

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

In the Matter of

**REVISION OF THE COMMISSION'S PROGRAM
CARRIAGE RULES**

MB Docket No. 11-131

COMMENTS OF DIRECTV, INC.

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SUMMARY

Any changes to the Commission's program carriage regime must be legally sustainable. They should also promote the expeditious resolution of complaints that Congress envisioned. When evaluated in light of these criteria, many of the proposals the Commission is now considering should be rejected, or at least modified prior to implementation.

Of most concern to DIRECTV, the Commission proposes to expand dramatically the basis for a discrimination claim by allowing a complainant to assert that a defendant MVPD favors comparable programming affiliated with *any* MVPD, not just its own programming. This proposal is based on an assumption that vertically integrated MVPDs will collude to favor each other's programming at the expense of independent programming. Yet that assumption runs directly counter to nearly two decades of Commission precedent and factual findings, including the finding that "cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO."¹ The only time the Commission attempted to deviate from this conclusion (in connection with a proposed cable ownership cap in 1999), the D.C. Circuit held that the Commission "has put forth no evidence at all that indicates the prospects for collusion," and that in the absence of substantial evidence "that such collusion has in fact occurred or is likely to occur[], its assumptions are mere conjecture."² No such evidence exists today, so nothing in this record supports a different result now. In addition, nothing in the record even begins to support expanding the unproven collusion hypothesis to include DBS and telco video operators that compete directly with cable.

¹ *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd. 8565, ¶ 53 (1993).

² *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1130, 1133 (D.C. Cir.), *cert. denied sub nom. Consumer Fed'n of Am. v. FCC*, 122 S. Ct. 644 (2001).

The Commission also seeks comment on a significant expansion of discovery available in program carriage cases. Party-initiated or “expanded” discovery would lead to more disputes and is fundamentally incompatible with the expedited timelines for resolution of complaints put in place just months ago. “Automatic” discovery would require defendants to undertake burdensome discovery even before the Commission has determined that a complainant has a viable claim, and would require production of a laundry-list of documents regardless of their relevance to the facts and circumstances of a particular case. Moreover, neither proposal contemplates that the defendant is unlikely to have in its possession much of the information called for under this new discovery regime. DIRECTV supports adoption of a model protective order to facilitate production of highly confidential materials, but that will not enable defendants to produce documents outside their control. Were the Commission to expand the basis for a discrimination claim as discussed above, it would severely exacerbate each of these concerns.

Several other proposals should be reconsidered or rejected:

- Requiring parties to submit “final offers” for carriage would be illogical in cases where a defendant does not wish to carry the complainant’s programming. Moreover, the utility of such offers would be undermined because the adjudicator is not required to accept one of the offers.
- A rule presuming that *any* decision by an MVPD not to carry programming of a recent complainant is anticompetitive retaliation would be overbroad and merely encourage programmers to file frivolous complaints in order to gain negotiating leverage.

- Expanding the attribution rules to encompass contractual arrangements would run contrary to congressional intent to address carriage decisions made by MVPDs based on ownership interests.
- If the Commission chooses to allow the recovery of damages in program carriage cases, such damages cannot be limited to complainants alone, but must also be available to defendants forced to make payments and expend capacity for interim carriage if a complaint is ultimately rejected.

As the Commission assesses the sweeping changes proposed in this proceeding, DIRECTV urges that it recognize the potential unintended consequences of such changes and instead take a more measured approach.

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DIRECTV, Inc. (“DIRECTV”) respectfully submits these comments on the Commission’s proposals to revise and expand the program carriage rules.¹ DIRECTV believes that many of these proposed changes have not been justified and would be inadvisable as a policy matter.

Most importantly, the Commission should not expand the scope of its “antidiscrimination” rule, which now prohibits multichannel video programming distributors (“MVPDs”) from favoring their own programming, to address alleged favoritism to *other MVPDs’* programming. For nearly twenty years, the Commission has interpreted the key statutory “affiliation” language to describe programming “affiliated with the defendant.” It also has found repeatedly as a factual matter that MVPDs simply do not collude to favor one another’s programming. In fact, the one time it suggested otherwise, the Commission was overturned by the D.C. Circuit.² Based on the record before it, the Commission could not provide a “reasoned explanation” for changing course here. Moreover, such a change would be

¹ *Revision of the Commission’s Program Carriage Rules*, 26 FCC Rcd. 11494 (2011) (“*Notice*”).

² *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1130, 1133 (D.C. Cir.) (“*Time Warner II*”), cert. denied sub nom. *Consumer Fed’n of Am. v. FCC*, 122 S. Ct. 644 (2001).

questionable policy, as it would impose additional harm on MVPDs already victimized by forced tying, and it would introduce a host of evidentiary and discovery complications to an already overly-complicated program carriage regime.

Likewise, the Commission should reconsider or reject a number of other proposals.

- It should not augment program carriage discovery, as such an expansion would be fundamentally incompatible with expeditious resolution of complaints and would impose undue burdens on defendants.
- The program carriage context is inappropriate for the submission of “final offers,” especially if the adjudicator is not even bound to choose one or the other.
- There is no basis for assuming that all decisions not to carry programming affiliated with a complainant are taken as a form of retaliation, and doing so would likely lead to frivolous complaints filed to gain an advantage in negotiations.
- It would be inadvisable to expand the attribution rules beyond the ownership interests Congress meant to address to contractual arrangements it did not.
- Lastly, if damages are to be recoverable, they should be available to complainants and defendants alike.

Given these considerations, DIRECTV submits that the Commission would be best served by taking a more measured approach in revising its program carriage regime.

I. THE COMMISSION HAS NO BASIS FOR A REVERSAL OF COURSE THAT WOULD DRAMATICALLY AND UNJUSTIFIABLY EXPAND THE SCOPE OF THE ANTIDISCRIMINATION RULE.

The nondiscrimination provision in Section 616(a)(3) of the Communications Act prohibits MVPDs from engaging in conduct that unreasonably restrains 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 programmers.³ In 1993, the Commission determined that the key term “affiliation” referred to an attributable interest held by the defendant in the allegedly favored programming vendor.⁴ Thus, for nearly twenty years, it has been unlawful for an MVPD to discriminate in favor of its own affiliated programming.⁵ Citing the possibility of MVPD collusion, the Commission now proposes also to prohibit an MVPD from discriminating in favor of programming affiliated with another MVPD.⁶

The Commission should not expand the antidiscrimination provision in this manner. It lacks legal authority to do so, as no evidence exists that could justify abandoning repeated legal determinations (about the meaning of this and parallel language) and factual determinations (that MVPDs do not collude). There is also no policy basis for doing so, as the proposal would both exacerbate the problem of forced tying and be nearly impossible to administer.

A. The Commission Cannot Justify Changing Its Prior Interpretation of “Affiliation.”

1. The Commission Has Consistently Required Affiliation With the Defendant MVPD and Has Never Found Evidence of Collusion.

The 1992 Cable Act introduced numerous provisions intended to prevent vertically integrated cable operators from using affiliated programming to harm rivals. Several of these

³ 47 U.S.C. § 536(a)(3).

⁴ *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*, 9 FCC Rcd. 2642, ¶ 29 (1993) (“1993 Program Carriage Order”) (“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 Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd. 4415 (1994) (“1994 Program Carriage Order”).

⁵ 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.”)

⁶ *See Notice*, ¶ 72.

provisions are specifically designed to prevent such cable operators from disadvantaging unaffiliated, independent programmers.⁷ For nearly twenty years, the Commission has interpreted each of these provisions as preventing MVPDs from favoring *their own* affiliated programming, not the programming affiliated with other MVPDs. For all of this time, the Commission has also found no factual evidence that MVPDs favor other MVPDs' programming. Indeed, the one time it suggested that such collusion might exist, the D.C. Circuit reversed it for failing to provide any evidence to support that conjecture.⁸ The record contains nothing that might justify a departure from this longstanding precedent.

The Commission first faced the question of MVPD/programmer affiliation in construing the language at issue in this rulemaking: Section 616(a)(3)'s prohibition on conduct that unreasonably restrains the ability of "an unaffiliated video programming vendor" to compete fairly by discriminating on the basis of "affiliation or non-affiliation" of programmers.⁹ Although the Cable Act itself does not define the key terms, the legislative history is unequivocal that this nondiscrimination provision "was crafted to ensure that a multichannel video programming operator does not discriminate against an unaffiliated video programming vendor *in which it* does not hold a financial interest."¹⁰ Not surprisingly, the Commission concluded

⁷ See 47 U.S.C. § 536 (program carriage rules); *id.* § 533(f) (restrictions on channel occupancy of affiliated programming on cable systems).

⁸ See *Time Warner II*, 240 F.3d at 1130-1134.

⁹ 47 U.S.C. § 536(a)(3).

¹⁰ H. Rep. No. 102-628, 110, 111 1992 WL 166238 (emphasis added). As the Commission also noted, one of the stated findings of the 1992 Cable Act is that "cable operators have the incentive and ability to favor *their* affiliated programmers, [which] could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act, Section 2(a)(5) (emphasis added).

that the antidiscrimination provision related to programming affiliated with the defendant MVPD without the need for any further discussion.¹¹

That same day, moreover, the Commission provided its rationale for reaching the same conclusion when implementing a parallel provision of the Cable Act. Section 613(f)(1)(B) of the Act requires the Commission to establish “reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.”¹² The Commission explained that this language is “not entirely clear” with respect to affiliation “because it can also be read as applying to carriage of video programmers affiliated with the particular cable operator or to carriage of any vertically integrated cable programmer on any cable system.”¹³ The Commission concluded that the “most reasoned approach” was to interpret this language “to apply such limits only to video programmers that are vertically integrated with the particular cable operator in question.”¹⁴

In arriving at this conclusion, moreover, the Commission made the specific factual determination that “cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO.”¹⁵ It continued: “A vertically integrated cable operator appears to have significantly less power to control the content or distribution of a programming service in which it has no ownership interest.”¹⁶ And it concluded that, “[i]n the

¹¹ The only thing the *1993 Program Carriage Order* has to say on the subject is that, as a procedural matter, the complainant must provide evidence that “the defendant has an attributable interest in the allegedly favored programming vendor.” *1993 Program Carriage Order*, ¶ 29.

¹² See 47 U.S.C. § 533(f)(1)(B).

¹³ *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd. 8565, ¶ 51 (1993).

¹⁴ *Id.*, ¶ 52.

¹⁵ *Id.*, ¶ 53.

¹⁶ *Id.* The Commission also expressed concern that, in the absence of such evidence, “application of the channel occupancy limits to all vertically integrated programmers, regardless of whether they are

absence of significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming affiliated with a rival MSO.”¹⁷

The only time the Commission attempted to deviate from this conclusion was in 1999, in the context of establishing “reasonable limits on the number of cable subscribers a person is authorized to reach through [owned or affiliated] cable systems” pursuant to Section 613(f)(1)(A) of the Act. At that time, the Commission adopted a national cable ownership cap based on the hypothesis that cable operators might collude to favor their own programming at the expense of independent programming.¹⁸ The D.C. Circuit rejected that hypothesis, holding that the Commission “has put forth no evidence at all that indicates the prospects for collusion,” and that in the absence of substantial evidence “that such collusion has in fact occurred or is likely to occur[,] its assumptions are mere conjecture.”¹⁹ Upon examining the issue on remand just three years ago, the Commission conceded that it “lack[ed] evidence to draw definitive conclusions regarding the likelihood that cable operators will behave in a coordinated fashion.”²⁰

affiliated with the particular cable operator, would severely inhibit MSO investment in video programming services, since the mere fact of such MSO investment may restrict carriage of the video programming service on all cable systems.” *Id.*

¹⁷ *Id.*

¹⁸ *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd. 19098, ¶¶ 40-53 (1999).

¹⁹ *Time Warner II*, 240 F.3d at 1130, 1133.

²⁰ *See Cable Horizontal and Vertical Ownership Limits*, 23 FCC Rcd. 2134, 2165-66, ¶¶ 63-66 (2008) (“2008 Ownership Order”), vacated on other grounds *sub nom. Comcast Corp. v. FCC*, 579 F.3d 1 (2009).

2. The Record Here Does Not Support the “Reasoned Explanation” Required for the Change Proposed by the Commission.

The Commission cannot abandon these repeated and explicit legal and factual determinations without good reason and an adequate explanation.²¹ Agencies must always “articulate[] a rational connection between the facts found and the choice made.”²² Of particular relevance in this case, changes in established policy require a more detailed explanation “when, for example, [the] new policy rests upon factual findings that contradict those which underlay [the agency’s] prior policy.”²³ As the Supreme Court has explained, “in such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”²⁴

The record in this proceeding does not support any “reasoned explanation” for the change proposed by the Commission. To the contrary, the notion that MVPDs might collude in favor of mutual carriage of one another’s affiliated programming is exactly the factual scenario that the Commission rejected explicitly in 1993 and 2008, and with respect to which the DC Circuit reversed the Commission in 2001. DIRECTV is aware of no evidence showing either that the Commission misunderstood the facts previously or that the facts have changed now.

Certainly, the *Notice* itself points to no such evidence. It refers only to a single study relying on decade-old data suggesting that vertically integrated cable operators are four percent

²¹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

²² *Id.* at 43.

²³ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

²⁴ *Id.*

more likely to carry basic cable networks of other cable operators.²⁵ Not only was this study published prior to the Commission’s decision on remand of the cable ownership cap, it also provides no basis for expanding these rules to DBS and telco video providers. As the Kang Study concedes, the “fundamental basis for reciprocal carriage” was the “unique structure of the cable television industry,” in which collusion can be profitable among cable monopolies that do not compete against one another.²⁶ Conversely, the study stated that the analysis could not be extended to markets with a more competitive structure, as collusion would be “impossible” among competing providers.²⁷ Accordingly, the proffered study is wholly irrelevant with respect to satellite and telco video providers, who have always competed against cable operators, and each other.²⁸

Moreover, recent factual evidence further undermines the Commission’s collusion hypothesis. Specifically, two recent program carriage complainants were themselves brought by

²⁵ See Notice, ¶ 74 (citing Jun-Seok Kang, Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study (“Kang Study”). The Kang Study states that it is based on data from the 1999 *Television and Cable Factbook*, which reflects data as of 1998, and on *Economics of Basic Cable Networks*, which reflects data as of 1997. Even taken at face value, the study only shows that a vertically integrated cable operator is four percentage points more likely to take cable-affiliated programming than is a non-vertically integrated cable operator. Kang Study at 18.

²⁶ Kang Study at 10 (“The fundamental basis for reciprocal carriage is the unique structure of the cable television industry. As described in section 2.1, SOs are geographically separated with monopoly power. This means that SOs are not directly competing with each other: one does not directly gain as a rival loses.”).

²⁷ *Id.* at 23. (“If AT&T Wireless and NTT DoCoMo were competing for the same customer in the same geographical market or if the marginal costs of serving additional customer were large, it would be impossible for the two firms to act in such a cooperative mode.”).

²⁸ The Notice also refers briefly to the Commission’s tentative conclusion in 2008 to expand the scope of the channel occupancy limitations to include programming affiliated with any MVPD. See Notice, ¶ 73. The channel occupancy item, however, contained no factual discussion whatsoever, belied factual findings in the very same document (see discussion above), and was never implemented. Compare 2008 Ownership Order, ¶ 145 (seeking comment on whether to expand definition of affiliation) with *id.*, ¶ 74 (noting that the Commission “lack[ed] evidence to draw definitive conclusions regarding the likelihood that cable operators will behave in a coordinated fashion”).

MVPD-affiliated programmers claiming discrimination by programmer-affiliated MVPDs.²⁹

This evidence suggests that, far from colluding with other MVPDs for *quid pro quo* carriage of affiliated programming, some MVPDs may be affirmatively discriminating against such programming in their carriage decisions.

Even if it found evidence of MVPD collusion, moreover, the Commission still could not provide a reasoned justification for the particular antidiscrimination formulation it now proposes due to its patent overbreadth. As the Commission now articulates the proposed rule, the only affiliation-related information that would be needed for a *prima facie* discrimination case is the following:

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 factors³⁰

This broad formulation is not sufficiently tailored to address the hypothetical collusive activity because it would apply even in situations where MVPD collusion would be legally or practically impossible. For example, it would apply to a defendant whose affiliated channels cannot be carried by the third-party MVPD affiliated with the similarly situated programmer, and thus cannot be the subject of collusion. If an MVPD owns a regional news channel in Washington, it cannot collude for carriage of that channel with an MVPD that operates entirely in New York whose programming the complainant asserts is “comparable.” The proposed rule would also

²⁹ See *The Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P; *Game Show Network, LLC v. Cablevision Sys. Corp.*, File No. CSR-8529-P. The Tennis Channel and the Game Show Network are both affiliated with DIRECTV, among others.

³⁰ *Notice*, App. D, proposed 47 C.F.R. § 76.1302(d)(3)(B)(2)(i) (emphasis in original).

apply to cases of “affiliation” that would not facilitate collusion.³¹ For example, if an MVPD owns five percent of a cable network, there is no reason to believe that such a non-controlling interest provides the ability to collude with other vertically integrated MVPDs, or any incentive to do so.

The D.C. Circuit has already rebuked the Commission once for adopting restrictions based on a theory of MVPD collusion while failing to provide any evidence of such collusion.³² The evidence before the Commission here is even weaker, while its proposed rule is even broader. On such an evidentiary record, the Commission’s proposed expansion of the program carriage antidiscrimination rule could not survive judicial scrutiny.

B. Expansion of the Antidiscrimination Rule Would Be Counterproductive and Impossible to Administer.

Even were it legally supportable, expanding the antidiscrimination rule would be unwise. While it would likely give independent programmers an unfair advantage in many situations, it almost certainly would compound the harm to MVPDs caused by large cable operators’ anticompetitive behavior. It also would significantly complicate fact-finding and discovery.

Under the Commission’s proposal, an independent programmer could bring a complaint against a vertically integrated MVPD that favored its own programming or the programming of a third-party MVPD. Yet these two scenarios are very different. While differential treatment of one’s own programming may legitimately prompt an inference of discrimination, the same inference cannot be made where the defendant carries another MVPD’s programming.

³¹ *Id.* (referring to affiliation “as defined in § 76.1300(a) of this part,” which covers ownership of as little as five percent).

³² *Time Warner II*, 240 F.3d at 1132 (“The Commission never explains why the vertical integration of MSOs gives them ‘mutual incentive to reach carriage decisions beneficial to each other,’ what may be the firms’ ‘incentives to buy . . . from one another,’ or what the probabilities are that firms would engage in reciprocal buying (presumably to reduce each other’s average programming costs).”)

When an MVPD carries another MVPD's programming, it is often the case that the distributor is itself the victim of anticompetitive behavior *by* the vertically integrated programmer rather than engaged in collusion *with* it. The Commission has found repeatedly that vertically integrated cable operators have the incentive and ability to harm their MVPD rivals by raising the price of must-have programming.³³ It also has found that vertically integrated cable operators can effectively raise their rivals' costs through forced tying arrangements.³⁴ MVPDs thus often carry channels affiliated with large cable operators because they are forced to do so in order to gain carriage of other programming affiliated with that cable operator.

In this situation, subjecting such MVPDs to discrimination complaints would be akin to driving the ambulance over a hit-and-run victim. Successful complaints would result in the MVPD being forced to carry two unwanted channels: the cable operator's and the independent programmer's. If the Commission is concerned about forced tying—and DIRECTV believes it

³³ *E.g., Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶7 (2010), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) ("Cable operators have an incentive and ability to engage in unfair acts involving their affiliated programming; record evidence indicates that cable operators have engaged in unfair acts involving certain terrestrially delivered, cable-affiliated programming; and these unfair acts have impacted competition in the video distribution market in certain cases.").

³⁴ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 120 (2007) ("*Exclusivity Extension Order and Tying NPRM*"), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis.").

should be³⁵—then it should take direct action against such practices. It certainly should not compound the harm of tying arrangements by making them a basis for discrimination complaints.

Expanding the antidiscrimination rule also would raise a host of practical and implementation questions. First among these is whether any evidence other than admissions or similar proof is probative in establishing collusion, especially in cases alleging discrimination in the price or terms of carriage. This is yet another difference between the existing rule and the proposed expansion. While a defendant’s carriage agreements can be highly probative in establishing price discrimination in favor of the defendant’s own programming,³⁶ those agreements tell one almost nothing about whether the defendant and the third party have colluded. In theory, MVPDs can collude both to lower prices of their respective programming (to reduce costs) or to raise prices (to set a high bar for others at no real cost to themselves).³⁷ If *any* pricing of the third-party MVPD’s programming could be consistent with collusion, then *no* pricing evidence is probative of whether collusion has in fact occurred.

³⁵ See Comments of DIRECTV, Inc., MB Docket No. 10-71 at 25-26 (filed May 27, 2011) (discussing forced tying in the broadcast context).

³⁶ E.g., *The Tennis Channel, Inc. v. Comcast Cable Commc’ns LLC*, Comments of Enforcement Bureau, MB Docket No. 10-204, at ¶¶ 25-31 (filed July 8, 2011) (comparing carriage of Tennis Chanel with that of Golf Channel and Versus, and examining Tennis Chanel’s carriage on MVPDs other than Comcast).

³⁷ Compare *Time Warner II*, 240 F.3d at 1132 (discussing a strategy of collusion “presumably to reduce each other’s average programming costs”) with *Adelphia Commc’ns Corp., Time Warner Cable, Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶159 (2006) (describing uniform price increase strategy (“*Adelphia Order*”).

II. PROPOSED REVISIONS TO DISCOVERY PROCEDURES ARE UNDULY BURDENSOME AND INCONSISTENT WITH EXPEDITED RESOLUTION OF COMPLAINTS.

Congress has directed the Commission to “provide for expedited review” of program carriage complaints.³⁸ In order to comply with that mandate, the Commission traditionally has limited discovery available in cases where the Media Bureau rules on the merits, with the staff determining the appropriate scope for requests to each party.³⁹ Just months ago, the Commission established strict deadlines for action on program carriage complaints to further promote the efficient resolution of such cases.⁴⁰ Thus, for example, on matters to be decided by the Media Bureau after discovery, the staff now has 150 days in which to accomplish “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.”⁴¹

Having just taken steps to streamline and expedite program carriage proceedings, however, the instant *Notice* includes several proposals that would thoroughly undermine those policies. One is for “expanded” discovery, while the other for “automatic” discovery. The former would inevitably lead to disputes that would be inconsistent with the statutory mandate and the expedited timetable for resolution. The latter effectively would force every MVPD defendant to begin a wide-ranging discovery process before the Commission has even determined that the complainant has presented a *prima facie* case. In either case, moreover, the Commission must recognize that an MVPD defendant cannot be expected to act as the guarantor

³⁸ See 47 U.S.C. § 536(a)(4).

³⁹ See *1993 Program Carriage Order*, ¶ 32 (“The staff will determine what additional information is necessary to resolve the complaint, and will develop a discovery process and timetable to resolve the dispute expeditiously”); 47 C.F.R. § 76.7(f).

⁴⁰ See *Notice*, ¶ 21.

⁴¹ *Id.*

of third-party compliance with new production requirements, a problem that would be magnified were the Commission to expand the discrimination rule as discussed above.

A. “Expanded” Discovery Is Inconsistent With the Expedited Processing Schedule.

By “expanded” discovery, the Commission refers to a process in which the parties would be able to request documents and other information directly from each other. As the Commission recognized in 1993 when it decided to permit only Commission-initiated discovery in program carriage proceedings, a party-directed process introduces a substantial likelihood of overbroad requests and resulting disputes.⁴² Such disputes are common in the context of program carriage complaints adjudicated by an Administrative Law Judge, in which the parties are allowed to make direct discovery requests of each other.⁴³

Establishing numerical limits on such requests would not address this problem, as imaginative counsel likely would be able to frame their requests just as broadly while nominally complying with such limitations.⁴⁴ Similarly, tight deadlines would not prevent overbroad requests, or enable the staff to consider and resolve the disputes that are bound to arise therefrom. Indeed, tight deadlines actually could end up being counterproductive, since (as the Commission recognized in the program access context) “overly accelerated pleading and

⁴² See *1993 Program Carriage Order*, ¶ 32.

⁴³ See, e.g., *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, MB Docket No. 10-204, Order (Feb. 28, 2011) (resolving motion to compel request for documents Comcast had filed in other FCC proceedings); *Id.*, Stipulation and Third Protective Order Concerning Use of Covered Information (Apr. 27, 2011) (resolving dispute over treatment of information supplied by the Nielsen Company); *NFL Enter., LLC v. Comcast Cable Commc’ns, LLC*, MB Docket No. 08-214, Order (Mar. 20, 2009) (resolving dispute re deposition requests); *Herring Broad., Inc. d/b/a Wealth TV v. Time Warner Cable et al.*, MB Docket No. 08-214, Order (Mar. 11, 2009) (resolving motion to compel communications re carriage proposals).

⁴⁴ *Notice*, ¶ 43.

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.”⁴⁵

B. Automatic Discovery Would Burden Defendants Unduly.

“Automatic” discovery, in which parties are required to produce documents in response to a pre-determined, Commission-generated list, similarly would be ill-advised.⁴⁶ First, it would have the perverse effect of requiring defendants to engage in discovery even before a complaint has even been accepted. Under the proposal in the *Notice*, an MVPD defendant would be required to produce documents responsive to the automatic discovery categories within 10 days after the Commission has determined that the complainant has made out a *prima facie* case.⁴⁷ The Commission justifies this short deadline on the grounds that the MVPD can begin the discovery process before the staff has determined whether the complaint should be accepted or dismissed.⁴⁸ Imposing discovery obligations before it is even established that the case will proceed to the discovery phase is unfair and unduly burdensome to defendants. The Commission should not put the cart before the horse in this way.

Second, automatic discovery is far too blunt a tool for the task at hand. Program carriage proceedings always involve fact-intensive inquiries, each of which turns on the unique facts and circumstances presented in a particular case. The proposed automatic discovery provisions

⁴⁵ *Exclusivity Extension Order and Tying NPRM*, ¶ 108. Although the Commission recently decided to allow expanded discovery in program access proceedings, it is worth noting that (1) such proceedings are not subject to a Congressional mandate for “expedited review,” and (2) the Commission has not established a strict timetable for resolution of complaints. Accordingly, the case for expanded discovery in the program carriage context is not comparable.

⁴⁶ Although the Commission revised its discovery procedures for program access proceedings in 2007, it did not even consider (much less adopt) automatic discovery provisions.

⁴⁷ See *Notice*, ¶ 44.

⁴⁸ *Id.*, ¶ 45 (“The automatic document production list should help address this concern by providing the parties with advanced notice that they may have to produce certain documents in the event of a *prima facie* finding, thus providing parties with time to secure any required third-party consents.”)

cannot provide the necessary flexibility for handling discovery in such varying circumstances. In the end, it simply is not possible to reduce such a fact-intensive inquiry to a one-size-fits-all list of items that must be produced in all cases.

Third, the specific list proposed by the Commission is highly burdensome and overbroad. As set forth in the *Notice*, the parties must produce “all” documents that fall within certain categories.⁴⁹ The production requirement is not qualified in any way, and there is no procedure for seeking relief in appropriate cases or for more narrowly tailoring the search obligation where warranted. Accordingly, the proposed automatic discovery would presumably obligate the parties to conduct e-discovery, including searches for responsive e-mails and electronic records on archival data tapes and individual hard drives. Moreover, because there is no way to arrive at an agreed upon list of relevant persons whose files should be searched, the parties will be obliged to cast their nets very broadly in order to ensure that they identify “all” potentially responsive materials. For a large company such as DIRECTV, this is likely to be a burdensome undertaking that will distract management and divert resources that otherwise would be focused on providing consumers with better video products and services. Moreover, even after completing this automatic discovery, a defendant MVPD still faces the prospect of producing yet more documents, answering interrogatories, and producing witnesses for deposition in response to expanded discovery requests.⁵⁰

C. The Commission Cannot Require A Party To Produce Documents Outside of Its Control.

Regardless of how it addresses discovery issues in other respects, the Commission should clarify that parties are not required to produce documents that are not within their control. Many

⁴⁹ See *id.*, ¶ 46.

⁵⁰ See *id.*, ¶ 44 (“Based on the documents produced [in automatic discovery], the parties would then proceed to request additional discovery”).

categories of information deemed presumptively relevant by the Commission may not be within the defendant's control. The Commission, for example, proposes automatic production of carriage agreements and related communications between the similarly situated programmer and other MVPDs.⁵¹ Yet the similarly situated programmer may be one in which the defendant MVPD holds only a five percent interest. Such a non-controlling interest is unlikely to give the MVPD any rights to review confidential information about the programmer on its own account, much less search through all of the programmer's files and produce responsive information to third parties. A programmer with such an attenuated interest in an MVPD may have little incentive to cooperate voluntarily in a disruptive search of its files that would distract its management and expose its most confidential documents to production.

As in the program access context, a defendant MVPD should not be expected to produce documents that are not under its control.⁵² The Commission should make clear that, so long as the MVPD has made a good faith effort to request production of documents in the custody of a third party it does not control, no adverse inference can be drawn and no adverse action can be taken against the MVPD if the third party nonetheless declines to cooperate.⁵³

All of these issues would, of course, be compounded were the Commission to expand the basis for a discrimination claim to include alleged bias in favor of a programmer affiliated with *any* MVPD. Under such a regime, an MVPD such as DIRECTV, which competes in all markets and therefore with all MVPDs, would be faced with the task of procuring highly confidential documents from a programmer affiliated with (or even controlled by) one of its MVPD rivals. In

⁵¹ *Id.*, ¶ 46.

⁵² See 47 C.F.R. § 76.1003(j); *2007 Exclusivity Extension Order and Tying NPRM*, ¶ 98 (“the respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute”).

⁵³ This should apply to a programmer's document redactions as well as outright withholding.

such a case, the link between the programmer and the proceeding would be so attenuated as to be virtually non-existent. The Commission should be under no illusion that securing the cooperation of a programmer in such a case would be a routine matter.

As the Commission acknowledges, even documents within the defendant's control that are potentially relevant to a discrimination claim may also be subject to confidentiality restrictions that require notice to or approval from a third party before they may be produced.⁵⁴ As programmers have made clear in a number of proceedings, moreover, such agreements are highly confidential and proprietary, and these "crown jewels" are not to be disclosed absent demonstrated need and the most stringent protections.⁵⁵ In order to address this concern in an efficient and expedited manner, DIRECTV endorses the Commission's proposal to adopt a model protective order similar to the one adopted for use in program access cases.⁵⁶ While such a model order may smooth production of confidential materials within the defendant MVPD's control, it will not necessarily have a similar effect with respect to documents controlled by third parties.

III. THE PROPOSED "FINAL OFFER" REGIME WOULD BE INAPPROPRIATE FOR MOST CLAIMS AND INEFFECTIVE IF NEITHER OFFER MUST BE CHOSEN.

In the context of several recent vertical mergers, the Commission has imposed program access safeguards in the form of "final offer" arbitration.⁵⁷ In such a proceeding, each party makes a last best offer in the form of a contract for carriage, and the adjudicator must choose one

⁵⁴ See Notice, ¶ 45.

⁵⁵ See, e.g., Reply Comments of Time Warner, Inc., MB Docket No. 07-29, at 12 (filed Apr. 16, 2007) ("These agreements contain information at the very heart of the programmer conducts its business, and thus are highly proprietary and maintained in the strictest confidence.").

⁵⁶ See Notice, ¶ 48.

⁵⁷ See, e.g., *Adelphia Order*, App. B, Sec. B.3; *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, App. F, Secs. III-IV (2004) ("*News/Hughes Order*").

or the other *in toto*. Such an approach is viewed as desirable because, among other things, it is designed to force both parties to make the most attractive offer possible or risk having the adjudicator pick the competing offer.⁵⁸ As proposed by the Commission in this context, however, it would not be appropriate for two reasons.

First, a “final offer” approach presumes a willing buyer and a willing seller who have failed to reach agreement on terms of carriage.⁵⁹ In most program carriage complaints, however, an MVPD either does not want to continue carriage of a programmer, or chooses not to carry a programmer in the first place. In such cases, the underlying assumption of final offer arbitration does not hold. Forcing an MVPD to submit an offer for carriage of programming it has already determined not to carry is not only irrational, but essentially prejudges the merits of the case by tacitly assuming that carriage will be required. Moreover, if the MVPD has decided not to carry the programming in question, no final offer for carriage is likely to increase the likelihood of a settlement.

Second, in this particular case, the Commission proposes to undercut the defining feature of the “final offer” approach by granting the adjudicator discretion to resolve the case by drawing aspects from both offers.⁶⁰ Even in disputes where arbitration might lead to a settlement, requiring final offers would be pointless if the arbitrator is not required to accept one offer as submitted. By permitting the arbitrator discretion to instead craft a compromise, the

⁵⁸ See, e.g., *News/Hughes Order*, ¶ 174 (“Final offer arbitration has the attractive ‘ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.’” (footnote omitted)).

⁵⁹ Thus, the proposed rule authorizes the adjudicator to order the parties “to each submit a final offer for the prices, terms, or conditions in dispute,” which presupposes that the dispute does not arise from one party’s desire not to carry the other at all. *Notice*, App. D. proposed 47 C.F.R. § 76.1302(j)(3).

⁶⁰ See *id.*, ¶ 55.

Commission's proposal would undermine the purpose of "final offer" adjudication, and would not promote more expeditious resolution.

IV. THE PROPOSED RETALIATION RULE WOULD ENCOURAGE FRIVOLOUS COMPLAINTS TO GAIN NEGOTIATING LEVERAGE.

The Commission proposal that any adverse action against a complainant within two years of a program carriage complaint is *prima facie* evidence of retaliation would reduce neither program carriage violations in the first instance nor retaliatory actions against programmers. Rather, it would encourage the filing of frivolous complaints by programmers hoping to take advantage of any anti-retaliation rule to gain leverage in business negotiations. This would be particularly true if the scope of the program carriage rules is expanded to encompass programmers affiliated with any MVPD.

If the Commission is to adopt a retaliation rule, that rule should not be based strictly on whether a programmer has filed a complaint against the MVPD within a certain amount of time. Instead, any retaliation provision must require the programmer to show some basis for concluding that the MVPD acted based on some motivation other than legitimate business considerations.⁶¹ Without such an evidentiary requirement, a programmer would have the incentive to file complaints just to trigger the presumption and thereby gain an unfair advantage in its negotiations with the MVPD. Such a rule, particularly in conjunction with the proposed discovery rules, would effectively allow programmers to hold MVPDs hostage.

⁶¹ This approach is embodied in the first prong of the proposed rule. *See Notice*, App. D, proposed 47 C.F.R. § 76.1302(d)(2)(iv)(B)(1). Further, the programmer must show that the MVPD's actions unreasonably restrained the ability of the programmer to compete fairly. *See* 47 U.S.C. § 536(a)(3).

V. CHANGING THE ATTRIBUTION STANDARDS FOR CARRIAGE PROCEEDINGS ONLY WOULD CONTRAVENE CONGRESSIONAL INTENT AND ENGENDER CONFUSION.

The Commission has a well-established set of rules for determining whether an MVPD has an attributable interest in a programmer for purposes of the program carriage rules, which are also used by the Commission in multiple other contexts. These rules are well understood, and already trigger regulation based on as little as five percent common ownership. Nonetheless, the *Notice* asks whether the Commission should adopt more extensive attribution standards applicable solely in the program carriage context.⁶²

The existing attribution rules sweep broadly, and broadening them still further in this proceeding cannot be justified. In particular, expanding “affiliation” to include (as suggested in the *Notice*) contractual relationships would be unreasonable and contrary to the statute’s intent. As the Commission concedes in this very proceeding, however, there is no evidence that non-vertically integrated MVPDs (*i.e.*, those with no financial interest in programmers) engage in anticompetitive conduct based on the “affiliation” of a programming vendor.⁶³ Thus, it would be unreasonable, and not legally sustainable, for the Commission to decide now to regulate such entities.⁶⁴

Such an expansion also would directly contravene Congress’s express and specific intent. The legislative history of the 1992 Cable Act makes quite clear that Congress was concerned that MVPDs would act anticompetitively with programmers in which they had a financial stake, not that they might negotiate anticompetitive contractual arrangements at arm’s length with

⁶² See *Notice*, ¶ 78.

⁶³ See, *e.g.*, *id.*, ¶ 72 (“we are not aware of concerns that a non-vertically integrated MVPD would have an incentive to favor an MVPD-affiliated programming vendor over an unaffiliated programming vendor based on reasons of ‘affiliation’ as opposed to legitimate business reasons”).

⁶⁴ See discussion in Section I.A.2 above concerning the legal and evidentiary standards governing an agency’s change of policy.

unaffiliated programmers. Thus, Congress described the program carriage provision as having been “crafted to ensure that a multichannel video programming operator does not discriminate against an unaffiliated video programming vendor in which it does not *hold a financial interest*.”⁶⁵ Likewise, Congress specifically limited the parallel program access regime to vertically integrated cable programmers.⁶⁶

Moreover, changing the affiliation standards solely for purposes of the program carriage context would create inconsistencies with the many other contexts in which such standards apply.⁶⁷ In comparable situations, the Commission has refrained from amending its rules for one purpose when they have applicability across a range of Commission regulations. For example, when the Commission considered amending the definition of “Grade B intensity” only with respect to distant network signal carriage by satellite operators, it decided it lacked the authority to “create a special Grade B definition solely for the purpose of the [Satellite Home Viewer Act].”⁶⁸ It also concluded that, even if it had the authority to do so, creating such a special rule

⁶⁵ H. Rep. No. 102-628, 110, 111, 1992 WL 166238 (emphasis added).

⁶⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd. 12124, ¶ 74 (2002) (“With regard to non-vertically integrated programming, we note that Congress designed the program access rules to constrain the ability of cable operators and vertically integrated programmers to impede the development of nonaffiliated cable operators and competitive MVPDs. The program access rules, including the exclusivity prohibition, apply only to satellite-delivered program services in which a cable operator has an attributable interest. The program access provisions do not prohibit exclusive arrangements between cable operators and independent programmers. The record in this proceeding provides no support for statutory authority to expand the program access rules to include independent programmers within the exclusivity prohibition. Such an expansion would directly contradict Congress' intent in limiting the program access provisions to a specific group of market participants.”(footnote omitted)).

⁶⁷ *See, e.g.*, 47 C.F.R. § 76.501 note (containing general affiliation standard); *see also, e.g.*, 47 C.F.R. § 73.3555 (substantially similar broadcast ownership standard); 47 C.F.R. § 76.503-05 (cable ownership rules incorporating standard in 76.501); 47 C.F.R. § 76.905 (cable effective competition); 47 C.F.R. § 76.922 (rate regulation); 47 C.F.R. § 76.924 (same); 47 C.F.R. § 76.970 (leased access); 47 C.F.R. § 76.1000 (program access); 47 C.F.R. § 76.1200 (navigation devices); 47 C.F.R. § 76.1500 (open video systems); 47 C.F.R. § 76.1710 (operator interests in video programming).

⁶⁸ *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, 14 FCC Rcd. 2654, ¶ 43 (1999).

“would be inadvisable” because of the confusion and dislocation it would cause.⁶⁹ Here too, refining an affiliation standard applicable across multiple contexts for only one of those contexts would likely result in unnecessary confusion.

VI. IF DAMAGES ARE AVAILABLE, THEY SHOULD BE AVAILABLE TO MVPDs AS WELL AS TO INDEPENDENT PROGRAMMERS.

The Commission has tentatively concluded that it has authority to award damages in program carriage cases, and that such a potential remedy would be useful in deterring program carriage violations and promoting settlement of any disputes.⁷⁰ If the Commission chooses to allow the recovery of damages, it must ensure that this remedy is available to all parties, not only to programmers. MVPDs can incur damages as a result of meritless program carriage complaints. The Commission’s rules should allow an MVPD to submit its claim for such damages, with appropriate supporting documentation, at the conclusion of an unsuccessful complaint.⁷¹

In particular, an MPVD suffers damage if forced to carry programming it would otherwise have chosen not to carry. Unlike a dispute over the price for carriage, there is no way to “true up” payments made during the pendency of a complaint proceeding if the Commission ultimately determines that the MVPD’s decision not to carry a programmer was not biased by affiliation. For example, a satellite provider might wish to drop a non-affiliated channel with low subscriber demand so that it can add an affiliated channel with higher subscriber demand. Were the Commission to order “standstill” carriage of the non-affiliated programmer, the

⁶⁹ *Id.*, ¶ 31.

⁷⁰ *See id.*, ¶¶ 50-51.

⁷¹ Such a proceeding could be accommodated under the post-resolution procedures in the proposed rules. *See Notice*, App. D, proposed 47 C.F.R. § 76.1302(k)(3) (authorizing adjudicator to allow the party seeking to apply remedies as of the expiration date of the previous programming contract to submit a proposal for such remedies).

satellite carrier would have to both pay for such carriage⁷² and potentially forgo carriage of the more desirable programming until the dispute is resolved. In such a situation, the DBS provider would have incurred financial harm (in the form of the carriage fees)⁷³ as well as the opportunity costs of forgone carriage. It should be allowed the opportunity to demonstrate and recover those damages.

Accordingly, if the Commission is to allow the recovery of damages in program carriage proceedings, it must make them equally available to MVPDs and programmers.

* * *

The record does not contain the substantial evidence necessary to support a change in policy to expand the scope of discrimination claims to include programming affiliated with third-party MVPDs. The proposed expansion of discovery would further complicate what Congress decreed to be an expedited review of carriage claims, imposing undue burdens along the way. In addition, many of the other proposals in the *Notice* are unjustified or would not achieve the public interest benefit claimed. Accordingly, and for the reasons discussed above, the Commission should adopt a more measured approach as it considers revision of its program carriage regime.

⁷² Although the Commission has recognized the severe capacity limitations of satellite providers with respect to local and regional carriage, *see Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999*, 23 FCC Rcd. 5351, ¶ 8 (2008), satellite carriers also face significant limits on their nationwide CONUS beams.

⁷³ Alternatively, payment for interim carriage could be deferred while a complaint is pending until such time as the proceeding is resolved and, if long-term carriage is ordered, the terms and conditions for such carriage have been established. *See Notice*, ¶ 53.

