

the defendant meets this burden of production, the complainant would then have the burden of persuasion to show that these reasons are so implausible that they constitute pretexts for discrimination.²⁷⁹

81. We seek comment on whether one of these frameworks is compelled by the language of Section 616(a)(3). If not, we seek comment on whether one of these frameworks is more consistent with the statutory scheme of Section 616, its underlying policy objectives, and its legislative history.²⁸⁰ We also seek comment on the potential ramifications of each framework for consumers, MVPDs, and unaffiliated programming vendors.

V. PROCEDURAL MATTERS

A. Second Report and Order in MB Docket No. 07-42

1. Final Regulatory Flexibility Analysis

82. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),²⁸¹ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Second Report and Order*. The FRFA is set forth in Appendix F.

2. Final Paperwork Reduction Act Analysis

83. This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13 (44 U.S.C. 3501-3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the *Federal Register* inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program carriage complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix F, *infra*.

²⁷⁹ See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (“And in attempting to satisfy this burden, the plaintiff -- once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision -- must be afforded the ‘opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.’” (citations omitted)).

²⁸⁰ See, e.g. H.R. Rep. No. 102-628 (1992), at 110 (“The Committee intends that the term ‘discrimination’ is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act. The Committee does not intend, however, for the Commission to create new standards for conduct in determining discrimination under this section. An extensive body of law exists addressing discrimination in normal business practices, and the Committee intends the Commission to be guided by these precedents.”).

²⁸¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

3. Congressional Review Act

84. The Commission will send a copy of this *Second Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

B. NPRM in MB Docket No. 11-131

1. Initial Regulatory Flexibility Act Analysis

85. As required by the RFA,²⁸² the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this *NPRM*. The IRFA is attached to this *NPRM* as Appendix G.

2. Paperwork Reduction Act

86. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.²⁸³ In addition, pursuant to the Small Business Paperwork Relief Act of 2002,²⁸⁴ we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”²⁸⁵

3. Ex Parte Rules

87. Permit-But-Disclose. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under section 1.1206(b) of the Commission’s rules.²⁸⁶ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.²⁸⁷ Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

4. Filing Requirements

88. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,²⁸⁸ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (“ECFS”), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.²⁸⁹

²⁸² See 5 U.S.C. § 603.

²⁸³ Pub. L. No. 104-13.

²⁸⁴ Pub. L. No. 107-198.

²⁸⁵ 44 U.S.C. § 3506(c)(4).

²⁸⁶ See 47 C.F.R. § 1.1206(b); see also *id.* §§ 1.1202, 1.1203.

²⁸⁷ See *id.* § 1.1206(b)(2).

²⁸⁸ See *id.* §§ 1.415, 1.419.

²⁸⁹ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

89. **Availability of Documents.** Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

90. **Accessibility Information.** To request information in accessible formats (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

91. **Additional Information.** For additional information on this proceeding, contact David Konczal, David.Konczal@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

A. Second Report and Order in MB Docket No. 07-42

92. **IT IS ORDERED**, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536, the *Second Report and Order* in MB Docket No. 07-42 **IS ADOPTED**.

93. **IT IS FURTHER ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix B.

94. **IT IS FURTHER ORDERED** that the rules adopted herein **WILL BECOME EFFECTIVE** 30 days after the date of publication in the *Federal Register*, except for Sections 47 C.F.R. §§ 1.221(h); 1.229(b)(3), (b)(4); 1.248(a), (b); 76.7(g)(2); and 76.1302(c)(1), (d), (e)(1), and (k) which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA) and **WILL BECOME**

EFFECTIVE after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective date.

95. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Second Report and Order* in MB Docket No. 07-42, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

96. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Second Report and Order* in MB Docket No. 07-42 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

B. NPRM in MB Docket No. 11-131

97. **IT IS ORDERED** that pursuant to the authority contained in Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536, this *Notice of Proposed Rulemaking* in MB Docket No. 11-131 **IS ADOPTED**.

98. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking* in MB Docket No. 11-131, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**List of Commenters****Comments filed in MB Docket No. 07-42**

Black Television News Channel
Bruno Goodworth Network, Inc
CaribeVision Holdings LLC
Charles Stogner
Combonate Media Group
Comcast Corporation
Community Broadcasters Association
Duane J. Polich
Engle Broadcasting
Ideal Living Media
iNFO Channel Group
Media Access Project
National Cable & Telecommunications Association
NFL Enterprises LLC
Pope Broadcasting Company, Inc
Positive Media, Inc d/b/a TV Camden
Reynolds Media Inc
SHOP NBC
StogMedia
The America Channel
Time Warner Cable Inc.

Reply Comments filed in MB Docket No. 07-42

Black Television News Channel
CaribeVision Holdings LLC
Combonate Media Group
Comcast Corporation
Crown Media Holdings, Inc/The Hallmark Channel
Engle Broadcasting
HDNet
HTV Corporation
Leased Access Programmers Association
Media Access Project
National Cable & Telecommunications Association
NFL Enterprises LLC
Pope Broadcasting Company, Inc
Positive Media, Inc d/b/a TV Camden
Reynolds Media Inc.
Time Warner Cable Inc.
Verizon
WealthTV

APPENDIX B**Final Rules**

For the reasons discussed in the preamble, Parts 0 and 76 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 0 – COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.341 is amended by adding paragraph (f) to read as follows:

* * * * *

(f) (1) For program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the presiding administrative law judge shall release an initial decision in compliance with one of the following deadlines:

(i) 240 calendar days after a party informs the Chief Administrative Law Judge that it elects not to pursue alternative dispute resolution as set forth in § 76.7(g)(2) of this part; or

(ii) if the parties have mutually elected to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this part, within 240 calendar days after the parties inform the Chief Administrative Law Judge that they have failed to resolve their dispute through alternative dispute resolution.

(2) The presiding administrative law judge may toll these deadlines under the following circumstances:

(i) if the complainant and defendant jointly request that the presiding administrative law judge toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness; or

(iii) in extraordinary situations, due to a lack of adjudicatory resources available at the time in the Office of Administrative Law Judges.

3. Section 1.221 is amended by adding paragraph (h) to read as follows:

* * * * *

(h) (1) For program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, each party, in person or by attorney, shall file a written appearance within five calendar days after the party informs the Chief Administrative Law Judge that it elects not to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this part or, if the parties have mutually elected to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this part, within five calendar days after the parties inform the Chief Administrative Law Judge that they have

failed to resolve their dispute through alternative dispute resolution. The written appearance shall state that the party will appear on the date fixed for hearing and present evidence on the issues specified in the hearing designation order.

(2) 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 Administrative Law Judge shall dismiss the complaint with prejudice for failure to prosecute.

(3) 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. If the hearing is so waived, the Chief Administrative Law Judge shall expeditiously terminate the proceeding and certify to the Commission the complaint for resolution based on the existing record.

4. Section 1.229 is amended by redesignating current paragraph (b)(3) as (b)(4), revising the first sentence of redesignated paragraph (b)(4), and adding new paragraph (b)(3) to read as follows:

* * * * *

(b) * * *

(3) For program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, such motions shall be filed within 15 calendar days after the deadline for submitting written appearances pursuant to § 1.221(h) of this part, except that persons not named as parties to the proceeding in the designation order may file such motions with their petitions to intervene up to 30 days after publication of the full text or a summary of the designation order in the Federal Register. (See § 1.223 of this part).

(4) Any person desiring to file a motion to modify the issues after the expiration of periods specified in paragraphs (a), (b)(1), (b)(2), and (b)(3) of this section, shall set forth the reason why it was not possible to file the motion within the prescribed period. * * *

* * * * *

5. Section 1.248 is amended by revising the second sentence of paragraph (a) and the second sentence of paragraph (b)(1) to read as follows:

(a) * * * The initial prehearing conference shall be scheduled 30 days after the effective date of the order designating a case for hearing, unless good cause is shown for scheduling such conference at a later date, except that for program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the initial prehearing conference shall be held no later than 10 calendar days after the deadline for submitting written appearances pursuant to § 1.221(h) of this part or within such shorter or longer period as the Commission may allow on motion or notice consistent with the public interest.

(b) (1) * * * The initial prehearing conference shall be scheduled 30 days after the effective date of the order designating a case for hearing, unless good cause is shown for scheduling such conference at a later date, except that for program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the initial prehearing

conference shall be held no later than 10 calendar days after the deadline for submitting written appearances pursuant to § 1.221(h) of this part or within such shorter or longer period as the presiding officer may allow on motion or notice consistent with the public interest.

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

6. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

7. Section 76.7 is amended by revising the second sentence of paragraph (g)(2) to read as follows:

(g) ***

(2) *** Such election shall be submitted in writing to the Commission and the Chief Administrative Law Judge.

8. Section 76.1302 is amended by revising paragraph (c)(1), removing paragraph (c)(3), redesignating current paragraph (c)(4) as (c)(3), redesignating current paragraph (d) as paragraph (e) and revising paragraph (e)(1), redesignating current paragraph (e) as paragraph (f), redesignating current paragraph (f) as paragraph (h), redesignating current paragraph (g) as paragraph (j) and revising paragraph (j)(2), and adding new paragraphs (d), (g), (i), and (k) to read as follows:

(c) ***

(1) 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;

(d) *Prima facie case.* In order to establish a *prima facie* case of a violation of § 76.1301 of this part, the complaint must contain evidence of the following:

(1) The complainant is a video programming vendor as defined in section 616(b) of the Communications Act of 1934, as amended, and § 76.1300(e) of this part or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part;

(2) The defendant is a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part; and

(3) (i) *Financial interest.* In a complaint alleging a violation of § 76.1301(a) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant's systems.

(ii) *Exclusive rights.* In a complaint alleging a violation of § 76.1301(b) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant coerced a video programming vendor to provide, or retaliated against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(iii) *Discrimination.* In a complaint alleging a violation of § 76.1301(c) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B) (1) Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors; or

(2) (i) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(ii) Evidence that the defendant multichannel video programming distributor has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(2)(i) of this section with respect to the selection, terms, or conditions for carriage.

(e) *Answer.* (1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within sixty (60) days of service of the complaint, unless otherwise directed by the Commission.

* * * * *

(g) *Prima facie determination.* (1) Within sixty (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), the Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of § 76.1301 of this part.

(2) The Chief, Media Bureau may toll the sixty (60)-calendar-day deadline under the following circumstances:

(i) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(3) A finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.

(4) If the Chief, Media Bureau finds that the complainant has not established a *prima facie* case of a violation of § 76.1301 of this part, the Chief, Media Bureau will dismiss the complaint.

* * * * *

(i) *Deadline for decision on the merits.* (1) (i) For program carriage complaints that the Chief, Media Bureau decides on the merits based on the complaint, answer, and reply without discovery, the Chief, Media Bureau shall release a decision on the merits within sixty (60) calendar days after the Chief, Media Bureau's *prima facie* determination.

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall release a decision on the merits within 150 calendar days after the Chief, Media Bureau's *prima facie* determination.

(iii) The Chief, Media Bureau may toll these deadlines under the following circumstances:

(A) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(B) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(2) For program carriage complaints that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the deadlines set forth in § 0.341(f) of this part apply.

(j) * * *

(2) *Additional sanctions.* The remedies provided in paragraph (j)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(k) *Petitions for temporary standstill.* (1) A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

- (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 favors grant of a stay.

(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (*i.e.*, either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract.

APPENDIX C

Restated Section 76.1302 Showing Changes Adopted in *Second Report and Order*

For ease of review, Section 76.1302 is restated below showing the changes adopted herein in **bold/underline** (for additions) or ~~strikethrough~~ (for deletions).

§ 76.1302 Carriage agreement proceedings

(a) *Complaints.* Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) *Prefiling notice required.* Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(c) *Contents of complaint.* In addition to the requirements of § 76.7 of this part, a carriage agreement complaint shall contain:

(1) ~~The type of complainant, 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;~~

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

~~(3) For complaints alleging a violation of § 76.1301(e) of this part, evidence that supports complainant's claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly.~~

~~(4)~~ The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (b) of this section has been made.

(d) Prima facie case. In order to establish a *prima facie* case of a violation of § 76.1301 of this part, the complaint must contain evidence of the following:

(1) The complainant is a video programming vendor as defined in section 616(b) of the Communications Act of 1934, as amended, and § 76.1300(e) of this part or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part;

(2) The defendant is a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part; and

(3) (i) *Financial interest.* In a complaint alleging a violation of § 76.1301(a) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant's systems.

(ii) *Exclusive rights.* In a complaint alleging a violation of § 76.1301(b) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant coerced a video programming vendor to provide, or retaliated against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(iii) *Discrimination.* In a complaint alleging a violation of § 76.1301(c) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B) (1) Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors; or

(2) (i) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(ii) Evidence that the defendant multichannel video programming distributor has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(2)(i) of this section with respect to the selection, terms, or conditions for carriage.

(de) *Answer.* (1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within ~~thirty (30)~~ sixty (60) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall address the relief requested in the complaint, including legal and documentary support, for such response, and may include an alternative relief proposal without any prejudice to any denials or defenses raised.

(ef) *Reply.* Within twenty (20) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(g) *Prima facie determination.* (1) Within sixty (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), the

Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of § 76.1301 of this part.

(2) The Chief, Media Bureau may toll the sixty (60)-calendar-day deadline under the following circumstances:

(i) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(3) A finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.

(4) If the Chief, Media Bureau finds that the complainant has not established a *prima facie* case of a violation of § 76.1301 of this part, the Chief, Media Bureau will dismiss the complaint.

(f) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or

(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or

(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

(i) Deadline for decision on the merits. (1) (i) For program carriage complaints that the Chief, Media Bureau decides on the merits based on the complaint, answer, and reply without discovery, the Chief, Media Bureau shall release a decision on the merits within sixty (60) calendar days after the Chief, Media Bureau's *prima facie* determination.

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall release a decision on the merits within 150 calendar days after the Chief, Media Bureau's *prima facie* determination.

(iii) The Chief, Media Bureau may toll these deadlines under the following circumstances:

(A) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(B) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(2) For program carriage complaints that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the deadlines set forth in § 0.341(f) of this part apply.

(g) Remedies for violations -- (1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) Additional sanctions. The remedies provided in paragraph (g)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(k) Petitions for temporary standstill. (1) A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

(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 favors grant of a stay.

(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (i.e., either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract.

APPENDIX D

Potential Amendments to the Program Carriage Rules Based on the *NPRM*

For ease of review, Sections 76.1301 and 76.1302 and new Section 76.1303 are restated below showing the potential amendments in **bold/underline** (for additions) or ~~strike through~~ (for deletions).

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1301 is amended by new paragraphs (d) and (e) to read as follows:

§ 76.1301 Prohibited Practices

(a) *Financial interest.* No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) *Exclusive rights.* No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) *Discrimination.* No multichannel video programming distributor shall engage 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 non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

(d) Retaliation. No multichannel video programming distributor shall retaliate against a video programming vendor for filing a complaint with the Commission alleging a violation of § 76.1301 of this part, if the effect of the conduct is to unreasonably restrain the ability of the video programming vendor to compete fairly.

(e) Bad faith negotiations. (1) No multichannel video programming distributor shall fail to negotiate in good faith with an unaffiliated video programming vendor with respect to video programming that is similarly situated to video programming affiliated (as defined in § 76.1300(a) of this part) with the multichannel video programming distributor, if the effect of such a failure to negotiate in good faith is to unreasonably restrain the ability of the unaffiliated video programming vendor to compete fairly.

(2) Video programming will be considered similarly situated based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.

(3) Standards. The following actions or practices violate the multichannel video programming distributor's duty to negotiate in good faith as set forth in § 76.1301(e)(1) of this part:

(i) Refusal by the multichannel video programming distributor to negotiate for carriage;

(ii) Refusal by the multichannel video programming distributor to designate a representative with authority to make binding representations on carriage;

(iii) Refusal by the multichannel video programming distributor to meet and negotiate for carriage at reasonable times and locations, or acting in a manner that unreasonably delays carriage negotiations;

(iv) Refusal by the multichannel video programming distributor to put forth more than a single, unilateral proposal;

(v) Failure of the multichannel video programming distributor to respond to a carriage proposal of the other party, including the reasons for the rejection of any such proposal;

(vi) Execution by the multichannel video programming distributor of an agreement with any party, a term or condition of which, requires that the multichannel video programming distributor not enter into a carriage agreement with an unaffiliated video programming vendor; and

(vii) Refusal by the multichannel video programming distributor to execute a written carriage agreement that sets forth the full understanding of the unaffiliated video programming vendor and the multichannel video programming distributor.

(4) Totality of the circumstances. In addition to the standards set forth in § 76.1301(e)(3) of this part, an unaffiliated video programming vendor may demonstrate, based on the totality of the circumstances of a particular carriage negotiation, that a multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.1301(e)(1) of this part.

3. Section 76.1302 is amended by adding paragraph (c)(4), revising paragraph (d)(3)(iii)(B)(2)(i), revising paragraph (d)(3)(iii)(B)(2)(ii), adding paragraph (d)(3)(iv), adding paragraph (d)(3)(v), adding paragraph (e)(3), revising the introductory text of paragraph (h), removing paragraphs (h)(1) through (h)(3), revising paragraph (j)(1), adding paragraph (j)(3), adding paragraph (j)(4), and adding paragraph (l) to read as follows:

§ 76.1302 Carriage agreement proceedings

(a) *Complaints.* Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) *Prefiling notice required.* Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature

of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(c) *Contents of complaint.* In addition to the requirements of § 76.7 of this part, a carriage agreement complaint shall contain:

(1) 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;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

(3) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (b) of this section has been made.

(4) Damages requests. (i) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of paragraph (c)(4)(iii) of this section.

(ii) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded if the complaint complies fully with the requirement of paragraph (c)(4)(iii) of this section where the defendant knew, or should have known that it was engaging in conduct violative of section 616.

(iii) In all cases in which recovery of damages is sought, the complainant shall include within, or as an attachment to, the complaint, either:

(A) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(B) An explanation of:

(1) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(2) The reason such information is unavailable to the complaining party;

(3) The factual basis the complainant has for believing that such evidence of damages exists; and

(4) A detailed outline of the methodology that would be used to create a computation of damages when such evidence is available.

(d) *Prima facie case.* In order to establish a *prima facie* case of a violation of § 76.1301 of this part, the complaint must contain evidence of the following:

(1) The complainant is a video programming vendor as defined in section 616(b) of the Communications Act of 1934, as amended, and § 76.1300(e) of this part or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part;

(2) The defendant is a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part; and

(3) (i) *Financial interest.* In a complaint alleging a violation of § 76.1301(a) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant's systems.

(ii) *Exclusive rights.* In a complaint alleging a violation of § 76.1301(b) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant coerced a video programming vendor to provide, or retaliated against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(iii) *Discrimination.* In a complaint alleging a violation of § 76.1301(c) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B) (1) Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors; or

(2) (i) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor **or with another multichannel video programming distributor**, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(ii) Evidence that the defendant multichannel video programming distributor **is affiliated (as defined in § 76.1300(a) of this part) with any video programming vendor and** has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(2)(i) of this section with respect to the selection, terms, or conditions for carriage.

(iv) Retaliation. In a complaint alleging a violation of § 76.1301(d) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of the complainant to compete fairly; and

(B) (1) Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant retaliated against the complainant for filing a complaint with the Commission alleging a violation of § 76.1301 of this part; or

(2) (i) Evidence that the defendant multichannel video programming distributor has taken an adverse carriage action while the complainant has pending with the Commission a complaint alleging a violation of § 76.1301 of this part (the “initial complaint”) or within two years after the initial complaint is resolved on the merits.

(ii) An “adverse carriage action” for purposes of paragraph (d)(3)(iv)(B)(2)(i) of this section is any action taken by the defendant multichannel video programming distributor with respect to any video programming affiliated with the complainant that adversely impacts the complainant, including, but not limited to, refusing to carry any video programming affiliated with the complainant or moving any video programming affiliated with the complainant to a less favorable channel position or tier, provided that an “adverse carriage action” does not include the action at issue in the initial complaint.

(v) *Bad faith negotiations.* In a complaint alleging a violation of § 76.1301(e) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of the complainant to compete fairly;

(B) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(C) Evidence that the defendant multichannel video programming distributor breached its duty to negotiate in good faith pursuant to § 76.1301(e) of this part.

(e) *Answer.* (1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within sixty (60) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall address the relief requested in the complaint, including legal and documentary support, for such response, and may include an alternative relief proposal without any prejudice to any denials or defenses raised.

(3) To the extent that a defendant expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

(f) *Reply.* Within twenty (20) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(g) *Prima facie determination.* (1) Within sixty (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), the Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of § 76.1301 of this part.

(2) The Chief, Media Bureau may toll the sixty (60)-calendar-day deadline under the following circumstances:

(i) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(3) A finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.

(4) If the Chief, Media Bureau finds that the complainant has not established a *prima facie* case of a violation of § 76.1301 of this part, the Chief, Media Bureau will dismiss the complaint.

(h) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which **the alleged violation of the program carriage rules occurred**, ~~one of the following events occurs:~~

~~(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or~~

~~(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or~~

~~(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.~~

(i) *Deadline for decision on the merits.* (1) (i) For program carriage complaints that the Chief, Media Bureau decides on the merits based on the complaint, answer, and reply without discovery, the Chief, Media Bureau shall release a decision on the merits within sixty (60) calendar days after the Chief, Media Bureau's *prima facie* determination.

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall release a decision on the merits within 150 calendar days after the Chief, Media Bureau's *prima facie* determination.

(iii) The Chief, Media Bureau may toll these deadlines under the following circumstances:

(A) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(B) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(2) For program carriage complaints that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the deadlines set forth in § 0.341(f) of this part apply.

(j) *Remedies for violations -- (1) Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission **adjudicator deciding the case on the merits (i.e., either the Chief, Media Bureau or an administrative law judge)** shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless **the adjudicator rules that the defendant has made a sufficient evidentiary showing that demonstrates that a**ny order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) *Additional sanctions.* The remedies provided in paragraph (j)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(3) Submission of final offers. To assist in ordering an appropriate remedy, the adjudicator has the discretion to order the complainant and the defendant to each submit a final offer for the prices, terms, or conditions in dispute. The adjudicator has the discretion to adopt one of the final offers or to fashion its own remedy.

(4) Imposition of damages. (i) Bifurcation. In all cases in which damages are requested, the adjudicator deciding the case on the merits (i.e., either the Chief, Media Bureau or an administrative law judge) may bifurcate the program carriage violation determination from any damage adjudication.

(ii) Burden of proof. The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program carriage violation. Requests for damages that grossly overstate the amount of damages may result in a determination by the adjudicator that the complainant failed to satisfy its burden of proof to demonstrate with specificity the damages arising from the program carriage violation.

(iii) Damages adjudication. (A) The adjudicator may, in its discretion, end adjudication of damages with a written order determining the sufficiency of the damages computation submitted in accordance with paragraph (c)(4)(iii)(A) of this section or the damages computation methodology submitted in accordance with paragraph (c)(4)(iii)(B)(4) of this section, modifying such computation or methodology, or requiring the complainant to resubmit such computation or methodology.

(I) Where the adjudicator issues a written order approving or modifying a damages computation submitted in accordance with paragraph (c)(4)(iii)(A) of this section, the defendant shall recompense the complainant as directed therein.

(2) Where the adjudicator issues a written order approving or modifying a damages computation methodology submitted in accordance with paragraph (c)(4)(iii)(B)(4) of this section, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the adjudicator-mandated methodology.

(B) Within thirty (30) days of the issuance of a paragraph (c)(4)(iii)(B)(4) of this section damages methodology order, the parties shall submit jointly to the adjudicator either:

(1) A statement detailing the parties' agreement as to the amount of damages;

(2) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(3) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(C)(1) In cases in which the parties cannot resolve the amount of damages within a reasonable time period, the adjudicator retains the right to determine the actual amount of damages on its own, or through the procedures described in paragraph (j)(4)(iii)(C)(2) of this section.

(2) In cases in which the Chief, Media Bureau acts as the adjudicator, issues concerning the amount of damages may be designated by the Chief, Media Bureau for hearing before, or, if the parties agree, submitted for mediation to, an administrative law judge.

(D) Interest on the amount of damages awarded will accrue from either the date indicated in the adjudicator's written order issued pursuant to paragraph (j)(4)(iii)(A)(1) of this section or the date agreed upon by the parties as a result of their negotiations pursuant to paragraph (j)(4)(iii)(A)(2) of this section. Interest shall be computed at applicable rates published by the Internal Revenue Service for tax refunds.

(k) Petitions for temporary standstill. (1) A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

- (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 favors grant of a stay.

(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (*i.e.*, either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract. **To facilitate the application of remedies as of the expiration date of the previous programming contract, the adjudicator, after deciding the case on the merits, may request the party seeking to apply the remedies as of the expiration date of the previous programming contract to submit a proposal for such application of remedies pursuant to the procedures set forth in § 76.1302(c)(4)(iii) and § 76.1302(j)(4) of this part for requesting damages. An opposition to such a proposal shall be filed within ten (10) days after the proposal is filed. A reply to an opposition shall be filed within five (5) days after the opposition is filed.**

(l) Protective Orders. In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of program carriage complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.

4. Section 76.1303 is added to read as follows:

§ 76.1303 Discovery

(a) In addition to the general pleading and discovery rules contained in § 76.7 of this part, the following procedures apply to complaints alleging a violation of § 76.1301 of this part in which the Chief, Media Bureau acts as the adjudicator.

(b) Automatic document production. Within ten (10) calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery, each party must provide the following documents to the opposing party:

(1) In a complaint alleging a violation of § 76.1301(a) of this part:

(i) All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant multichannel video programming distributor;

(ii) All documents relating to the defendant multichannel video programming distributor's interest in obtaining or plan to obtain a financial interest in the complainant or the video programming at issue in the complaint; and

(iii) All documents relating to the programming vendor's consideration of whether to provide the defendant multichannel video programming distributor with a financial interest in the complainant or the video programming at issue in the complaint.

(2) In a complaint alleging a violation of § 76.1301(b) of this part:

(i) All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant multichannel video programming distributor;

(ii) All documents relating to the defendant multichannel video programming distributor's interest in obtaining or plan to obtain exclusive rights to the video programming at issue in the complaint; and

(iii) All documents relating to the programming vendor's consideration of whether to provide the defendant multichannel video programming distributor with exclusive rights to the video programming at issue in the complaint.

(3) In a complaint alleging a violation of § 76.1301(c) of this part:

(i) All documents relating to the defendant multichannel video programming distributor's carriage decision with respect to the complainant's video programming at issue in the complaint, including the defendant multichannel video programming distributor's reasons for not carrying the video programming or the defendant multichannel video programming distributor's reasons for proposing, rejecting, or accepting specific carriage terms; and the defendant multichannel video programming distributor's evaluation of the video programming;

(ii) All documents comparing, discussing the similarities or differences between, or discussing the extent of competition between the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, including in terms of genre, ratings, license fee, target audience, target advertisers, and target programming;

(iii) All documents relating to the impact of defendant multichannel video programming distributor's carriage decision on the ability of the complainant, the complainant's video programming at issue in the complaint, the defendant multichannel video programming distributor, and the allegedly similarly situated, affiliated video programming to compete, including the impact on subscribership; license fee revenues; advertising revenues; acquisition of advertisers; and acquisition of programming rights;

(iv) For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, all documents (both internal documents as well as documents received from multichannel video programming distributors, but limited to the ten largest multichannel video programming distributors in terms of subscribers with which the complainant or the affiliated programming vendor have engaged in carriage discussions regarding the video programming) discussing the reasons for the multichannel video programming distributor's carriage decisions with respect to the video programming, including the multichannel video programming distributor's reasons for not carrying the video programming or the multichannel video programming distributor's reasons for proposing, rejecting, or accepting specific carriage terms; and the multichannel video programming distributor's evaluation of the video programming; and

(v) For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, current affiliation agreements with the ten largest multichannel video programming distributors (including, if not otherwise covered, the defendant

multichannel video programming distributor) carrying the video programming in terms of subscribers.

(c) Party-to-party discovery. (1) Within twenty (20) calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery, each party to the complaint may serve requests for discovery directly on the opposing party, and file a copy of the request with the Commission.

(2) Within five (5) calendar days after being served with a discovery request, the respondent may serve directly on the party requesting discovery an objection to any request for discovery that is not in the respondent's control or relevant to the dispute, and file a copy of the objection with the Commission.

(3) Within five (5) calendar days after being served with an objection to a discovery request, the party requesting discovery may serve a reply to the objection directly on the respondent, and file a copy of the reply with the Commission.

(4) To the extent that a party has objected to a discovery request, the parties shall meet and confer to resolve the dispute. Within forty (40) calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery, the parties shall file with the Commission a joint proposal for discovery as well as a list of issues pertaining to discovery that have not been resolved.

(5) Until any objection to a discovery request is resolved either by the parties or by the Chief, Media Bureau, the obligation to produce the disputed discovery is suspended.

(6) Unless the parties agree to extend the 150-calendar-day deadline for a decision on the merits by the Chief, Media Bureau set forth in § 76.1302(i)(1)(ii) of this part, discovery must conclude within 75 calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery.

(7) Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

(8) Unless the parties agree to extend the 150-calendar-day deadline for a decision on the merits by the Chief, Media Bureau set forth in § 76.1302(i)(1)(ii) of this part, the parties must submit post-discovery briefs and reply briefs within twenty (20) calendar days and ten (10) calendar days, respectively, after the conclusion of discovery. Such briefs shall summarize the facts and issues presented in the pleadings and other record evidence, including the information exchanged during discovery.