficient to establish this element of a *prima facie* case. Again, however, we recognize that such direct evidence of affiliation-based discrimination will seldom be available to complainants and is not required to establish this element of a *prima facie* case.[53]

14. Because it is unlikely that direct evidence of a discriminatory motive will be available to potential complainants,[54] we clarify that a complainant can establish this element of a *prima facie* case of a violation of the program carriage discrimination provision by providing the following circumstantial evidence of discrimination "on the basis of affiliation or non-affiliation." First, the complainant programming vendor must provide evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD,[55] based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming,[56] and other factors.[57] We emphasize that a finding at the *prima facie* stage that affiliated

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[52] *See* Hallmark Channel Reply at 10 ("[D]iscrimination is often subtle, and the evidence of its existence is likely outside the control of an independent programmer."); NFL Enterprises Reply at 5-6 ("[T]he best evidence of discriminatory motive is under the exclusive control of the MVPD. . . . [V]ertically integrated MVPDs are determined not to provide potential complainants with direct evidence of the underlying purpose of their discriminatory conduct.").

[53] *See supra* n.52.

[54] *See* NFL Enterprises Reply at 6 (stating that requiring only documentary evidence of improper motive before a programmer can file a complaint "would make it extremely difficult to bring any complaint, since . . . 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"); Outdoor Channel Nov. 16 2007 *Ex Parte* Letter at 2 ("Because evidence of predatory intent is commonly controlled by the MVPD, and not the programmer, it is unrealistic to expect a programmer to have clear evidence of predation before it can bring a claim.").

[55] In the *1993 Program Carriage Order*, the Commission interpreted the discrimination provision in Section 616(a)(3) to require a complainant alleging discrimination that favors an "affiliated" programming vendor to provide evidence that the defendant MVPD has an attributable interest in the allegedly favored "affiliated" programming vendor. *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29 ("For complaints alleging discriminatory treatment that favors 'affiliated' programming vendors, the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in Section 76.1300(a)."); *see also* 47 C.F.R. § 76.1300(a) ("For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities."); *Review of the Commission's Cable Attribution Rules*, Report and Order, 14 FCC Rcd 19014, 19063, ¶ 132 n.333 (1999) (amending definition of "affiliated" in the program carriage rules to be consistent with definition of this term in other cable rules); *but see NPRM* in MB Docket No. 11-131, *infra* ¶¶ 72-77 (seeking comment on whether to interpret the discrimination provision in Section 616(a)(3) more broadly to preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD).

[56] By "target programming," we refer to programming rights that a video programming vendor seeks to acquire to display on its network.

[57] The Media Bureau will assess on a case-by-case basis whether the complaint contains evidence to establish at the *prima facie* stage that the affiliated and unaffiliated video programming is similarly situated. In previous cases assessing at the *prima facie* stage whether the complaint contains evidence that the affiliated and unaffiliated video programming is similarly situated, the Media Bureau has assessed similar factors. *See Tennis Channel HDO*, 25 FCC Rcd at 14159-60, ¶¶ 17-18; *Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14795-97, ¶¶ 12-17 (MB 2008) ("*WealthTV HDO*"); *NFL Enters. LLC v. Comcast Cable Communications, LLC*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd

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and unaffiliated video programming is similarly situated should be based on examination of a combination of factors put forth by the complainant. Although no single factor is necessarily dispositive, the more factors that are found to be similar, the more likely the programming in question will be considered similarly situated to the affiliated programming. On the other hand, it is unlikely that programming would be considered "similarly situated" if only one of these factors is found to be similar. For example, a complainant is unlikely to establish a *prima facie* case of discrimination on the basis of affiliation by demonstrating that the defendant MVPD carries an affiliated music channel targeted to younger viewers but has declined to carry an unaffiliated music channel targeted to older viewers with lower ratings and a higher license fee. Second, the complaint must contain evidence that the defendant MVPD has treated the video programming provided by the complainant programming vendor differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage.[58] In the absence of direct evidence supporting the claim that the defendant MVPD discriminated "on the basis of affiliation or non-affiliation," the circumstantial evidence discussed here will establish this element of a *prima facie* case of a violation of the program carriage discrimination provision.

15. In addition, we note that the program carriage discrimination provision prohibits only conduct that has "the effect of . . . unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly."[59] Thus, regardless of whether the complainant relies on direct or circumstantial evidence of discrimination "on the basis of affiliation or non-affiliation," the complaint must also contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly.[60]

16. We emphasize that a Media Bureau finding that a complainant has established a *prima facie* case does not mean that the complainant has proven its case or any elements of its case on the merits. Rather, a *prima facie* finding means that the complainant has provided sufficient evidence in its complaint, without the Media Bureau having considered any evidence to the contrary, to proceed.[61] If the

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14787, 14822-23, ¶ 75 (MB 2008) ("*NFL Enterprises HDO*"); *TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14835-36, ¶ 108 (MB 2008) ("*MASN II HDO*").

[58] *See Tennis Channel HDO*, 25 FCC Rcd at 14160-61, ¶ 19; *WealthTV HDO*, 23 FCC Rcd at 14797, ¶ 18, 14801, ¶ 28, 14806, ¶ 40, 14812, ¶ 52; *NFL Enterprises HDO*, 23 FCC Rcd at 14823, ¶ 76; *MASN II HDO*, 23 FCC Rcd at 14836, ¶ 109; *MASN I HDO*, 21 FCC Rcd at 8993-94, ¶ 11; *but see Hutchens Communications, Inc. v. TCI Cablevision of Georgia, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 4849, 4853, ¶ 27 (CSB 1994) (finding that complainant programming vendor did not make a *prima facie* showing of discrimination on the basis of affiliation because it failed to demonstrate that it was offered different price, terms, or conditions as compared to that offered to an affiliated programming vendor).

[59] *See* 47 U.S.C. § 536(a)(3).

[60] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 14 (citing 47 U.S.C. § 536(a)(3)). The Media Bureau will assess on a case-by-case basis whether the complaint contains evidence at the *prima facie* stage to establish that the effect of the defendant MVPD's conduct is to unreasonably restrain the ability of the complainant video programming vendor to compete fairly. In previous cases, the Media Bureau has made this assessment based on the impact of the defendant MVPD's adverse carriage action on the programming vendor's subscribership, licensee fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale. *See Tennis Channel HDO*, 25 FCC Rcd at 14161-62, ¶¶ 20-21; *WealthTV HDO*, 23 FCC Rcd at 14798, ¶ 19, 14802, ¶¶ 29-31, 14807-08, ¶¶ 41-42, 14812-13, ¶¶ 53-54; *NFL Enterprises HDO*, 23 FCC Rcd at 14823-25, ¶¶ 77-78; *MASN II HDO*, 23 FCC Rcd at 14836, ¶ 110; *MASN I HDO*, 21 FCC Rcd at 8993-94, ¶ 11.

[61] *See* TWC Comments at 30 n.105.

complainant establishes a *prima facie* case but the record is not sufficient to resolve the complaint, the adjudicator (*i.e.*, either the Media Bureau or an ALJ) will allow the parties to engage in discovery[62] and will then conduct a *de novo* examination of all relevant evidence on each factual and legal issue. For example, although the Media Bureau may find that a complaint contains sufficient evidence to establish a *prima facie* case that a defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly, thus allowing the case to proceed, the adjudicator when ruling on the merits may reach an opposite conclusion after conducting further proceedings and developing a more complete evidentiary record.[63]

17. We also clarify that the Media Bureau's determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only.[64] If the Media Bureau determines that the complainant has established a *prima facie* case, the Media Bureau will then review the answer (including any attachments) and reply to determine whether there are procedural defenses that might warrant dismissal of the case (*e.g.*, arguments pertaining to the statute of limitations); whether there are any issues that the defendant MVPD concedes; whether there are substantial and material questions of fact as to whether the defendant MVPD has engaged in conduct that violates the program carriage rules; whether the case can be addressed by the Media Bureau on the merits based on the pleadings or whether further evidentiary proceedings are necessary; and whether the proceeding should be referred to an ALJ in light of the nature of the factual disputes. For example, if the Media Bureau determines that the complainant has established a *prima facie* case but the defendant MVPD provides legitimate and non-discriminatory business reasons in its answer for its adverse carriage decision, the Media Bureau might conclude that there are substantial and material questions of fact that warrant allowing the parties to engage in discovery or referring the matter to an ALJ for an adjudicatory hearing, or it might conclude that the complaint can be resolved on the merits based on the pleadings.

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[62] Under the current program carriage rules, discovery is Commission-controlled, meaning that Media Bureau staff identifies the matters for which discovery is needed and then issues letters of inquiry to the parties on those matters or requires the parties to produce specific documents related to those matters. *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id.* at 2652, ¶ 23 (providing that discovery will "not necessarily be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff"); *see also* 47 C.F.R. § 76.7(f). In the *NPRM* in MB Docket No. 11-131, we propose to revise these procedures by providing for expanded discovery, whereby parties to a program carriage complaint may serve requests for discovery directly on opposing parties rather than relying on the Media Bureau staff to seek discovery through letters of inquiry or document requests. *See NPRM* in MB Docket No. 11-131, *infra* ¶¶ 42-43. We also seek comment on an automatic document production process whereby both parties would have a certain period of time after the Media Bureau's *prima facie* determination to produce basic threshold documents listed in the Commission's rules that are relevant to the program carriage claim at issue. *See NPRM* in MB Docket No. 11-131, *infra* ¶¶ 44-47.

[63] *Compare WealthTV HDO*, 23 FCC Rcd 14787 *with Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Recommended Decision, 24 FCC Rcd 12967 (Chief ALJ Sippel 2009) ("*WealthTV Recommended Decision*") *and Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Order, FCC 11-94 (2011) ("*WealthTV Commission Order*"). We note, however, the Media Bureau in the course of making a *prima facie* determination may rule on the merits of certain elements of the case based on the pleadings and refrain from referring these specific issues for further evidentiary proceedings. For example, to the extent that the parties concede that the complainant is a video programming vendor and the defendant is an MVPD, further evidentiary proceedings on these issues are unnecessary.

[64] *See* Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (April 28, 2008).

B. Deadline for Defendant's Answer to a Program Carriage Complaint

18. Our current rule provides that an MVPD served with a program carriage complaint shall answer the complaint within 30 days of service.[65] We amend this rule to provide an MVPD with 60 days to answer a program carriage complaint.[66] Having established specific evidentiary requirements for what the complainant must provide in its complaint to establish a *prima facie* case of a program carriage violation, we believe it is appropriate to provide the defendant with additional time to answer the complaint in order to develop a full, case-specific response, with supporting evidence, to the evidence put forth by the complainant. As discussed in the next section, Congress directed the Commission to "provide for expedited review" of program carriage complaints,[67] and we adopt deadlines herein for the Media Bureau and ALJs when acting on program carriage complaints to satisfy this requirement.[68] Providing additional time for a defendant to file an Answer to a complaint does not conflict with this requirement. By requiring a complainant to provide specific evidence in its complaint and providing a defendant with additional time to respond to this evidence and provide specific evidence supporting its response, the rules we adopt today will allow for the development of a more robust factual record earlier in the complaint process than under our current rules. We believe that this will better enable the Media Bureau to either resolve cases on the merits based on the pleadings without referring the matter to an ALJ, or narrow the factual issues in dispute that warrant discovery or referral to an ALJ. As a result, this will lead to the more expeditious resolution of disputes than under other current program carriage complaint procedures.

C. Deadlines for Media Bureau and ALJ Decisions

19. The record reflects that the unpredictable and sometimes lengthy time frames for Commission action on program carriage complaints have discouraged programming vendors from filing complaints.[69] Both programming vendors[70] and MVPDs[71] support expeditious action on program carriage

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[65] *See* 47 C.F.R. § 76.1302(d)(1).

[66] *See* Letter from Ryan G. Wallach, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Dec. 10, 2008), Attachment at 2 (urging the Commission to allow defendants 60 days to file an answer); Letter from Arthur H. Harding, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 1, 2011), at 2 (stating that a program carriage defendant needs a full and fair opportunity to respond to a complaint) ("Time Warner Cable June 1 2011 *Ex Parte* Letter").

[67] *See* 47 U.S.C. § 536(a)(4).

[68] *See infra* ¶¶ 19-24.

[69] *See* TAC Comments at 9 ("Faced with the likelihood of FCC inaction, combined with the real risk of retaliation by cable operators, [] no independent channel would want to file with the FCC."); HDNet June 16 2010 *Ex Parte* Letter at 5 ("Independent programmers simply cannot commence proceedings against potential carriers, even in cases of clear misconduct, unless these proceedings are truly expedited, as Congress directed, because they risk retaliation and, for some independent programmers, financially ruinous delays in acquiring carriage for their programming."); *see also* BTNC Comments at 4.

[70] *See* TAC Comments at 9 (requesting that the Commission provide a "shot clock," such as a requirement that the Commission hear and resolve the complaint within 60 to 90 days); NFL Enterprises Reply at 8 (explaining that, given the time-sensitivity of program carriage disputes, it is critical that the Commission adopt a streamlined complaint process and an expedited timeline for dispute resolution); HDNET Reply at 1 (endorsing an expedited complaint resolution process); WealthTV Reply at 1 (same); *see also* NAMAC Comments at 18; ION Dec. 11 2008 *Ex Parte* Letter, Attachment at 1; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1; HDNet July 22 2008 *Ex Parte* Letter (attaching Letter from U.S. Sen. Herb Kohl to Kevin J. Martin, Chairman, FCC (June 23, 2008) at 2 ("I urge that the FCC set a deadline by which program carriage complaints by programmers be decided in prompt and reasonable time . . . .")); *id.* (attaching Letter from U.S. Sen. Byron L. Dorgan to Kevin J. Martin, Chairman, FCC (June 13, 2008) at 1 ("I worry that while the FCC has a shot clock for consideration of forbearance petitions, in a

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complaints. We believe that establishing deadlines for the Media Bureau and ALJs when acting on program carriage complaints will help to resolve disputes quickly and efficiently and thus fulfill our statutory mandate to "provide for expedited review" of program carriage complaints.[72] While the Commission in the *1993 Program Carriage Order* directed both the Media Bureau and ALJs to resolve cases "expeditiously," we now conclude that a specific deadline codified in our rules is needed to ensure that this goal is achieved.[73]

20. Action on program carriage complaints entails a two-step process: the initial *prima facie* determination by the Media Bureau, followed (if necessary) by a decision on the merits by an adjudicator (*i.e.*, either the Media Bureau or an ALJ).[74] We adopt deadlines herein for both of these steps. For the first step, we direct the Media Bureau to release a decision determining whether the complainant has established a *prima facie* case within 60 calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed). Based on our past experience in addressing program carriage complaints, we believe that 60 calendar days after the complainant files its reply[75] provides sufficient time for the Media Bureau to make a *prima facie* determination while providing for the "expedited review" required by Congress. In light of this expedited timeframe for the Media Bureau's *prima facie* determination, we again emphasize that complainants should not raise new matters in a reply[76] and that additional pleadings outside of the pleading cycle will not be accepted.[77]

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separate area of programming discrimination, the Commission lacks any type of timeline.")); *id.* (attaching Letter from U.S. Reps. Gene Green, Mike Doyle, and Charles Gonzalez to Kevin J. Martin, Chairman, FCC (June 30, 2008) at 2 (urging the Commission to adopt a "shot clock")).

[71] *See* Comcast Comments at 28; Comcast Reply at 35; *see also* Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 30, 2010), at 2.

[72] *See* 47 U.S.C. § 536(a)(4).

[73] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32 (directing Media Bureau staff to "develop a discovery process and timetable to resolve the dispute expeditiously"); *see id.* at 2656, ¶ 34 ("ALJs are expected to resolve program carriage complaints expeditiously, and should hold an immediate status conference to establish timetables for discovery, hearing and submission of briefs and proposed findings of fact and conclusions of law.").

[74] A potential third step applies to the extent a party appeals the decision of the Media Bureau or an ALJ to the Commission. *See* 47 C.F.R. §§ 1.115, 76.10(c)(1) (pertaining to Applications for Review of actions taken on delegated authority); 47 C.F.R. §§ 1.276, 76.10(c)(2) (pertaining to exceptions to initial decisions of an ALJ). We decline at this time to establish a deadline for Commission action on review of decisions by the Media Bureau or an ALJ.

[75] As amended herein, the program carriage rules provide for a 80-calendar-day initial pleading cycle (*i.e.*, a 60-calendar-day period for filing an answer to a complaint and a 20-calendar-day period for filing a reply to the answer). *See infra*, Appendix D (47 C.F.R. § 76.1302(e)(1), (f)).

[76] *See* 47 C.F.R. § 76.1302(e) (stating that a reply "shall be responsive to matters contained in the answer and shall not contain new matters").

[77] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 23 ("Given the statute's explicit direction to the Commission to handle program carriage complaints expeditiously, additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff."); *see id.* at 2654-55, ¶ 30 n.51 ("[U]nless specifically requested by the Commission or its staff, additional pleadings such as motions to dismiss or motions for summary judgment will not be considered. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.") (emphasis in original).

21. For the second step, we impose different deadlines for a ruling on the merits of the complaint depending upon whether the adjudicator is the Media Bureau or an ALJ. After the Media Bureau concludes that the complaint contains sufficient evidence to establish a *prima facie* case, the Media Bureau has three options for addressing the merits of the complaint: (i) the Media Bureau can rule on the merits of the complaint based on the pleadings without discovery;[78] (ii) if the Media Bureau determines that the record is not sufficient to resolve the complaint, the Media Bureau may outline procedures for discovery before proceeding to rule on the merits of the complaint;[79] or (iii) if the Media Bureau determines that disposition of the complaint or discrete issues raised in the complaint requires resolution of factual disputes or other extensive discovery in an adjudicatory proceeding, the Media Bureau will refer the proceeding or discrete issues arising in the proceeding for an adjudicatory hearing before an ALJ.[80] We establish the following deadlines for the adjudicator's decision on the merits. For complaints that the Media Bureau decides on the merits based on the pleadings without discovery, the Media Bureau must release a decision within 60 calendar days after its *prima facie* determination. We believe this timeframe is sufficient to allow the Media Bureau to review the record and draft and release a decision on the merits. For complaints that the Media Bureau decides on the merits after discovery is conducted, the Media Bureau must release a decision within 150 calendar days after its *prima facie* determination. We believe this timeframe is sufficient to allow for the entry of a protective order, discovery, and the submission of supplemental briefs and other information required by the Media Bureau, as well as for the Media Bureau to review the record and draft and release a decision on the merits. For complaints referred to an ALJ for a decision on the merits, we believe that a longer timeframe is warranted to allow for, among other things, the preparation for and conduct of a fair hearing, the submission of proposed findings of fact and conclusions of law, and the ALJ's preparation of an initial decision and, if necessary, formulation of a remedy. Accordingly, we direct the ALJ to release an initial decision within 240 calendar days after one of the parties informs the Chief ALJ that it elects not to pursue ADR or, if the parties have mutually elected to pursue ADR, within 240 calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR.[81] To the extent that the Media Bureau refers only discrete issues raised in the proceeding to the ALJ rather than the entire proceeding, we expect that the ALJ will be able to act in less than 240 calendar days. We note that the Commission has previously stated that "[t]ime limits on the ALJs are permissible so long as they do not unduly interfere with a judge's independence to control the course of the proceeding . . . or subject the

[78] *See id.* at 2652, ¶ 23 ("[W]e hereby adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply."); *but see id.* at 2652, ¶ 24 ("As a practical matter, however, given that alleged violations of Section 616, especially those involving potentially 'coercive' practices, will require an evaluation of contested facts and behavior related to program carriage negotiations, we believe that the staff will be unable to resolve most program carriage complaints on the sole basis of a written record as described above. Rather, we anticipate that resolution of most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations.").

[79] *See id.* at 2655-56, ¶¶ 31-33; *see also* 47 C.F.R. § 76.7(f).

[80] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34; *see also* 47 C.F.R. § 76.7(g)(1). In cases referred to an ALJ, the parties have ten days after the Media Bureau's *prima facie* determination to elect whether to attempt to resolve their dispute through ADR. *See* 47 C.F.R. § 76.7(g)(2); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34.

[81] Section 76.7(g)(2) of the Commission's rules currently states that a party must submit in writing to the Commission its election as to whether to proceed to ADR. *See* 47 C.F.R. § 76.7(g)(2). We amend this rule to further specify that this election must also be submitted with the Chief ALJ.

judge to performance appraisals."[82] We do not believe that the 240-calendar-day deadline adopted herein will unduly interfere with the ALJ's independence, and this deadline will not be used for performance appraisals.[83]

22. We also amend certain procedural deadlines applicable to adjudicatory hearings to reflect that an adjudicatory hearing involving a program carriage complaint does not commence until a party elects not to pursue ADR pursuant to Section 76.7(g)(2) or, if the parties have mutually elected to pursue ADR, the parties fail to resolve their dispute through ADR. We also adopt expedited deadlines to account for the 240-calendar-day deadline for the ALJ's initial decision. First, we revise the deadline for filing a written appearance in a program carriage matter referred to an ALJ. Section 1.221(c) of the Commission's rules provides that a written appearance must be filed within 20 days of the mailing of the HDO.[84] We amend this rule to provide that, in a program carriage complaint proceeding that the Media Bureau refers to an ALJ, a party must file a written appearance within five calendar days after the party informs the Chief ALJ that it elects not to pursue ADR or, if the parties have mutually elected to pursue ADR, within five calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR. Because the parties would have already been involved in a complaint proceeding before the Media Bureau resulting in the *prima facie* determination and will have had the opportunity to retain counsel for litigating the complaint before the Media Bureau, we believe that reducing the time for filing a written appearance in a program carriage matter referred to an ALJ from 20 to five days is reasonable. We also amend our rules to specify the consequences of failing to timely file a written appearance in a program carriage matter referred to an ALJ. If the complainant fails to file a written appearance by this deadline, or fails to file prior to the deadline either a petition to dismiss the proceeding without prejudice or a petition to accept, for good cause shown, a written appearance beyond such deadline, the Chief ALJ shall dismiss the complaint with prejudice for failure to prosecute.[85] If the defendant fails to file a written appearance by this deadline, or fails to file prior to this deadline a petition to accept, for good cause shown, a written appearance beyond such deadline, its opportunity to present evidence at hearing will be deemed to have been waived.[86] If the hearing is so waived, the Chief ALJ will

[82] *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, Report and Order, 5 FCC Rcd 157, ¶ 40 n.26 (1990) (citing *Butz v. Economou*, 438 U.S. 478, 513 (1978) and 5 C.F.R. § 930.211) ("*1990 Comparative Hearing Order*").

[83] We note that only one previous ALJ decision has addressed the merits of a program carriage complaint. *See WealthTV Recommended Decision*. In that case, the ALJ reached a decision one year after the Media Bureau's HDO. We do not believe this timeframe is necessarily reflective of the time required to reach a decision on the merits of a program carriage complaint given the unique circumstances of this case, including the following: (i) the case consolidated four separate complaints involving the same complainant against four separate defendant MVPDs; and (ii) the proceeding was delayed by the Media Bureau's decision to take back jurisdiction over the case, which was subsequently rescinded by the Commission. *See Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Order, 23 FCC Rcd 18316 (MB 2008), *rescinded by Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Order, 24 FCC Rcd 1581 (2009). Although the type and complexity of cases referred to ALJs vary considerably, we note that the ALJ has ruled within approximately 240 calendar days after referral in previous cases. *See Under His Direction, Inc.*, Initial Decision, 11 FCC Rcd 16831 (ALJ Luton 1996) (approximately eight months from HDO to ALJ's decision); *AJI Broad., Inc.*, Initial Decision, 11 FCC Rcd 19756 (ALJ Luton 1996) (approximately eight months from HDO to ALJ's decision); *Community Educ. Ass'n*, Initial Decision, 10 FCC Rcd 3179 (ALJ Chachkin 1995) (approximately eight months from HDO to ALJ's decision); *Aurio A. Matos*, Initial Decision, 8 FCC Rcd 7920 (ALJ Gonzalez 1993) (approximately seven months from HDO to ALJ's decision).

[84] *See* 47 C.F.R. § 1.221(c).

[85] *See, e.g., Tennis Channel HDO*, 25 FCC Rcd at 14164, ¶ 27.

[86] *See id.* at 14164, ¶ 28.

terminate the proceeding and certify to the Commission the complaint for resolution based on the existing record.[87] Second, we revise the deadline for filing a motion to enlarge, change, or delete issues.[88] Section 1.229(a) provides that a motion to enlarge, change, or delete issues shall be filed within 15 days after the HDO is published in the *Federal Register*.[89] We amend this rule to provide that, in a program carriage complaint proceeding that the Media Bureau refers to an ALJ, a motion to enlarge, change, or delete issues shall be filed within 15 calendar days after the deadline for filing a written notice of appearance. Third, we revise the deadline for holding an initial prehearing conference. Section 1.248 of the Commission's rules provides that, to the extent an initial prehearing conference is scheduled, it shall be scheduled 30 days after the effective date of the HDO, unless good cause is shown for scheduling the conference at a later date.[90] We amend this rule to provide that, to the extent the ALJ in a program carriage complaint proceeding conducts an initial prehearing conference, the conference shall be held no later than ten calendar days after the deadline for filing a written notice of appearance, or within such shorter or longer period as the ALJ may allow consistent with the public interest.[91]

23. We believe that the deadlines established herein for a decision by the Media Bureau or an ALJ on a program carriage complaint provide sufficient time for the adjudicator to reach a decision on the merits while also providing for the "expedited review" required by Congress and ensuring fairness to all parties.[92] We will allow the adjudicator to toll these deadlines only under certain circumstances. First, the adjudicator can toll a deadline if the parties jointly request tolling in order to pursue settlement discussions or ADR or for any other reason that the parties mutually agree justifies tolling.[93] Second, the adjudicator may toll a deadline if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness. Finally, in extraordinary situations, tolling a deadline may be necessary in light of the adjudicatory resources available at the time in the Office of Administrative Law Judges. The Commission has a number of alternatives under such circumstances to ensure expedited review, but a brief tolling of deadlines may be required in pending hearing cases.[94] To

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[87] *See id.*

[88] *See* 47 C.F.R. § 1.223(b).

[89] *See* 47 C.F.R. § 1.229(a).

[90] *See* 47 C.F.R. § 1.248(a), (b).

[91] We note that the parties may commence discovery before the prehearing conference is held. *See* 47 C.F.R. § 1.311(c)(2).

[92] We note that the Commission in the *1993 Program Carriage Order* rejected a 90-day deadline for resolution of program carriage complaints. *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655, ¶ 32 n.52. We continue to believe that a 90-day deadline is impractical, but the longer deadlines established herein are realistic given our experience with program carriage cases since 1993. We also note that the Commission previously declined to adopt revised deadlines for resolving program access complaints, stating that "overly accelerated pleading and discovery time periods can lead to increased litigation costs if the parties are required to hire additional staff and counsel in attempting to meet unrealistic deadlines." *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17857, ¶ 108 (2007) ("*2007 Program Access Order*"). We find these concerns are not presented here because the deadlines we adopt for resolving program carriage complaints are not "overly accelerated" or unrealistic.

[93] For example, if the parties jointly request to toll the Media Bureau's 60-calendar-day deadline for reaching a *prima facie* determination to pursue settlement discussions or ADR, the Media Bureau will toll the deadline until the parties jointly inform the Media Bureau that efforts to resolve the dispute were unsuccessful. Similarly, if the parties jointly request to toll the deadline for reaching a decision on the merits, the adjudicator will toll the deadline until the parties jointly inform the adjudicator that efforts to resolve the dispute were unsuccessful.

[94] *See, e.g.*, 5 C.F.R. § 930.208.

the extent an ALJ decides to toll the deadline, we emphasize that this interlocutory decision will not be appealable to the Commission as a matter of right.[95] Rather, pursuant to Section 1.301(b) of the Commission's rules, an appeal to the Commission of an ALJ's decision to toll the deadline shall be filed only if allowed by the ALJ.[96] To the extent the ALJ does not allow an appeal, or if no permission to file an appeal is requested, an objection to the ALJ's decision to toll the deadline may be raised on review of the ALJ's initial decision.[97]

24. Taken together, the 80-calendar-day initial pleading cycle, the 60-calendar-day deadline for a *prima facie* determination, the 10-calendar-day ADR election period in cases referred to an ALJ, and the 60- or 150-calendar-day (in cases decided by the Media Bureau, depending on whether discovery is conducted) or 240-calendar-day (in cases decided by an ALJ) deadline for a ruling on the merits mean that program carriage complaints will be resolved within approximately seven or ten months (in cases decided by the Media Bureau, depending on whether discovery is conducted) or thirteen months (in cases decided by an ALJ) after a complaint is filed, assuming that the parties do not elect ADR or seek to toll the deadlines. While these timeframes are longer than our aspirational goals for resolving program access complaints,[98] we believe these time frames are necessary given the often fact-intensive nature of program carriage claims, which will often focus on the details of the negotiation process and similarities and differences in programming.[99]

D. Temporary Standstill of Existing Contract Pending Resolution of a Program Carriage Complaint

25. We establish specific procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract. The procedures we adopt herein mirror the procedures adopted previously for temporary standstills involving program access complaints.[100] The

[95] *See* 47 C.F.R. § 1.301(a).

[96] *See* 47 C.F.R. § 1.301(b).

[97] *See* 47 C.F.R. § 1.301(b)(1).

[98] *See 2007 Program Access Order*, 22 FCC Rcd at 17857, ¶ 108 (retaining goal of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases).

[99] *See* Comcast Comments at 31-33 (arguing that program carriage cases are more complex than program access cases).

[100] *See* 47 C.F.R. § 76.1003(l); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 794-797, ¶¶ 71-75 (2010) ("*2010 Program Access Order*"), *vac'd in part, Cablevision Sys. Corp. v. FCC*, 2011 WL 2277217 (D.C. Cir. June 10, 2011). Comcast contends that the Commission "should be wary" of importing a standstill adopted for program access complaints into the program carriage context because, unlike the program access context where a network is under an obligation not to withhold the network from an MVPD, there is no duty to carry a network in the program carriage context. *See* Letter from David P. Murray, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 25, 2011), at 3 n.9 ("Comcast July 25 2011 *Ex Parte* Letter"). In fact, the Commission adopted a program access standstill requirement for both satellite-delivered and terrestrially delivered networks, despite the fact that a terrestrially delivered network is under no obligation to refrain from withholding the network from an MVPD in the absence of a Commission order. *See 2010 Program Access Order*, 25 FCC Rcd at 794, ¶ 71. We also note that there are important parallels between the program access and program carriage regimes, inasmuch as both are based on concerns with the impact of vertical integration on competition in the video distribution and video programming markets. Moreover, Comcast ignores the fact that the program carriage regime may also impose a duty on an MVPD to carry a programming vendor if the MVPD otherwise refuses to do so on the basis of affiliation or non-affiliation.

record reflects that, absent a standstill, an MVPD will have the ability to retaliate against a programming vendor that files a legitimate complaint by ceasing carriage of the programming vendor's video programming, thereby harming the programming vendor as well as viewers who have come to expect to be able to view that video programming.[101] Moreover, absent a standstill, programming vendors may feel compelled to agree to the carriage demands of MVPDs, even if these demands violate the program carriage rules, in order to maintain carriage of video programming in which they have made substantial investments.[102] While some MVPDs may offer month-to-month extensions after expiration of a carriage contract, programming vendors explain that such extensions may lead to uncertainty for viewers and programming vendors and impede the ability of programming vendors to attract financing.[103]

26. The Supreme Court has affirmed the Commission's authority to impose interim injunctive relief, in the form of a standstill order, pursuant to Section 4(i).[104] The Commission recently relied on this authority in adopting standstill procedures for program access cases.[105] Under Section 4(i), the Commission is authorized to "make such rules and regulations . . . as may be necessary in the execution of its functions," and to "[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act."[106] Accordingly, the Commission has statutory

[101] *See* WealthTV Aug. 4 2008 *Ex Parte* Letter (attaching Letter from U.S. Sen. Amy Klobuchar to Kevin J. Martin, Chairman, FCC (July 24, 2008) at 1 ("Independent programming providers continue to express concern that continued uncertainties and delays create a chilling effect on their willingness to bring discrimination complaints, because of their fear of potential retaliation by MVPDs while a complaint remains pending.")); HDNet Nov. 20 2007 *Ex Parte Letter* at 2 ("An MVPD could retaliate by allowing the clock to run and harmful uncertainty about the unaffiliated video programming provider to mount, or even by allowing the arrangement to expire and then removing the unaffiliated video programming provider from the platform."); *see also* NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1; Letter from David S. Turetsky, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 4, 2008) at 2.

[102] *See* Letter from Stephen A. Weiswasser, Counsel for the Hallmark Channel, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007) at 1-2 ("Hallmark Channel Nov. 20 2007 *Ex Parte* Letter"); HDNet Nov. 20 2007 *Ex Parte* Letter at 2.

[103] *See* Hallmark Channel Nov. 20 2007 *Ex Parte* Letter at 1; HDNet Nov. 20 2007 *Ex Parte* Letter at 2; Outdoor Channel Nov. 16 2007 *Ex Parte* Letter at 1-2.

[104] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *see also AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998) (standstill order issued pursuant to 47 U.S.C. § 154(i) temporarily preventing Ameritech from enrolling additional customers in, and marketing and promoting, a "teaming" arrangement with Qwest Corporation pending a decision concerning the lawfulness of the program); *Formal Complaints Order*, 12 FCC Rcd at 22566, ¶ 159 and n.464 (1997) (stating that the Commission has authority under section 4(i) of the Act to award injunctive relief); *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016 (MB 2006) (standstill order issued pursuant to section 4(i) denying a stay and reconsideration of the Media Bureau's order requiring Time Warner temporarily to reinstate carriage of the NFL Network on systems that it recently acquired from Adelphia Communications and Comcast Corporation until the Commission could resolve on the merits the Emergency Petition for Declaratory Ruling filed by the NFL).

[105] *See 2010 Program Access Order*, 25 FCC Rcd at 794-97, ¶¶ 71-75.

[106] 47 U.S.C. §§ 154(i), 303(r). In contract to the retransmission consent context, there is no statutory provision with which the Commission-ordered standstill of a program carriage agreement would be inconsistent. *See* 47 U.S.C. § 325(b)(1)(A) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except– (A) with the express authority of the originating station"); *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727-29, ¶¶ 18-19 (2011) ("*Retransmission Consent NPRM*") (concluding that Section 325(b) prevents the Commission from ordering interim carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement, and seeking comment on this conclusion).

authority to impose a temporary standstill of an existing contract in appropriate cases pending resolution of a program carriage complaint. While a complainant could request, and the Commission or Media Bureau could issue, a standstill order in a program carriage complaint proceeding under the same standards described in this order without the new procedures adopted herein, we believe that codifying uniform procedures will help to expedite action on standstill requests and provide guidance to complainants and MVPDs.[107]

27. Pursuant to the rules we adopt herein, a program carriage complainant seeking renewal of an existing programming contract, under which programming is then being provided, may submit along with its complaint a petition for a temporary standstill of its programming contract pending resolution of the complaint.[108] We encourage complainants to file the petition and complaint sufficiently in advance of the expiration of the existing contract, and in no case later than 30 days prior to such expiration, to provide the Media Bureau with sufficient time to act prior to expiration. In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest

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[107] NCTA has suggested that Section 624(f)(1) of the Communications Act, which generally prohibits any Federal agency, State, or franchising authority from imposing "requirements regarding the provision or content of cable services, except as expressly provided in this title," precludes *all* temporary standstill orders in the context of a program carriage complaint proceeding. 47 U.S.C. § 544(f)(1); *see* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 1, 2011) ("NCTA July 1 2011 *Ex Parte* Letter"); *see also* Comcast July 25 2011 *Ex Parte* Letter at 1-2. We disagree. Section 616(a) expressly directs the Commission to "establish regulations governing program carriage agreements and related practices." 47 U.S.C. § 536(a). Further, a temporary standstill order could be found necessary to prevent the likely occurrence of one of the practices expressly prohibited in Section 616(a). *See* 47 U.S.C. §§ 536(a)(1)-(3). Moreover, we note that Section 624(f)(1) is directed at the "provision or content of cable services" and thus by its terms does not apply to other types of MVPD services, such as direct broadcast satellite service. 47 U.S.C. § 544(f)(1). We need not, and do not, decide whether Section 624(f)(1) would bar granting temporary injunctive relief in the program carriage context in *some* circumstances. Instead, we ask for comment on that issue in the accompanying *NPRM* in MB Docket No. 11-131.

We also reject Comcast's claim that the Commission cannot rely on Section 4(i) as authority for granting a standstill because Section 616(a)(5) of the Act and Section 76.1302(g)(1) of the Commission's rules prevent the Commission from imposing remedies or penalties unless and until a violation of Section 616 has been found after an adjudication on the merits. *See* Comcast July 25 2011 *Ex Parte* Letter at 1-2 (citing 47 U.S.C. § 536(a)(5) (requiring the Commission to establish regulations "provid[ing] for appropriate penalties and remedies for violations of this subsection, including carriage"); 47 C.F.R. § 76.1302(g)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies . . . ."); *AT&T Co. v. FCC*, 487 F.2d 865, 874-76 (2d Cir. 1973)). As an initial matter, as noted above, the Commission has longstanding authority to grant injunctive relief pursuant to Section 4(i) and recently relied on that authority in adopting standstill procedures for program access cases. We do not believe that the provisions cited by Comcast preclude the Commission from imposing interim injunctive relief upon an appropriate showing. Indeed, the Commission relied on Section 4(i) in adopting a standstill procedure for program access complaints despite language in the program access provisions of the Act and the Commission's rules similar to the language cited by Comcast. *See* 47 U.S.C. § 548(e)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies . . . ."); 47 C.F.R. § 76.1003(h)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies . . . .").

[108] We note that program carriage claims involving existing contracts do not arise solely at renewal. The Media Bureau has previously found at the *prima facie* stage of review that a complainant may have a timely program carriage claim in the middle of a contract term if the basis for the claim is an allegedly discriminatory decision made by the MVPD that the contract left to the MVPD's discretion. *See Tennis Channel HDO*, 25 FCC Rcd at 14154-59, ¶¶ 11-16; *see also NFL Enterprises HDO,* 23 FCC Rcd at 14819-20, ¶¶ 69-70; *MASN II HDO*, 23 FCC Rcd at 14833-35, ¶¶ 102-105. We will consider the availability of a standstill outside of the renewal context on a case-by-case basis.

favors grant of a stay.[109] As part of a showing of irreparable harm, a complainant may discuss, among other things, the impact on subscribers and the extent to which the programming vendor's advertising and license fee revenues and its ability to compete for advertisers and programming will be adversely affected absent a standstill.[110] In order to ensure an expedited decision, the defendant will have ten calendar days after service to file an answer to the petition for a standstill order. In acting on the petition, the Media Bureau may limit the length of the standstill to a defined period or may specify that the standstill will continue until the adjudicator resolves the underlying program carriage complaint. The adjudicator may lift the temporary standstill to the extent that it finds that the stay is having a negative effect on settlement negotiations or is otherwise no longer in the public interest.

28. If the Media Bureau grants the temporary standstill, the adjudicator ruling on the merits of the complaint (*i.e.*, either the Media Bureau or an ALJ) will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement.[111] For example, if

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[109] *See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted). We reject Comcast's claim that the first criterion requires a showing of a "substantial" likelihood of success on the merits. *See* Comcast July 25 2011 *Ex Parte* Letter at 3. The factors set forth above are consistent with Supreme Court precedent (*Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)) and a recent D.C. Circuit case applying *Winter*. *See Winter*, 505 U.S. at 20 ("A plaintiff seeking a preliminary injunction must establish that he is *likely to succeed* on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.") (emphasis added; citations omitted); *Sherley v. Sebelius*, 2011 WL 1599685, *4 (D.C. Cir. Apr. 29, 2011) (quoting and applying the *Winter* test). We also reject Comcast's claim that a program carriage standstill is a "mandatory injunction" subject to a heightened standard because it will not preserve the *status quo* but will instead extend the term of a contract set to expire on an agreed-upon date and form a new, government-mandated contract. *See* Comcast July 25 2011 *Ex Parte* Letter at 2. As discussed above, we require a complainant to file a standstill request at least 30 days prior to the expiration of a contract to allow the Media Bureau with sufficient time to act prior to expiration. Accordingly, despite Comcast's claims, a program carriage standstill, if granted, will preserve the *status quo* by requiring continued carriage of a network that is being carried at the time the standstill is granted.

[110] Comcast claims that a complainant is unlikely to meet the requirements for a standstill because (i) under the first factor, it is unlikely that the facts will be developed at the standstill stage to demonstrate a likelihood of success on the merits, at least with respect to program carriage complaints alleging discrimination based on circumstantial evidence; (ii) under the second factor, irreparable harm cannot be established when there is an adequate remedy at law, which Comcast claims exists through a mandatory carriage remedy after a finding of a program carriage violation; and (iii) under the third factor, forced carriage would result in substantial harm to MVPDs by violating their First Amendment rights. *See* Comcast July 25 2011 *Ex Parte* Letter at 4-5. The Media Bureau will have the opportunity to consider these arguments when assessing the facts and circumstances presented in a standstill request on a case-by-case basis. We find no basis to deny complainants the opportunity to pursue a standstill in the program carriage context simply because of the potential difficulty in satisfying the requirements for a standstill. In this regard, we note that "injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 505 U.S. at 21 (citation omitted); *see also 2010 Program Access Order*, 25 FCC Rcd at 795, ¶ 73 n.266 ("'when a party seeks injunctive relief (which is precisely what a standstill is), the law is clear that this is a request for 'extraordinary relief,' and courts therefore require such party to demonstrate, on a case-by-case basis with a sufficient evidentiary record, that it satisfies' the criteria set forth in *Virginia Petroleum Jobbers Ass'n*)") (quoting with approval Time Warner Comments at 14 n.42); *Sky Angel*, 25 FCC Rcd 3879, 3884, ¶ 10 (MB 2010) ("we are unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted").

[111] *See* 47 C.F.R. § 76.1003(l)(3); *2010 Program Access Order*, 25 FCC Rcd at 795-796, ¶ 74; *see also Applications for Authority to Transfer Control, News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3347-48, Appendix B, §

(continued....)

carriage of the video programming has continued uninterrupted during resolution of the complaint, and if the decision on the merits requires the defendant MVPD to pay a higher amount to the programming vendor than was required under the terms of the expired contract, the defendant MVPD will make an additional payment to the programming vendor in an amount representing the difference between the amount that is required to be paid pursuant to the decision and the amount the defendant MVPD paid under the terms of the expired contract pending resolution of the complaint.[112] Conversely, if carriage of the video programming has continued uninterrupted during resolution of the complaint, and if the decision on the merits requires the defendant MVPD to pay a lesser amount to the programming vendor than was required under the terms of the expired contract, the programming vendor will credit the defendant MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during resolution of the complaint and the amount that is required to be paid pursuant to the decision.[113]

29. We note that program carriage complaints do not entail solely price disputes. Rather, complaints may entail the issue of whether the MVPD should be required to carry a programming vendor's video programming at all or whether the MVPD should carry the video programming on a specific tier. In these cases, it may be difficult to apply the new terms to the standstill period, especially in cases where the adjudicator does not ultimately order carriage. Despite these complications, we believe that the adjudicator can address these issues on a case-by-case basis. To facilitate expeditious resolution of these issues, we propose in the *NPRM* in MB Docket No. 11-131 specific procedures to assist an adjudicator to reach a fair and just result.[114]

30. As explained in the *2010 Program Access Order*, we expect parties to deal and negotiate with one another in good faith to come to settlement while the program carriage complaint is pending at the Commission.[115] We also note that the standstill requirement imposed in connection with previous merger conditions is automatic upon notice of the MVPD's intent to arbitrate,[116] whereas the process we adopt here requires a complainant to seek Commission approval based on the four-criteria test described above.[117] Thus, the Commission will be able to take into account all relevant facts in each case. Moreover, because the new carriage terms will be applied as of the expiration date of the previous

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IV(B)(8) (2008) ("*Liberty/DIRECTV Order*"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8338, Appendix B, § 3(h) (2006) ("*Adelphia Order*"); *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 554, ¶ 177 (2004) ("*News/Hughes Order*").

[112] *See 2010 Program Access Order*, 25 FCC Rcd at 795-796, ¶ 74; *Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order*, 21 FCC Rcd at 8338, Appendix B, § 3(h); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[113] *See 2010 Program Access Order*, 25 FCC Rcd at 795-796, ¶ 74; *Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order*, 21 FCC Rcd at 8338, Appendix B, § 3(h).

[114] *See NPRM* in MB Docket No. 11-131, *infra* ¶ 53.

[115] *See 2010 Program Access Order*, 25 FCC Rcd at 796-797, ¶ 75.

[116] *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order*, 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[117] *See supra* ¶ 27; *see also* Time Warner Cable June 1 2011 *Ex Parte* Letter at 2 ("An MVPD should remain free to exercise its contractual rights to drop or reposition a programmer who has filed a program carriage complaint unless the Commission determines that the traditional factors for granting a stay are satisfied.").

contract, we believe that complainants will not have an incentive to seek a temporary standstill solely to benefit from the *status quo* or to gain leverage.[118]

E. Constitutional Issues

31. Our efforts in this *Second Report and Order* to create an improved program carriage complaint regime are consistent with constitutional requirements. TWC argues that the constitutionality of the program carriage rules has never been tested under the First and Fifth Amendments.[119] TWC argues that, to the extent the goal of the program carriage rules is to promote diversity of speech, the rules are content-based and thus subject to strict scrutiny, which requires a "compelling" government interest and "narrow tailoring."[120] Diversity, however, is not the sole or even primary goal of the program carriage provision. Rather, through the program carriage provision, Congress also specifically intended to promote competition in both the video programming market and the video distribution market.[121] Indeed, the program carriage discrimination provision specifically requires the Commission to assess on a case-by-case basis whether conduct amounting to discrimination on the basis of affiliation has the effect of "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly."[122] By favoring its affiliated programming vendor on the basis of affiliation, an MVPD can hinder the ability of an unaffiliated programming vendor to compete in the video programming market, thereby allowing the affiliated programming vendor to charge higher license fees and reducing competition in the markets for the acquisition of advertising and programming rights.

32. The D.C. Circuit has already decided that the leased access provision of the 1992 Cable Act is not content-based.[123] The court held that the leased access provision does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator.[124] The same conclusion applies to the program carriage provision of the 1992 Cable Act, which prevents MVPDs from demanding exclusivity or financial interests from, or discriminating on the basis of affiliation with respect to, unaffiliated programming vendors and, accordingly, regulates speech

[118] Comcast claims that the possibility of a program carriage standstill presents practical and policy problems, such as affecting existing business negotiations; making it riskier for MVPDs to agree to carry new or less popular networks given the potential for a standstill request to be filed at the end of the carriage term; and making it more likely that parties will fail to reach agreement by allowing only programming vendors to request a standstill. *See* Comcast July 25 2011 *Ex Parte* Letter at 5-7. In making these claims, Comcast ignores the fact that a complainant could request, and the Commission or Media Bureau could issue, a standstill order in a program carriage complaint proceeding today under the same procedures adopted herein. Thus, all of the alleged practical and policy problems raised by Comcast exist today and are not created by these procedural rules. Moreover, the procedural rules we adopt herein will help to mitigate these alleged practical and policy problems. By setting forth the standard that will be applied to a program carriage standstill request and establishing specific deadlines for submitting and responding to such a request, we provide certainty to both complainants and MVPDs with respect to the standstill process. While Comcast claims that requiring a complainant to file a standstill request no later than 30 days prior to the expiration of a contract will chill business negotiations by placing parties in litigation before a contract ends (*see id.* at 6), the fact is that, without the procedures we adopt herein, a program carriage standstill request could be filed at any time, thereby creating greater uncertainty for MVPDs.

[119] *See* TWC Comments at 10-11.

[120] *See id.* at 12.

[121] *See supra* ¶ 4.

[122] 47 U.S.C. § 536(a)(3).

[123] *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996).

[124] *See id.*

based on affiliation with an MVPD, not based on its content.[125] The court held in *Time Warner* that the provisions of the 1992 Cable Act that regulate speech based on affiliation are subject to intermediate scrutiny and are constitutional 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.[126] The *Time Warner* court found that there are substantial government interests in promoting diversity and competition in the video programming market.[127] The program carriage rules, like the leased access requirements, promote diversity in video programming by promoting fair treatment of unaffiliated programming vendors and providing these vendors with an avenue to seek redress of anticompetitive carriage practices of MVPDs. Moreover, because MVPDs have an incentive to shield their affiliated programming vendors from competition with unaffiliated programming vendors for viewers, advertisers, and programming rights, the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programming vendors. Thus, like the leased access rules, the program carriage rules would be subject to, and would withstand, intermediate scrutiny.

33. TWC argues that whatever justification existed for the program carriage provisions at the time they were adopted no longer exists today.[128] Despite TWC's claim to the contrary, we find that the substantial government interests in promoting diversity and competition remain. TWC notes that the number of all national programming networks has grown since 1992;[129] the percentage of these networks affiliated with cable operators has decreased;[130] channel capacity has increased, thereby providing more room for unaffiliated programming vendors,[131] and cable operators face more competition in the distribution market today than in 1992.[132] In the program carriage discrimination provision, however, Congress directed the Commission to assess on a case-by-case basis the impact of anticompetitive conduct on an unaffiliated programming vendor's ability to compete. These nationwide figures do not undermine Congress's finding that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain

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[125] *See* Hallmark Channel Reply at 24-27; NFL Enterprises Reply at 13-14.

[126] *See Time Warner Entertainment Co., L.P.*, 93 F.3d at 969.

[127] *See id.* (stating that after *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 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994))).

[128] *See* TWC Comments at 11-12; *see also* Comcast Comments at 6-12; Comcast Reply at 2-6.

[129] *See* TWC Comments at 8; Comcast Reply at 5; *compare* H.R. Rep. No. 102-628, at 41 (1992) (68 nationally delivered cable networks) *with Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 550-51, ¶ 24 (2009) ("*13th Annual Report*") (based on data from 2006, finding that there are 565 nationally delivered cable networks).

[130] *See* TWC Comments at 8; Comcast Reply at 5; *compare* H.R. Rep. No. 102-628, at 41 (1992) (stating that 57 percent of nationally delivered cable networks are affiliated with cable operators) *with 13th Annual Report*, 24 FCC Rcd at 550-51, ¶ 24 (based on data from 2006, finding that 14.9 percent of nationally delivered cable networks are affiliated with cable operators).

[131] *See* TWC Comments at 7-8.

[132] *See id.* at ii and 9-10 (stating that competition in the distribution market requires a cable operator to make programming decisions "based on business and editorial judgments as to whether particular channels meet the needs and interests of the operator's subscribers and to attempt to maximize consumer value by making the best deal possible in arm's length negotiations"); *see also* Comcast Reply at 5, 28 n.100, 30.

the ability of an unaffiliated programming vendor to compete fairly.[133] While the D.C. Circuit in vacating the Commission's horizontal ownership cap stated that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992," the court in that case was reviewing a broad prophylactic rule that would limit individual cable operators to a maximum percentage of subscribers nationwide.[134] Unlike the rule at issue in that case, the program carriage statute requires an assessment of the facts of each case and the impact on the ability of an unaffiliated programming vendor to compete fairly. In addition, we note that the number of cable-affiliated networks recently increased significantly after the merger of Comcast and NBC Universal, thereby highlighting the continued need for an effective program carriage complaint regime.[135] The Commission noted that that transaction would "result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."[136] The Commission specifically relied upon the program carriage complaint process to address these concerns.[137]

34. Moreover, the program carriage rules are no broader than necessary because the Commission will find a violation of the rules only after conducting a proceeding in which the complaining unaffiliated programming vendor or MVPD proves that an MVPD has demanded exclusivity from a programming vendor, has demanded a financial interest in a programming vendor, or has discriminated against the programming vendor on the basis of affiliation and that such discrimination has unreasonably restrained the programming vendor's ability to compete fairly. Thus, the program carriage rules burden no more speech than necessary to vindicate the government's goal of protecting competition and diversity.

35. We also reject TWC's claim that the program carriage rules infringe cable operators' rights under the Takings Clause of the Fifth Amendment.[138] Quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994), TWC argues that, "[g]iven the existence of a fiercely competitive landscape fostering the development of diverse programming sources, there is no 'essential nexus' or 'rough proportionality' that would justify the taking that occurs under the ... program carriage rules."[139] TWC's reliance on *Dolan* is misplaced, as the "essential nexus" test concerns land use regulations that allegedly impose "unconstitutional conditions" and is inapplicable here.[140] None of the factors that the Supreme Court has identified as particularly significant in evaluating regulatory takings claims supports TWC's claim.[141]

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[133] *See supra* ¶ 4.

[134] *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (2009).

[135] *See Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4238, ¶ 1 and 4284-85, ¶ 116 (2011) ("*Comcast/NBCU Order*").

[136] *See id.* at 4284-85, ¶ 116; *see also id.* at 4282, ¶ 110 ("We agree that the vertical integration of Comcast's distribution network with NBCU's programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming.").

[137] *See id.* at 4288, ¶ 123 and Appendix A, Section III.4.

[138] *See* TWC Comments at 13 n.51; *see also* U.S. Const., amend. V ("nor shall private property be taken for public use, without just compensation.").

[139] *See* TWC Comments at 13 n.51.

[140] *See Dolan*, 512 U.S. at 385-86; *see also id.* at 390 (Fifth Amendment requirement of "rough proportionality" applies where government requires a landowner to dedicate private land for some future public use in exchange for a discretionary benefit such as a building permit).

[141] *See Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986) ("In all of these cases, we have eschewed development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have

(continued....)