BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Revision of the Commission's Program Carriage Rules	)	MB Docket No. 11-131
	)	

COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to the above captioned Notice of Proposed Rulemaking ("*Notice*").[1] In today's vibrantly competitive and diverse video programming marketplace, Congress's goals of promoting competition and diversity have been achieved. Yet the Commission's approach in this area has not reflected this reality. In recent years, the Commission has been a too-inviting forum for the costly airing of meritless program carriage grievances, undermining appropriate incentives to negotiate, and the proposals in the *Notice* promise to continue and compound those regrettable developments. The Commission should be wary of adopting additional unnecessary regulations because they will increase the likelihood of illegitimate litigation, inevitably distort marketplace negotiations, massively increase costs and burdens, and interfere with the editorial discretion of MVPDs. Adopting such regulations would be arbitrary and capricious and beyond the Commission's authority and would infringe on MVPDs' and programmers' First Amendment rights.

[1] *In re Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming*, Second Report & Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd. 11494 (2011) ("*2011 Program Carriage Order & Notice*").

I. INTRODUCTION AND SUMMARY

Nearly 20 years after Congress enacted Section 616, and in conjunction with the adoption of certain unwise and unnecessary changes to its program carriage rules, the Commission has initiated this new rulemaking proceeding in order to further "improve" the program carriage procedures and "advance the goals of the program carriage statute."[2] The proposals here are not improvements, and the goals of the statute have been fulfilled by the competitive marketplace. Further advances can best be achieved not by engrafting new and knotty regulatory branches onto the program carriage statute, but by pruning back unnecessary regulation and allowing the marketplace to function.

Consistent with Congress's statutory directive to "rely on the marketplace, to the maximum extent feasible, to achieve th[e] availability" of "a diversity of views and information,"[3] the Commission, until recently, has endeavored to "prohibit those activities specified by Congress in the statute *without unduly interfering with legitimate negotiating practices* between [MVPDs] and programming vendors."[4] And, the reality is that reliance on the marketplace has worked exceptionally well. In fact, the evolution of the marketplace – including the increased number of competing MVPDs that programming networks can market their programming to, as well as the substantial growth in channel capacity and proliferation of new means of distribution – has made it impossible for any MVPD to unreasonably restrain a programming network's ability to compete fairly.

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2 *Id.* ¶ 3.

3 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463 ("1992 Cable Act").

4 *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection & Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 9 FCC Rcd. 2642 ¶ 1 (1993) ("*1993 Program Carriage Order*") (emphasis added).

The tremendous growth of competition and diversity in the video programming marketplace, exceeding anything Congress predicted in 1992, has advanced the goals of Section 616 far beyond what any regulatory scheme could do. Today, hundreds of diverse cable networks are investing vast sums to develop new programming and acquire rights in order to compete with other networks for viewers, advertisers, and carriage. The *Notice*, however, appears to be predicated on the assumptions that the marketplace is failing, competition is nonexistent, diversity is suffering, and "legitimate" program carriage grievances are going unheard. As a result, the *Notice* proposes a host of new rules and a much more active role for the Commission, a role that inevitably would intrude on MVPDs' editorial discretion and First Amendment rights and place the Commission squarely (and intrusively) in the middle of relationships between programming networks and MVPDs.

The *Notice*'s numerous proposed regulations make little sense given that there is no credible evidence that the video programming marketplace requires this type of government intervention, and no justification for making the program carriage rules more favorable to complainants and more costly for everyone. In all the years that the program carriage rules have been in effect, there have been very few program carriage complaints,[5] and not a single adjudicated case of a program carriage violation. Rather, programming networks' claims of program carriage violations chiefly have been used as leverage to try to pressure MVPDs to give those networks more favorable terms of carriage. Notably, neither of the two parties that the

[5] Contrary to the statement in the *Order*, only nine program carriage complaints – not eleven – had been filed at the time of its release. *See 2011 Program Carriage Order & Notice* ¶ 6 n.27. Those nine were (1) *Classic Sports v. Cablevision*; (2) *MASN v. Comcast (I)*; (3) *WealthTV v. Time Warner Cable*; (4) *WealthTV v. Bright House Networks*; (5) *WealthTV v. Cox Communications*; (6) *WealthTV v. Comcast*; (7) *NFL v. Comcast*; (8) *MASN v. Comcast (II)*; and (9) *The Tennis Channel v. Comcast*. There have also been two program carriage arbitration proceedings under the *Adelphia Order*: *The America Channel v. Comcast*, and *MASN v. Time Warner Cable*. The *Bloomberg* complaint referenced in the *2011 Program Carriage Order & Notice* alleges a violation of a "neighborhooding" condition of the *Comcast-NBCUniversal Order* but does not claim that the program carriage statute or rules have been violated.

Notice cites for its fundamental premise that "the lack of complaints is a direct result of . . . inadequate procedures, not a lack of program carriage claims" – Hallmark Channel and BTNC – ever filed a complaint; both, instead, reached carriage agreements through private, arms-length negotiations.[6]

It is probably not coincidental that there have been many more complaints filed in the four years since the Commission last undertook to "review" and "modify" its program carriage rules than in the fourteen previous years that the rules were in effect. But this has not advanced any public interest; instead, it has resulted in increased litigation costs and burdens to respond to unfounded claims. To date, not one of those complainants has proven its claims, and the most active complainant (which filed more than a third of all program carriage cases to date) stands exposed as "not credible," in the words of the Commission's Chief Administrative Law Judge ("ALJ") and the Commission itself.[7]

If would-be complainants seeking greater negotiating leverage continue to view the Commission as a forum where barely colorable claims will be given credence and procedures are forever being reviewed and modified to the benefit of complainants, then more illegitimate complaints inevitably will be filed and more time and money will be wasted. These results were not what Congress intended in enacting Section 616 and would not be in the public interest. Indeed, the litigation record of the past four years, together with the overwhelming evidence in the record of the prior rulemaking, demonstrates that the type of "improvements" proposed in the *Notice* likely will only promote further regulatory gamesmanship and meritless litigation.

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6 *2011 Program Carriage Order & Notice* ¶ 8.

7 *Herring Broad., Inc. v. Time Warner Cable Inc*., Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, 24 FCC Rcd. 12967 ¶ 31 n.117, ¶ 44 n.179 (2009) ("*WealthTV ALJ Decision*"); *see also Herring Broad., Inc. v. Time Warner Cable Inc.*, Memorandum Opinion & Order, 26 FCC Rcd. 8971 ¶ 3 (2010) ("*WealthTV FCC Order*") (adopting the conclusions of the *Wealth TV ALJ Decision*).

Virtually every one of the proposals in the *Notice* is unnecessary and unworkable, would impose substantial costs and burdens on the parties and consumers, and would further trample on MVPDs' editorial discretion and infringe their First Amendment rights. Yet the *Notice* largely ignores these pitfalls without any discussion as to why the proposals are necessary, how the costs and burdens are justified, and, most importantly, how the proposals are narrowly tailored to promote a compelling (or even an important or substantial) government interest consistent with the First Amendment. Among other concerns:

- The proposal to define broad types of documents that parties would be required automatically to produce in discovery would result in wasted effort, more discovery disputes and delay, and greater risk that confidential information would be improperly disclosed.

- The proposal to allow complainants to seek compensatory and punitive damages would turn the program carriage complaint process into a litigation lottery that will provide incentives for programming networks to manufacture carriage negotiation disputes as an opportunity to pursue a windfall.

- The proposal to remove the automatic stay defendants receive if an order compelling carriage would result in the deletion of other programming would not only significantly harm MVPDs, but also harm any programmer that would be deleted and the consumers who watch that programming.

- The proposal to allow a program carriage complaint to be brought against an MVPD based on its carriage of an *un*affiliated programming network lacks any factual or legal basis and would expand the number of program carriage complaints and likely harm the very independent programming networks that the *Notice* claims it seeks to protect. The proposal to expand this even further to allow complaints based on relationships MVPDs may have with *non-programmer entities* is beyond the pale.

- The proposal to shift the burden of persuasion to the defendant simply upon a complainant making a prima facie showing – based on an assumption that all of the claims and evidence in the complaint are true, and prior to the development of a full evidentiary record – is contrary to centuries of jurisprudence and the requirements of the Administrative Procedure Act ("APA").

- The proposal to adopt a new anti-retaliation rule lacks any justification. And to define retaliation as any alleged adverse action an MVPD takes with respect to any of a complainant's affiliated programming networks would have the perverse effect of encouraging a programmer to file a groundless complaint with respect to one of its networks in order to secure an effective standstill for all of its other affiliated networks for a potentially indeterminate time period.

- The proposal to require good-faith negotiations in carriage negotiations addresses a problem that does not exist and is both outside of the Commission's authority and inappropriate in the program carriage context.

To the extent the Commission decides to revise its program carriage rules, it should consider adopting only those proposals that would improve and expedite the program carriage complaint process: (1) clarifying the statute of limitations to prevent complainants from manufacturing belated triggering events; and (2) requiring the submission of final offers in a separate remedy phase if mandatory carriage is ordered. But the rest of the proposals in the *Notice* cannot be justified. In today's vibrantly competitive and diverse video programming marketplace, there simply is no rational basis – let alone a compelling, important, or substantial government interest – to impose more costly and counter-productive regulatory burdens on MVPDs and programmers. Rather than loading new regulations on top of old, the Commission should seek to eliminate regulations that have long outlived their usefulness, that command vital private and public resources that could be used better elsewhere, and that invite parties to misuse the regulatory process in order to gain leverage in negotiations and increase programming costs and consumer prices.

As the *Notice* points out, when Congress adopted Section 616 in 1992, its rationale was "that the market power held by cable operators would adversely impact programming vendors" and that "this harm to programming vendors could adversely affect both competition and diversity in the video programming market."[8] To address that perceived "market power," Congress took the extraordinary step of allowing for regulatory review of MVPDs' carriage decisions – even authorizing the Commission to compel carriage of programming networks that

[8] *2011 Program Carriage Order & Notice* ¶ 4.

an MVPD might have chosen not to carry – but only in certain very specific circumstances (and only after a full adjudication on the merits).[9] Such oversight of the exercise of MVPDs' editorial discretion and authorization of compelled carriage necessarily implicate MVPDs' First Amendment rights. Although Congress and the Commission may have been able to justify those constraints in 1992, they simply cannot be justified in today's marketplace. And to expand the government's second-guessing of editorial and business decisions by First Amendment speakers would be inconsistent with Congressional intent and an affront to the Constitution.

II. IN TODAY'S COMPETITIVE MARKETPLACE, THERE IS NO JUSTIFICATION FOR EXPANDING GOVERNMENT REGULATION OF CARRIAGE NEGOTIATIONS.

The purpose of Section 616 was to provide a backstop to networks that feared that they could be coerced into handing over equity or exclusivity in order to obtain carriage, or that they could be unreasonably restrained from competing fairly in the marketplace as a result of discrimination on the basis of affiliation. This may have made sense in 1992. It makes no sense today.

At the time that Section 616 was enacted, DBS did not exist, the telephone companies were statutorily prohibited from providing video programming, and the Internet was still in its infancy. In addition, more than half of all programming networks were affiliated with cable operators.[10] In these circumstances, "Congress was concerned that increased horizontal concentration and vertical integration . . . created an imbalance of power between cable operators and program vendors."[11] At the same time, Congress and the Commission recognized that, if

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9 *See* 47 U.S.C. § 536(a)(5).

10 H.R. Rep. No. 102-628, at 49 (1992).

11 *1993 Program Carriage Order* ¶ 2.

networks and MVPDs could negotiate without having to worry about certain specific types of unreasonable conduct – relying not on any regulatory preference but rather "on the marketplace to the maximum extent feasible"[12] – then the American public would be better served by the fruits of those marketplace negotiations. Section 616 and the Commission's implementing order established the basic ground rules; these rules were never intended to take on outsized proportion and "preclud[e] legitimate business practices common to a competitive marketplace."[13]

The vibrant competition and diversity that have developed over the last two decades are undeniable and, as a result, the proper role of Section 616 is much diminished. Indeed, the video programming marketplace today looks entirely different than it did in 1992. DBS providers today successfully compete for multichannel video customers in every community in the country. DirecTV and Dish Network are the second and third largest MVPDs in the United States and together serve nearly 34 million customers,[14] or approximately a third of the multichannel video marketplace.[15] Telephone companies and other overbuilders have been able to compete successfully for customers, and that competition has accelerated during the past several years. For example, since entering the marketplace, Verizon and AT&T have grown to

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12 1992 Cable Act § 2(b)(2).

13 *1993 Program Carriage Order* ¶ 15 (quotation marks and citation omitted).

14 *See* Nat'l Cable & Telecomms. Ass'n, *Top 25 Multichannel Video Programming Distributors as of June 2011*, http://www.ncta.com/Stats/TopMSOs.aspx (showing DirecTV and Dish as the second and third largest MVPDs) (last visited Nov. 28, 2011); Press Release, DirecTV, Inc., *DIRECTV Announces Third Quarter 2011 Results: DIRECTV Adds All-Time Record 1.14 million Net New Subscribers in Latin America and the U.S. in the Quarter* (Nov. 3, 2011) ("*DirecTV 3Q Press Release*"), (reporting more than 19.76 million U.S. subscribers at the end of September 2011), *available at* http://investor.directv.com/releaseDetail.cfm?ReleaseID=620542; Press Release, Dish Network Corp., *DISH Network Announces Third Quarter 2011 Financial Results* (Nov. 7, 2011) ("*Dish 3Q Press Release*"), (reporting 13.95 million subscribers at the end of September 2011), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=621211.

15 *See* SNL Kagan, *U.S. Multichannel Industry Benchmarks* (2011) (showing that, in 2010, the DBS providers had more than 33 million subscribers out of 101 million pay TV subscribers); *see also* Comments of Comcast Corp., MB Docket No. 07-269, at 25 (June 8, 2011) ("Comcast Video Competition Comments").

be the seventh and eighth largest MVPDs in the country,[16] serving 4 million and 3.6 million multichannel customers, respectively.[17]

Consumers in every market served by cable now have a minimum of three – and often four or five – MVPDs from which to choose. So an MVPD that fails to carry the programming that its customers want (and in an attractive package at an attractive price point) is subject to effective market discipline, and it is doubtful whether any MVPD can unreasonably prevent any network from competing fairly. As the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") found two years ago,

> The record [of the horizontal ownership rulemaking proceeding] is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. *Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992*.[18]

Competitors' growth has continued since this decision. For example, DirecTV recently reported a net addition of 327,000 customers in the third quarter of 2011, the "highest third quarter net additions in 7 years," and it added over half a million new customers since the beginning of 2011.[19] Over the past two years, Verizon and AT&T both have nearly doubled their video

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16 NCTA, *Top 25 Multichannel Video Programming Distributors as of June 2011*, http://www.ncta.com/Stats/TopMSOs.aspx (showing Verizon and AT&T as the seventh and eighth largest MVPDs) (last visited Nov. 22, 2011); *id.* (showing AT&T having passed Cablevision in terms of subscriber numbers); *see also* Comcast Video Competition Comments at 28.

17 *See* Press Release, AT&T Inc., *AT&T Reports Solid Earnings, Strong Cash Flow, Robust Mobile Broadband Sales and Improving Wireline Revenue Trends* (Oct. 21, 2011) ("*AT&T 3Q Press Release*") (reporting 3.6 million U-Verse subscribers at the end of the third quarter of 2011), *available at* http://www.att.com/gen/press-room?pid=21794&cdvn=news&newsarticleid=33126&mapcode=financial; Verizon Communications, *Financial and Operating Information As of September 30, 2011*, at 16 (Oct 21, 2011) ("*Verizon 3Q Data*") (reporting 4 million FiOS TV connections at the end of the third quarter of 2011), *available at* http://www22.verizon.com/idc/groups/public/documents/adacct/2011_q3_foi_pdf_v2.pdf.

18 *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (emphasis added).

19 *DirecTV 3Q Press Release*, *supra* note 14.

subscriber numbers.[20] In total, over the past five years, traditional cable companies' competitors have added over 12.7 million customers, an increase of approximately 45 percent.[21]

As competition among MVPDs has intensified, so too have the number and variety of networks that have entered the marketplace and obtained carriage by MVPDs. The exponential growth of programming networks is powerful evidence that the circumstances underlying the adoption of Section 616 are no longer present, especially because this has occurred as the percentage of vertically integrated networks has decreased dramatically. In 1992, only 68 national programming networks existed, and 57 percent of those networks were vertically integrated with cable operators.[22] By contrast, now there are well over 500 national cable programming networks,[23] and the number of networks vertically integrated with cable operators has shrunk to roughly 15 percent.[24] Today, a cable operator typically carries more than 200 programming networks on its systems,[25] yet only a tiny fraction of these is affiliated with any cable operator. In fact, of the twenty-five most viewed cable networks, only two are wholly

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[20] *See AT&T 3Q Press Release*, *supra* note 17; *Verizon 3Q Data*, *supra* note 17, at 16.

[21] DirecTV, Dish, AT&T, and Verizon combined had a total of 28.6 million video subscribers after the third quarter of 2006. Today, these four competitors have a combined 41.3 million subscribers. *Compare* Press Release, DirecTV, *The DirecTV Group Announces Third Quarter 2006 Results* 3 (Nov. 8, 2006), *and* Press Release, Dish Network, *EchoStar Reports Third Quarter 2006 Financial Results* (Nov. 7, 2006), *and* Verizon Commc'ns, *Verizon 3rd Quarter 2006 Earnings Conference Call Transcrip*t, at 3 (Oct. 30, 2006), *and* Press Release, AT&T Corp., *AT&T Posts Strong Third-Quarter Earnings Growth* (Oct. 23, 2006), *with DirecTV 3Q Press Release*, *supra* note 14, *and Dish 3Q Press Release*, *supra* note 14, *and Verizon 3Q Data*, *supra* note 17, *and AT&T 3Q Press Release*, *supra* note 17.

[22] H.R. Rep. No. 102-628, at 49 (1992).

[23] *See In re Annual Assessment of the Status of Video Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd. 542 ¶ 20 (2009) (citing 2006 data); NCTA, *Other Industry Data*, http://www.ncta.com/StatsGroup/OtherIndustryData.aspx (last visited Nov. 22, 2011) (citing 2006 data).

[24] *See* Comments of NCTA, MB Docket No. 07-269, at 14 (June 8, 2011) ("2011 NCTA Video Competition Comments") (charting the percentage of vertically integrated national basic cable programming networks from 1994 through 2006).

[25] Further Reply Comments of NCTA, MB Docket No. 07-269, at 10 (Aug. 28, 2009).

owned by cable operators, and cable operators own small minority interests (less than 20 percent) in three others.[26]

With competition fierce all around and so many choices for consumers, cable networks continue to invest vast sums in original programming and new rights in order to compete for viewers, advertisers, and carriage.[27] Incumbent networks are far from immune from this competitive pressure and are striving to broaden and deepen their value propositions.[28] Although the threshold for newer networks to stand out is high given this robust state of competition, networks have continued to emerge and capture carriage opportunities.

For its part, since the Commission's prior program carriage NPRM four years ago, Comcast has launched dozens of networks, and significantly increased the carriage and exposure on various platforms of scores of others. Among the networks Comcast launched were, in 2008, Hallmark Movie Channel and RFD-TV; in 2009, ESPNU and MLB Network; in 2010, ESPN3D and the Smithsonian Channel; and thus far in 2011, BBC World News.[29] Comcast also has

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[26] 2011 NCTA Video Competition Comments at 14. Even taking into account Comcast's transaction with NBCUniversal this year, the number of networks affiliated with cable operators has gone down since 2009. *See* 2011 NCTA Video Competition Comments at 13. In fact, fully six out of seven of the hundreds of networks on Comcast's cable systems are unaffiliated with Comcast and NBCUniversal. *See* Reply Comments of Comcast Corp., MB Docket No. 07-269, at 9 (July 8, 2011).

[27] According to the Cable Advertising Bureau, between 2005 and 2010, the number of ad-supported original programs on cable television nearly doubled, and this growth occurred across every genre of programming. *See* Cable Advertising Bureau, *Cable's Original Programming: Driving Innovation* 3, *available at* www.thecab.tv/downloads/Original-Programming-2010-CL-6-16b.pdf.

[28] *See, e.g.*, John Ourand, *Fox Eyes New Sports Focus To Grow FX,* Sports Bus. J. Daily (Jan. 31, 2011), *available at* http://www.sportsbusinessdaily.com/Journal/Issues/2011/01/20110131/Media/Fox-Hill-FX.aspx; Sarah Rabil, *Time Warner Boosts Programming at TNT, TBS as Cable Outlets Drive Profit*, Bloomberg, May 10, 2010, *available at* http://www.bloomberg.com/news/2010-05-19/time-warner-boosts-programming-at-tnt-tbs-as-cable-outlets-drive-profit.html.

[29] As a voluntary commitment (which was later adopted as a condition) in the Comcast-NBCUniversal transaction, Comcast agreed to launch over the next eight years "ten new independently owned-and-operated channels to its digital (D1) tier on customary terms and conditions." *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent To Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion & Order, 26 FCC Rcd. 4238 app. A § III.3 (2011) ("*Comcast-NBCUniversal Order*"). For purposes of this commitment, Comcast agreed that independent networks "eligible for such channels

expanded significantly the carriage of scores of networks in the last four years, including BET, Bloomberg TV, Fox Business News, HDNet, Outdoor Channel, Ovation TV, and Sportsman Channel. Comcast also has launched and expanded the carriage of dozens of diverse networks, including The Africa Channel, Azteca America, Galavision, HITN, LATV, Mnet, MYX TV, nuvoTV (formerly SiTV), Telefutura, Telemundo (prior to the NBCUniversal transaction), and Univision.[30] In addition, Comcast has developed strong business relationships with numerous programmers unaffiliated with large media companies and has been praised publicly by many of them for its support of independent programming.[31]

Video delivery opportunities via the Internet – opportunities that have increased significantly in the past several years – further reduce programming producers' and networks' dependence on MVPDs to compete in the marketplace. Amazon, Facebook, Google, Netflix, and dozens of other Internet companies successfully conduct negotiations with programmers free of regulatory encumbrances, and no one has seriously called for government oversight or control

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are those networks that are not . . . an Affiliate of Comcast or a top 15 programming network, as measured by annual revenues." *Id.*

[30] *See* Press Release, Comcast Corp., *Comcast To Expand Carriage of Hispanic Networks to Additional 14 Million Subscribers* (July 26, 2011), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1104; Press Release, Comcast Corp., *Mnet Reaches New Carriage Agreement with Comcast* (Mar. 30, 2011); *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1059; Press Release, Comcast Corp., *The Africa Channel Continues Expansion on Comcast's Xfinity TV* (May 2, 2011), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1076; Press Release, Comcast Corp., *TV One Announces Expanded Carriage on Comcast's Xfinity TV Lineup in Chicago and Miami Markets* (May 9, 2011), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1079.

[31] *See, e.g.*, Letter from Stanley E. Hubbard, President & CEO, ReelzChannel, to Julius Genachowski, Chairman, FCC, et al., MB Docket No. 10-56, at 4 (Mar. 10, 2010) ("We truly feel there is a commitment [from Comcast] to our growth and economic well-being that is built on a sense of overall fairness and continuing mutual respect."); Letter from David S. Turetsky, Dewey LeBoeuf LLP, Counsel to HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1 (Dec. 22, 2010) ("Comcast has shown itself to be a strong supporter of independent networks."); Reply Comments of America Channel, MB Docket No. 10-56, at 2 (July 21, 2010) ("In our view, Comcast has taken a leadership role among MVPDs in providing opportunities for independent programmers in a challenging economic environment."); Letter from Charles Segars, CEO, Ovation, to Senators Rockefeller and Hutchison 2 (Mar. 9, 2010) ("Comcast has a strong record of launching viable, independent channels."); *see also* Comcast Video Competition Comments at 7-8 (citing same).

as to whether these "online video distributors," or "OVDs," are offering fair "carriage" terms.[32] In all areas across the video programming landscape, companies are experimenting with new platforms and business models.[33] Yet the Commission continues to train its narrow regulatory scrutiny on one area – programming networks and MVPDs – simply because it has some legacy authority to do so. Instead, networks and MVPDs should be afforded the same freedom to negotiate and figure out how they can best serve customers without having their conduct subject to regulatory gamesmanship and second-guessing.

Today's marketplace dynamics call into question the need for any government involvement in this area – a necessary prerequisite for surviving First Amendment scrutiny. But the regulations proposed in the *Notice* will inevitably increase it. Government interference with the program carriage marketplace is less justifiable than ever, and flies in the face of recent judicial guidance finding that technological and marketplace changes have undermined the government's justification for regulations with similar goals.[34]

The Commission cannot merely posit a hypothetical harm to be cured, but must put forth record evidence of an actual – not conjectural – problem.[35] And "reasoned decisionmaking"

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32 Such oversight or control would make no sense even as OVDs such as Netflix and YouTube are venturing into producing (and exclusively distributing) their own video programming. *See* Nellie Andreeva, *Netflix To Enter Original Programming with Mega Deal for David Fincher-Kevin Spacey Series "House of Cards,"* Deadline Hollywood, Mar. 15, 2011, *available at* http://www.deadline.com/2011/03/netflix-to-enter-original-programming-with-mega-deal-for-david-fincher-kevin-spacey-drama-series-house-of-cards; Jessica E. Vascellaro et al., *YouTube Recasts for New Viewers; Google Plans To Organize Site Around 'Channels,' Fund Original Content as TV and Web Converge*, Wall St. J., Apr. 7, 2011, *available at* http://online.wsj.com/article/SB10001424052748704013604576247060940913104.html.

33 In fact, WealthTV, which filed four program carriage complaints that were all found to be without merit, makes its programming available on the Internet to the over 67 million American households with broadband Internet service for $0.99 per month. *See WealthTV*, https://wealthtv.com/subscribe/Register.php (last visited Nov. 22, 2011). This eliminates any possible MVPD role in preventing those viewers who want WealthTV from watching the network.

34 *See Comcast*, 597 F.3d at 8.

35 *See Time Warner Entm't v. United States*, 240 F.3d 1126, 1132-36 (D.C. Cir. 2001) ("*Time Warner II*") (finding that "the Commission has pointed to nothing in the record supporting a non-conjectural risk of

requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action *including a rational connection between the facts found and the choice made*."[36] There is virtually no factual basis for the *Notice*'s proposed changes. The *Notice* places significant weight on concerns and conjecture offered by a handful of commenters, but none of those concerns are grounded in any sort of genuine evidence. In fact, these concerns and conjecture are directly refuted by the evidence that MVPDs carry (and continue to launch) far more programmers that are unaffiliated with MVPDs than programmers affiliated with MVPDs.

Most of the proposed changes come from parties whose credibility has been severely undermined by Commission adjudications and developments subsequent to their advocacy. Certain of the commenters who argued for changes to the program carriage rules to make it easier for "independent" networks to obtain carriage have little or no credibility. For example, WealthTV "failed completely" to prove its claims of cable company misconduct in its four program carriage gambits before the ALJ and the Commission.[37] Other parties – such as America Channel and Black Television News Channel ("BTNC") – never launched despite reaching carriage agreements with Comcast several years ago, which proponents of new rules

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anticompetitive behavior, either by collusion or other means" and reversing the Commission's horizontal ownership rule as violating the First Amendment); *Time Warner Entm't v. United States*, 211 F.3d 1313, 1318-19 (D.C. Cir. 2000) ("If a regulation on speech is intended to redress an actual or an anticipated harm to an important governmental interest, then the Government 'must demonstrate that the recited harms are real, not merely conjectural . . . .'" (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994))); *see also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985) ("[T]he Commission has failed entirely to determine whether the evil the rules seek to correct is a 'real or merely a fanciful threat.'" (citation omitted)). Indeed, the need for support in the record extends even to the agency's predictive judgments. *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995) (noting that the FCC must "provide at least some support for its predictive conclusions").

36 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added) (internal quotation marks omitted); *see Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting same); *City of Santa Monica v. FAA*, 631 F.3d 550, 554 (D.C. Cir. 2011); *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) ("[W]e insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.'" (quoting *State Farm*, 463 U.S. at 43)).

37 *WealthTV ALJ Decision* ¶ 63; *see Wealth TV FCC Order* ¶ 32 (affirming the ALJ's conclusion that the record evidence as a whole does not support WealthTV's claims).

routinely (but erroneously) claim is a prerequisite for success. And some past proponents of additional rules are sophisticated companies that need no regulatory assistance – for example, Crown Media, Mid-Atlantic Sports Network ("MASN"), and NFL Network – and have used the program carriage complaint process (or the threat of a complaint) as leverage in negotiations that could have been resolved without such tactics. One other sophisticated commenter heavily relied on by the *Notice*, HDNet, has never filed a program carriage complaint against any MVPD and publicly has praised Comcast's record of carrying independent networks.[38] Nothing could portend more clearly the future misuse of new regulations than the fact that even Viacom, which enjoys the carriage of *twenty-three* of its networks on Comcast's systems, has sought regulatory assistance to increase its negotiating leverage – a position that is completely contrary to its own prior advocacy before the Commission.[39]

In short, there is no demonstrated evidence of a problem that needs to be fixed. Of the eight complaints that have been filed since the previous NPRM, four have been found to be without merit by the full Commission (as has a program carriage arbitration claim), two have been settled, and two are currently pending. To the extent that the Commission undertakes to improve the complaint processes, it should recognize that a major problem has been the Commission's hesitation to act on fully-pleaded cases – and, more particularly, its reluctance to

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38 *See* Letter from David S. Turetsky, Dewey LeBoeuf LLP, Counsel to HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Dec. 22, 2010).

39 *Compare* Viacom Ex Parte, MB Docket No. 07-42 (May 26, 2011), *with* Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 2 (Dec. 22, 2010) (noting that Viacom previously told the Commission that program carriage and program access proceedings have yielded "overwhelming and unrebutted record evidence confirming that the wholesale video programming market is competitive and functioning as Congress intended" and that "*there is no conceivable justification for government intervention*" in this marketplace, and declaring that such "government intervention" would be "ill-considered and unjustified" (emphasis in original) (quoting Letter from Antoinette Cook Bush, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel to Viacom, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-198 and 07-42 (Dec. 8, 2008), and Letter from Peter Chernin, President and COO, News Corp.; Robert Iger, President and CEO, The Walt Disney Co.; Philippe Dauman, CEO, Viacom; and Jeff Zucker, President and CEO, NBC Universal, to Kevin Martin, Chairman, FCC, et al., MB Docket No. 07-42 (Nov. 20, 2007))).

dismiss complaints that lack merit. If the Commission were simply to make more timely decisions and apply its own rules more stringently, it could effect positive procedural change while avoiding the pitfalls of the *Notice*'s unwarranted, unauthorized, and unworkable proposals. What the Commission should *not* do is revise and re-revise its rules in order to make it increasingly easier for a programming network to file a complaint and establish some sort of circumstantial case of a violation, which is what many of the *Notice*'s proposals would do.

To be sure, recent Commission action already may have made fair, efficient, and expeditious proceedings more difficult to achieve. The *2011 Program Carriage Order*'s codification of a new minimal prima facie standard that ignores the defendant's evidence and gives credence to the complainant's unproven assertions likely will only worsen the Commission's chronic problem of failing to dismiss meritless complaints. The four *WealthTV* cases are perhaps the preeminent example of matters that could and should have been dismissed on the pleadings. However, it took several years, a significant expense of time and resources, a full ALJ hearing, and ultimately a Commission decision to reach conclusions about WealthTV's baseless claims that should have been obvious from the start.[40]

Although the Commission asserts that its recently adopted rules and proposed rules will not unduly lower the threshold for what it considers "legitimate complaints" that warrant "further evidentiary proceedings,"[41] the unfortunate truth is otherwise. Given the new minimal prima facie standard (urged by WealthTV and others in the prior rulemaking), it seems highly likely that a WealthTV-type complainant today would not be prevented from consuming valuable

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40 And the litigation continues: After submitting and then partially withdrawing and then fully withdrawing a petition for reconsideration of the Commission's order, WealthTV recently filed a petition for review of the order in the United States Court of Appeals for the Ninth Circuit. *See* Petition for Review, *Herring Broad., Inc v. FCC,* No. 11-73134 (9th Cir. Oct. 18, 2011).

41 *2011 Program Carriage Order & Notice* ¶ 10.

Commission and private resources beyond the prima facie phase of a complaint proceeding. Regrettably, in this regard the *2011 Program Carriage Order & Notice* appears to be insensitive not only to the realities of the marketplace, but also to the lessons of the Commission's own experience with the misuse of its processes.[42]

Further, in the midst of the recent national economic difficulties, the public mood – as reflected in the statements of elected leaders – shows no tolerance for excessive and costly regulation. President Obama has issued two Executive Orders about scaling back unnecessary regulation,[43] and Chairman Genachowski has stated publicly that he will respect and support the President's position.[44] The President reiterated the importance of minimizing regulation in an address to a joint session of Congress: "We should have no more regulation than the health, safety and security of the American people require. Every rule should meet that common-sense test."[45] The *Notice*'s proposed expansion of regulation is decidedly out of step with this directive and does not meet President Obama's "common-sense" test. The video programming distribution marketplace is an area of the economy that is continuing to grow in a challenging environment, and the Commission should be especially wary of unnecessary and costly regulation that could undermine the creation of new jobs, competition, and pro-consumer innovation.

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42 *Cf. BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) (noting that "the deference owed agencies' predictive judgments gives them no license to ignore the past when the past relates directly to the question at issue").

43 *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011).

44 *See* News Release, FCC, *Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies* (July 11, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308340A1.pdf.

45 Press Release, White House, *Address by the President to a Joint Session of Congress* (Sept. 8, 2011) (speech by President Barack Obama), *available at* www.whitehouse.gov/the-press-office/2011/09/08/address-president-joint-session-congress.

III. THE *NOTICE* WHOLLY IGNORES THE FIRST AMENDMENT IMPLICATIONS OF THE PROGRAM CARRIAGE RULES.

The *Notice* severely shortchanges consideration of the First Amendment. Instead of applying the First Amendment as the overarching commandment, the *Order* and *Notice* treat it as an afterthought. The *Order* makes only a passing attempt at addressing commenters' concerns about the program carriage rules' effects on MVPDs' and programmers' First Amendment rights, and the *Notice* never even considers or seeks comment on what effects the proposed rules would have on those rights.[46] There simply can be no dispute that, like must-carry and leased access,[47] program carriage rules directly impact the First Amendment rights of MVPDs and programmers. Therefore, it is essential that the First Amendment be restored to its rightful place as the primary consideration in any further Commission deliberations regarding program carriage.

To properly appreciate the constitutional considerations at play here, the Commission should recognize that the exercise of editorial discretion inevitably creates points of friction and even disputes, but that neither that friction nor any dispute justifies government interference with exercise of that discretion. Take for example the Washington Post. It would be unthinkable for a government agency to assert a role in reviewing a decision by the Washington Post not to hire a

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[46] *2011 Program Carriage Order & Notice* ¶ 33. The *2011 Program Carriage Order & Notice* does not even mention constitutional considerations in the *Notice* portion of the docket; they are referenced solely in the *Order* portion. There, the Commission casually dismissed First Amendment arguments on the basis that it was not adopting a "broad prophylactic rule" but rather will continue "to assess on a case-by-case basis the impact of anticompetitive conduct on an unaffiliated programming vendor's ability to compete." *Id.* Regardless of whether that is an accurate characterization of the rules adopted in the *Order*, the same cannot be said for the rules proposed in the *Notice*; almost all of the *Notice*'s proposals would adopt broad rules that would directly impact MVPDs' First Amendment rights and how they can conduct business well before the Commission conducts any case-by-case analysis. The Commission cannot avoid the First Amendment implications of its rules, including their chilling effect, simply by claiming that it will respect the First Amendment in a subsequent case-by-case analysis.

[47] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("*Turner I*") (finding that "the must-carry rules regulate cable speech" of cable operators and programmers); *Time Warner Entm't v. FCC*, 93 F.3d 957, 968-71 (D.C. Cir. 1996) (subjecting the leased access rules to intermediate scrutiny under the First Amendment).

new columnist, to change the location or frequency of an existing column, or not to renew its contract with even a long-published and widely-syndicated columnist. Perhaps the paper believes the columnist does not write very well, does not have interesting things to say, will not appeal to the paper's readers, or simply does not add anything to the paper's existing mix of columnists. Perhaps the editors think that, even with respect to a columnist who writes well and says interesting things that appeal to readers, the space and money would be better devoted to some other columnist. Perhaps they think the columnist is asking to be paid too much. Whatever the reasons for the Post's editorial decisions – and even if a disfavored columnist did not believe those reasons were valid – the Post could not be called upon to defend itself; to produce all of the documents relating to its assessments of the merits of various columnists; to hire experts to defend the legitimacy of its decision; to present its executives for depositions, testimony, and cross-examination to have their business and editorial decisions scrutinized by opposing counsel and government employees; or, in the end, to have their judgments second-guessed and overruled. There would be no reason for any government agency to seek public comments on what rules it should adopt to ensure that "column carriage" complaints are more quickly or efficiently processed. There would be no talk of automatic discovery, or damages, or burdens of proof. And this would be the case even if the newspaper was the only paper in town.

Why could the government never do these things? Because the First Amendment establishes freedoms of speech and of the press as bedrock principles of our system of government. They apply when a newspaper chooses its columnists and journalists, and when it selects its stories for daily or weekly publication. They apply when a bricks-and-mortar or online merchant chooses which books, movies, video games, and TV shows to sell. They apply when Netflix decides which movies to offer, and when iTunes chooses which artists' songs to sell. And they apply to carriage decisions by traditional cable operators, phone companies that now deliver video programming, and DBS providers.[48] Yet the *Notice* does not even pay lip service to these considerations.

The Supreme Court more than 15 years ago made clear:

> There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are *entitled to the protection of the speech and press provisions of the First Amendment*. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "seek to communicate messages on a wide variety of topics and in a wide variety of formats."[49]

The program carriage rules indisputably impact cable operators' and other MVPDs' editorial discretion by restricting their ability to decline to deliver certain programming networks to customers and potentially penalizing them for carrying affiliated networks.[50] If anything, the Commission should be all the more respectful of editorial discretion given the zeal with which the Supreme Court has been protecting First Amendment rights even where freedom of the press is *not* at issue; for example, protecting speech interests in violent video games, anti-gay picketing at armed service members' funerals, and animal cruelty videos.[51]

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[48] *See, e.g.*, *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952))); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 905 (2010) (reaffirming that the "institutional press" has the same constitutional privileges as other speakers).

[49] *Turner I*, 512 U.S. at 636 (emphasis added) (quoting *Los Angeles v. Preferred Communication, Inc.*, 476 U.S. 488, 494 (1986)); *see Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) ("Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others.").

[50] *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) ("*Turner II*) ("First, the provisions restrain cable operators' editorial discretion in creating programming packages by 'reducing the number of channels over which [they] exercise unfettered control.'" (quoting *Turner I*, 512 at 637)).

[51] *See Entm't Merchants Ass'n*, 131 S. Ct. at 2741-42 (striking down state law barring sale of violent video games to minors); *Synder v. Phelps*, 131 S. Ct. 1207, 1220-21 (2011) (finding that the First Amendment protected anti-gay picketing at funeral of an armed services member); *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (striking down federal law outlawing sale of videos depicting animal cruelty); *see also Arizona Free Enter. Club's*

With this in mind, and with freedom of the press directly at stake, the Commission must take into consideration First Amendment concerns in every adjudication of a complaint and with each and every proposed expansion of its program carriage rules. The *Notice*, however, lets the First Amendment fall by the wayside. Citing to the D.C. Circuit's 1996 decision in *Time Warner Entertainment v. FCC*, which addressed the constitutionality of the leased access provisions of the 1992 Cable Act,[52] the *2011 Program Carriage Order & Notice* asserts that the rules are subject to and survive intermediate scrutiny. Yet it fails to acknowledge the material differences between the leased access rules and the program carriage rules and offers no evidence (or even discussion) that (1) the government has an important interest that will *actually* be furthered by the proposed rules, and that (2) the rules are narrowly tailored to ensure they do not burden substantially more speech than is necessary to further the government's interest.[53]

At the outset, in asserting that the program carriage rules would be subject to the same intermediate scrutiny First Amendment standard as the leased access rules, the *Notice* fails to acknowledge the critical distinctions between leased access and program carriage. Of particular note, the D.C. Circuit, whose leased access decision was issued at a time when "most cable television subscribers ha[d] no opportunity to select between competing cable systems," made clear that its conclusion that the leased-access provisions were subject to intermediate scrutiny rested on the unique common carrier-like nature of those rules: under those provisions, "[w]hat programs appear on the operator's other channels – that is, what speech the operator is promoting

Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828-29 (2011) (overturning a state campaign finance law as infringement on free speech); *Citizens United*, 130 S. Ct. at 917 (overturning a federal campaign finance law as infringement on free speech).

52 *See 2011 Program Carriage Order & Notice* ¶ 32.

53 *See Turner I*, 512 U.S. at 662.

– matters not in the least."[54] That is not the case with respect to program carriage. Unlike leased access (or must-carry), the program carriage rules allow the Commission to directly evaluate cable operators' assessment of programming networks' merits and value, and expressly evaluate the "comparability" of different aggregations of programs. In fact, the *Order*'s recent amendments now explicitly invite comparisons between a complainant's programming and an MVPD's affiliated programming, including based on factors such as "genre" and "target programming."[55] These evaluations necessarily entail government judgments focused on the *content* of the programming, which triggers strict scrutiny.[56] There can be little doubt that, like the statute challenged in *Tornillo,* subject to strict scrutiny, the *Notice*'s proposed rules are not narrowly tailored to a compelling government interest, would intrude on cable operators' "editorial control and judgment," and could not pass constitutional muster.[57]

Even if strict scrutiny does not apply, the *Notice*'s proposed rules would not pass constitutional muster under intermediate scrutiny, i.e., they would not advance important governmental interests and do so without burdening substantially more speech than necessary to further those interests.[58] In the limited First Amendment discussion the *2011 Program Carriage Order & Notice* does provide (i.e., in the *Order* portion of the document), the Commission asserts that the program carriage rules further the government's interest in promoting

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[54] 93 F.3d at 967, 969 (quotations omitted).

[55] *2011 Program Carriage Order & Notice* ¶ 14 ("First, the complainant programming vendor must provide evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.").

[56] *See Turner I*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

[57] *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

[58] *See Turner I*, 512 U.S. at 662.

competition and diversity in the video programming marketplace.[59] Although promoting competition and diversity in programming may remain legitimate and substantial government interests, simply assuming that the *Notice*'s proposals are necessary to – and, in fact, actually will – further those interests is not sufficient. As the Supreme Court has made clear, when the government defends a regulation on speech to redress past harms or prevent anticipated harms, "it must do more than simply 'posit the existence of the disease sought to be cured.'"[60] The First Amendment requires that the Commission *prove* that its proposed expansion of the program carriage rules in fact *advances* these interests: "It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a *direct and material way*."[61]

The Commission has not met this burden. The *Notice* proposes to, among other things, expand discovery without any evidence that the current discovery rules have been inadequate; impose damages, including punitive damages, despite abundant evidence that marketplace conditions limit significantly the ability of any MVPD to affirmatively harm a programming network's ability to compete fairly; and adopt various anti-retaliation proposals, despite the fact that it does not cite a single instance of retaliation in the history of the program carriage rules. It also proposes to broaden dramatically the scope of programming and programming decisions subject to government scrutiny and intervention, again without any evidence that such intervention is warranted. Each of these proposals is likely to chill MVPDs' exercise of their

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[59] The *Order* is somewhat inconsistent on this point. It frequently states that both competition and diversity are the goals that underlie the program carriage rules. Yet, at one point, it downplays the role that diversity plays, stating that "[d]iversity . . . is not the sole or even the primary goal of the program carriage provision." *See 2011 Program Carriage Order & Notice* ¶ 31.

[60] *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV,* 768 F.2d at 1455).

[61] *Id.* (emphasis added).

editorial discretion and speech, yet there is no evidence that there is a harm in the marketplace that needs to be cured or that the proposed rules would actually cure those harms. Rather, the *Notice* is full of conjecture that the *current* rules have left gaps, that certain programmers (and would-be programmers that have yet to launch a network) have been harmed but have been unwilling to file a complaint, and that the *Notice*'s proposals will actually address those harms.[62] There simply is no proof that the proposed rules are designed to respond to specific harms, let alone that they will alleviate such harms in a "direct and material way." In fact, today's competitive marketplace effectively eliminates the very conjectural harms the *Notice* claims the proposed rules are needed to address.

As discussed in detail above, in today's marketplace, programmers have myriad options for distributing their programming, and consumers have just as many options for how they can receive programming. If the video marketplace of 1992 had as much competition and diversity as today's marketplace, there can be little debate that adoption of the program carriage rules would not have been justified. It is extremely doubtful that the courts will perceive program carriage regulation (and, particularly, *expansion* of program carriage regulation) as necessary to advance the interests of promoting competition and diversity in today's dynamically competitive marketplace.[63] And to the extent that the government has other interests in regulating MVPDs'

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62 The chief "harm" that the *Notice* appears to be concerned with is that not enough programmers have filed complaints. Ironically, if encouraging programmers to file more complaints regardless of the merits were a legitimate and important government interest, then the *Notice*'s proposals likely would further that interest. Section 616, however, was not intended to ensure that there was a constant flow of program carriage complaints; it was enacted to promote diversity and competition in a 1992 video marketplace where cable operators were viewed as monopolists and were vertically integrated with a majority of programming networks.

63 One proponent of expanded program carriage regulation highlighted in its advocacy that the program carriage statute had been upheld by the D.C. Circuit but later admitted that the program carriage statute has not yet been subject to First Amendment review by the courts. *Compare* Letter from Andrew Jay Schwartzman, Senior Vice President and Policy Director, Media Access Project, to Marlene Dortch, Secretary, FCC, MB Docket No. 07-42, at 1 (June 6, 2011), *with* Letter from Andrew Jay Schwartzman, Senior Vice President and Policy Director, Media Access Project, to Dave Grimaldi, Chief of Staff and Media Legal Advisor, Office of Commissioner Clyburn, FCC, MB Docket No. 07-42, at 1 (June 10, 2011).

carriage agreements – such as preventing the misuse of alleged monopoly power (which, as discussed above and below, cable operators do not possess) – antitrust laws already exist to protect against this concern. There is no justification for a separate regime to address speculative harms in a competitive environment.

The Commission should not draw the wrong lesson from the fact that the must-carry provisions of the 1992 Cable Act (a statute that also included the program carriage provisions) survived First Amendment judicial review.[64] It is doubtful that the *Turner* cases would be decided the same way today as they were in 1994 and 1997.[65] The opinions (which both included spirited dissents) relied explicitly on an assessment by Congress and the judiciary of marketplace circumstances in the *early 1990s*. Central to the Court's decisions was the 1992 finding by Congress, which the Court accepted, that cable was a monopoly.[66] This finding has no relevance to 2011's video marketplace, which looks entirely different from that of the early 1990s. As the U.S. Court of Appeals for the Second Circuit recently noted, the past two decades have seen "an explosion of media sources."[67] Not only have DBS and telco providers become highly successful players in the marketplace, but the Internet "has become omnipresent, offering access to everything from viral videos to feature films and . . . television programs."[68] This

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64 More than a decade ago in *Turner I*, the Supreme Court held that the must-carry rules directly implicated cable operators' First Amendment rights, but remanded the case to the District Court to determine whether the rules in fact furthered important government interests. *Turner I*, 512 U.S. at 668. In *Turner II*, the Supreme Court narrowly (5-4) found that the must-carry rules did further important government interests and upheld their constitutionality, in large part based on Congress's extensive statutory findings and the District Court's factual findings about the status of the marketplace at the time. *Turner II*, 520 U.S. at 208.

65 *See* Letter from James L. Casserly, Willkie Farr & Gallagher LLP, Counsel to Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, CS Docket Nos. 98-120, 00-96, & 00-2, at 1-3 (Oct. 16, 2003).

66 *See Turner I*, 512 U.S. at 633, 661; *Turner II*, 520 U.S. at 197.

67 *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010).

68 *Id.* at 326.

vastly different set of circumstances will feature prominently in judicial review of the program carriage rules, highlighting that they are a vestige of a bygone era.[69]

Indeed, the D.C. Circuit has recognized that, when the First Amendment is at stake, an agency's rules must reflect the reality of the current marketplace and the agency cannot impose prophylactic measures designed to protect against imaginary, hypothetical, or anachronistic harms. The court twice rejected the Commission's 30 percent ownership cap because it failed, among other things, to take into account whether the growth in competition in the marketplace (specifically, competition from DBS) had undermined the continued government interest that supported the rule.[70] In its latest decision, the court vacated the rule, stating:

> In light of the changed marketplace, the Government's justification for the 30% cap is even weaker now than in 2001 when we held the 30% cap unconstitutional. As the Supreme Court has observed, "the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973). To leave the Rule in place while the Commission tries yet again to justify it would be to ignore this crucial fact about the nature of the video industry.[71]

More recently, in a challenge to the Commission's decision to continue the program access exclusivity prohibition, Judge Kavanaugh reasoned, in his dissent, that the "radically changed and highly competitive marketplace – where no cable operator exercises market power in the downstream or upstream markets and no national video programming network is so powerful as to dominate the programming market – completely eviscerates the justification we

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[69] *See* Brief of Amicus Curiae C-SPAN in Support of Petitioner, *DISH Network Corp. v. FCC*, No. 11-481, at 6-7 (U.S. Nov. 16, 2011) (noting that facts change and evolve over time, and that the Supreme Court has recognized that "'the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist'" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938))).

[70] *See Time Warner II*, 240 F.3d at 1134; *Comcast*, 579 F.3d at 8, 10.

[71] *Comcast*, 579 F.3d at 9-10.

relied on in *Time Warner* for the ban on exclusive contracts."[72] Judge Kavanaugh further reasoned that, "[b]ecause both the video programming distributor market and video programming network market are competitive, a ban on exclusive vertical contracts does not serve the Government's interest in competition; if anything, it thwarts that interest."[73] Judge Kavanaugh concluded: "The FCC's exclusivity ban therefore fails the intermediate scrutiny test, and its infringement on the editorial and speech rights of cable operators and cable programmers cannot be squared with the First Amendment."[74]

Judge Kavanaugh's logic applies even more forcefully to any unwarranted extension of program carriage regulation. The video marketplace is vibrant and competitive and diverse. There is no legitimate, let alone important or compelling, government interest that will be advanced by expanding the Commission's role in reviewing MVPDs' exercise of their editorial discretion, or penalizing carriage of affiliated programming, or compelling the carriage of unaffiliated programming.

Moreover, in light of this dynamic marketplace, it is impossible for the proposed program carriage rule changes to be narrowly tailored. This is problematic both from a First Amendment standpoint, and, as discussed in Part IV, from an APA standpoint. Even assuming that intermediate scrutiny applies, narrow tailoring "requires . . . that the means chosen do not

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72 *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1324 (D.C. Cir. 2010) (Kavanaugh, J., dissenting). The majority, Chief Judge Sentelle and Judge Griffith, declined to address the First Amendment implications of the Commission's exclusivity ban, concluding that the petitioners had not raised a specific, as-applied challenge to the ban. *See id.* at 1311–12 (majority opinion).

73 *Id*. at 1326 (Kavanaugh, J., dissenting). Chief Judge Sentelle and Judge Griffith declined to vacate the Commission's extension of the exclusivity ban as arbitrary and capricious, but agreed with Judge Kavanaugh that "the MVPD market has changed drastically since 1992" and noted that, "if the market continues to evolve at such a rapid pace," they expected that the Commission would soon "conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming." *Id.* at 1314 (majority opinion).

74 *Id*. at 1326 (Kavanaugh, J., dissenting).

'burden substantially more speech than is necessary to further the government's legitimate interests.'"[75] As Comcast explains below when discussing each of the Commission's proposed expansions of the rules, almost every proposal is overbroad and is likely to coerce or compel MVPDs to carry programming that, in the absence of such regulation, they normally would choose not to carry for reasons in no way related to affiliation. For example, allowing programming vendors to file complaints against an MVPD based on its decisions on how to carry other *unaffiliated* programming networks significantly expands the number of programming networks that could subject the MVPD to a complaint and government's second-guessing of the MVPD's editorial decision to carry that unaffiliated programming. These proposals also increase the potential costs and risks of carrying affiliated programming broadly. Competition alone gives every network an opportunity to compete fairly and ensures that the government's legitimate interests are furthered.[76] Accordingly, adoption of any rules that burden MVPDs' speech and interfere with their editorial discretion would be unwise and unnecessary.[77]

For all the concerns discussed above, the Commission should reject proposals to expand the program carriage rules and tilt the scale in favor of complainants. It should tread lightly in the face of these serious First Amendment concerns, lest it enmesh itself in years of litigation and

[75] *Turner I*, 512 U.S. at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

[76] In adopting the program carriage provisions of the 1992 Cable Act, Congress instructed the Commission to implement rules to prevent an MVPD "from engaging in conduct the *effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly* by discriminating in video programming distribution on the basis of affiliation or nonaffiliation[.]" 47 U.S.C. § 536(a)(3) (emphasis added). Yet in a marketplace where new distribution methods are flourishing – on top of ample competition from DBS and telco providers – it is impossible for any single MVPD to unreasonably prevent a programmer from competing fairly.

[77] At a time when the Commission and Solicitor General are struggling to persuade the Supreme Court that it remains permissible to shortchange the First Amendment rights of broadcasters due to their supposedly unique characteristics, it would be especially inopportune for the Commission to show inadequate respect for the First Amendment rights of other communications media like cable and satellite, to whom the government has effectively admitted that the full measure of First Amendment protections apply. *See* Brief for Petitioners at 21, *FCC v. Fox Television Stations, Inc.*, No. 10-1293 (U.S. Sept. 7, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-309505A1.pdf.

reversals, as has happened in other situations where the Commission short-changed the First Amendment implications of its actions.[78]

IV. ADOPTION OF MOST OF THE *NOTICE*'S PROPOSALS WOULD BE ARBITRARY AND CAPRICIOUS AND BEYOND THE COMMISSION'S AUTHORITY.

The *Notice* seeks comment on "additional revisions or clarifications to both our procedural and substantive program carriage rules, which are intended to facilitate the resolution of program carriage claims."[79] Even if the Commission were to ignore the evidence that competition and diversity in the programming marketplace are thriving and determine that there is a need for new rules, the *Notice*'s proposals likely will not advance the Commission's goals and, thus, would be arbitrary and capricious under the APA and not narrowly tailored as required by the First Amendment. With few exceptions, the proposals in the *Notice* will impede successful marketplace resolution of program carriage negotiations, in direct conflict with Congress's expressed directive to "rely on the marketplace, to the maximum extent feasible."[80] Moreover, if adopted, the proposals likely would invite many more meritless program carriage complaints and lead to either drawn-out adjudications or, more likely given the new deadlines imposed on adjudicators, hasty and superficial decisions, in which due process is sacrificed for expediency. Any relief awarded under these circumstances would not withstand judicial review.

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[78] For example, litigation over the Commission's revised indecency policy, stemming from televised events that occurred in 2003 and 2004, is still ongoing. *See CBS Corp. v. FCC*, No. 06-3575, 2011 U.S. App. LEXIS 22501 (3d Cir. Nov. 2, 2011); *ABC, Inc. v. FCC*, No. 08-0841, 2011 U.S. App. LEXIS 72 (2d Cir. Jan. 4, 2011); *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011); *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, 129 S. Ct. 2176 (2009); *Fox Television Stations*, *Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *rev'd and remanded*, 129 S. Ct. 1800 (2009). Litigation over the Commission's personal attack and political editorial rules persisted for more than two decades. *See Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 270, 272 (D.C. Cir. 2000) (directing the Commission to immediately repeal the rules, which the court acknowledged "interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media" (internal quotation marks and citation omitted)).

[79] *2011 Program Carriage Order & Notice* ¶ 37.

[80] *See* 1992 Cable Act § 2(b), 106 Stat. at 1463.

A. Discovery

The *Notice* seeks comment on whether, in addition to "the Media Bureau's [current] ability to order discovery," the program carriage discovery process should be revised to provide for: (1) "expanded discovery procedures (also known as party-to-party discovery) similar to the procedures that exist for program access complaints"; and (2) "an automatic document production process that is narrowly tailored."[81] However, there is nothing in the *Notice* or in the prior record that justifies radically revising the discovery rules. The *Notice* does not contain a single citation to a commenter that claimed that there is anything wrong with the current discovery procedures. In fact, the scant but recent history of program carriage adjudications demonstrates that the current discovery process is working well while at the same time "ensuring fairness to all parties."[82] Thus, adopting the *Notice*'s proposals cannot be supported by the record and would be arbitrary and capricious.

Although the purported goal of these proposals "is to establish a discovery process that ensures the expeditious resolution of complaints while also ensuring fairness to all parties,"[83] the proposals would do neither. Rather, adoption of the proposals would establish a discovery process that would make every disagreement about carriage potentially very expensive, discovery disputes commonplace, expeditious resolution of complaints more difficult, issues of fairness secondary, and settlement increasingly unlikely. The *Notice*'s proposals would also result in an unwarranted intrusion on the normal business operations of MVPDs, would unfairly force MVPDs to collect information prior to the filing of a complaint in order to comply, and

81 *2011 Program Carriage Order & Notice* ¶ 41.

82 *Id.*

83 *Id.*

would unnecessarily expose highly-confidential contracts with third parties to improper disclosure.[84] In short, adoption of the *Notice*'s proposals would impose regulations that undermine the stated goals of the *Notice* while simultaneously burdening far more speech than necessary.

1. There is no basis to import the expanded (party-controlled) discovery process from the program access rules.

The *Notice* seeks comment on importing the party-controlled discovery procedures from program access disputes to the program carriage context. As an initial matter, whatever the merits of the program access discovery rule changes adopted in 2007,[85] the inquiry into whether a program access violation has occurred is significantly different than the inquiry into whether a program carriage violation has occurred. In the program access context, the sole issue that most frequently is in dispute is what price, terms, and conditions a cable-affiliated programming network must offer to an MVPD. In the program carriage context, by contrast, there almost inevitably are several much more complex issues that must be addressed, including, among other things, "the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained,"[86] whether a vertically integrated MVPD "acted upon" a motive to discriminate

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[84] Even in the best of circumstances, inadvertent mistakes can and do occur in the handling of third-party confidential information. *See, e.g.*, Letter from David C. Frederick, Counsel for MASN, to Marlene H. Dortch, Secretary, FCC, *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.* (Dec. 22, 2009) (explaining that one of MASN's affiliation agreements with a third-party MVPD had been improperly redacted when first produced to the Commission). The proposed expansion of discovery multiplies the likelihood of such errors occurring.

[85] Comcast's sole experience with the expanded program access discovery procedures has been to see a complainant, after the pleadings cycle closed, level literally hundreds of highly burdensome and completely unwarranted discovery requests at Comcast. *See* Petitioners' First Request for Production of Documents to Defendants, *WaveDivision Holdings, LLC v. Comcast Corp.*, File No. CSR-8257-P (Mar. 22, 2010); Defendants' Objection to Petitioners' First Request for Production of Documents and Interrogatories, *WaveDivision Holdings, LLC v. Comcast Corp.*, File No. CSR-8257-P (Mar. 31, 2010). The case was settled and dismissed with prejudice. *See WaveDivision Holdings, LLC v. Comcast Corp.*, Order, 26 FCC Rcd. 182 (2011).

[86] *WealthTV FCC Order* ¶ 6 (quoting the *1993 Program Carriage Order* ¶ 14) (quotations omitted).

on the basis of affiliation rather than based on legitimate business reasons,[87] and whether the programming network has been unreasonably restrained in its ability to compete fairly.[88]

In addition, although program access discrimination cases involve a threshold showing that two MVPDs are similarly situated (based on a fairly objective set of technical criteria), program carriage discrimination claims have been construed to require, among other elements, proof that two or more *networks* are similarly situated based on factors such as genre and targeted programming, which is a much more complex and qualitative analysis. The complexity of adjudicating program carriage complaints is why the Commission adopted the current limited discovery process in 1993 and stated that, "[a]s a practical matter, . . . given that alleged violations of Section 616 . . . will require an evaluation of contested facts and behavior related to program carriage negotiations, . . . the staff will be unable to resolve most program carriage complaints on the sole basis of a written record."[89]

As the *Notice* acknowledges, the Commission recognized almost two decades ago that expanded discovery procedures in program carriage disputes can "lead to overbroad discovery requests and extended disputes pertaining to relevance."[90] The Commission correctly recognized back then that "the resolution of most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations."[91] And, to date,

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87 *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 25 FCC Rcd. 18,099 ¶ 22 (2010), *appeal docketed*, No. 11-1151 (4th Cir. Feb. 22, 2011).

88 *See* 47 U.S.C. § 536(a)(3); *1993 Program Carriage Order* ¶ 14 ("[T]he implementing regulations for Section 616 will require that any complainant alleging a violation of Section 616(a)(3) must demonstrate that the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.").

89 *1993 Program Carriage Order* ¶ 24.

90 *2011 Program Carriage Order & Notice* ¶ 43.

91 *1993 Program Carriage Order* ¶ 24.

the referral of complaints to an ALJ to conduct discovery and a full hearing has ensured that the due process and confidentiality rights of the parties (and third parties) are respected while at the same time putting control over the timing of the proceeding in the hands of the person responsible for ensuring an expeditious resolution, i.e., the ALJ.

Based on the Media Bureau's recent experience in certain program access cases where discovery was party-controlled during the pleadings stage, it is clear that such discovery is less efficient and more burdensome than party-to-party discovery managed by an experienced and impartial adjudicator (i.e., an ALJ).[92] The ALJ is uniquely in a position of independence at the Commission and repeatedly has proved to be a fair and efficient arbiter of discovery disputes. In contrast, expanded discovery is far more susceptible to abuse and misuse, as well as likely to cause delays that would interfere severely with the Media Bureau's or ALJ's ability to rule expeditiously.[93] In effect, the *Notice*'s proposed expanded discovery directly would undermine the Commission's goal of ensuring expeditious resolution and fairness to all parties and, thus, be arbitrary and capricious.

2. The *Notice*'s proposals regarding automatic document production similarly are deeply flawed.

The automatic discovery proposals in the *Notice* similarly are at odds with the new rules adopted in the *Order* to expedite decisions on program carriage complaints. In fact, because the proposals are overly broad, they would add complexity, create more discovery disputes, and delay resolution of complaints. In addition, automatic discovery would create an incentive for

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92 The ALJ, working with the parties, has managed discovery in seven cases (*MASN II*, *Wealth TV v. Comcast/Cox/Bright House/TWC*, *NFL Network*, and *The Tennis Channel*) in ways that were acceptable to complainants and defendants alike. By contrast, the Bureau's only program carriage discovery orders in a program carriage case (12/24/08 and 12/31/08) were rescinded by a unanimous Commission decision. *See Herring Broad., Inc. v. Time Warner Cable Inc.*, Order, 24 FCC Rcd. 1581 ¶¶ 2-3 (2009).

93 The expanded discovery obligations proposed in the *Notice* will likely cause further delays when parties inevitably contest each other's compliance with the additional requirements.

networks to file complaints for the purpose of conducting fishing expeditions to obtain access to documents containing trade secrets and other commercially valuable information. This would be particularly problematic when combined with the *Order*'s new minimal standard for establishing a prima facie case (based solely on the complaint, and not looking at any evidence or legitimate business defenses contained in the answer). Together, these rules make it a relatively simple matter for programming networks to establish a prima facie case and, under the *Notice*'s proposed rules, automatically obtain access to their self-proclaimed competitors' key carriage contracts.[94] This would be unfair not only to the MVPD defendant but also to third parties whose contracts could fall within the scope of discovery. The end result would be that, in practically every carriage dispute, MVPDs will be put in the untenable position of either (1) having to defend against a complaint and potentially being required to hand over their programming contracts – what have long been considered (and acknowledged by the Commission) as the "crown jewels" of the business – *or* (2) having to forego some part of their editorial discretion by acceding to programmers' demands to avoid this outcome. Of course, none of these likely effects would further the Commission's goals of ensuring expeditious resolutions and fairness to all parties.

Nor, by its nature, can automatic document production be "narrowly tailored to the issues raised in program carriage complaints," as the *Notice* claims it would be.[95] Each program carriage dispute will have unique facts and issues, and the parties (and Media Bureau or ALJ after they have reviewed the pleadings and are presented by the parties with concrete disputes) will best understand what discovery will be necessary to illuminate the particular issues involved

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[94] Programming networks suddenly would have increased incentives to manufacture disputes in the hopes of obtaining these contracts.

[95] *2011 Program Carriage Order & Notice* ¶ 44.

and what protections are needed for confidential information. Narrow tailoring requires not only identifying documents relating to specified issues, but also identifying custodians/files to be searched and search terms to be used in electronic filtering. This type of identification simply cannot be done prior to a complaint being filed, and therefore automatic disclosure, by its nature, *broadens* rather than narrows the discovery process.

The proposed automatic discovery requests in the *Notice* make this abundantly clear. For example, the *Notice* proposes to require parties to disclose automatically "[a]ll 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."[96] Read literally, this disclosure requirement would require a search of countless employees' records for *any* reference to the complainant's "target" programming or the MVPD's affiliated programming. And, unlike in an adjudicator-controlled discovery process, the parties would not be in a position to clarify ambiguities in the undefined terms used, or in the application of those terms to specific situations. Nor would there be bilateral negotiation between the parties over their respective discovery requests, which has the salutary effect of winnowing out each party's demands to the particular discovery of highest value to its case.

Automatic document production not only would *not be* narrowly tailored, but also would impose significant, and potentially unnecessary, costs and burdens on the parties. Specifically, the requirement that documents be produced ten calendar days after the Media Bureau finds that the complainant has made a prima facie case will force parties to begin gathering documents

[96] *Id.* ¶ 46.

long *before* the Media Bureau finds that a prima facie case has been made so that they are prepared to submit documents a mere ten days later. Such preparation likely would involve ongoing anticipatory expenses, including starting information collections before a complaint is even filed. The time and expense of dealing with privilege issues also would skyrocket.

The *Notice* states that its automatic document production draws on an approach used in comparative broadcast proceedings, and that it was adopted "because it would result in 'substantial time savings.'"[97] But the automatic document production process used in comparative broadcast proceedings was overseen by an ALJ in a hearing process and, more importantly, did not involve production of documents whose disclosure was inherently controversial or required third-party consent.[98] In fact, the list of documents required to be automatically produced in comparative broadcast hearings was submitted by the Federal Communications Bar Association ("FCBA"), which tends to comment only in proceedings where the views of its various members reflect an overwhelming consensus.[99] And, based on the order, no party opposed the automatic production of documents proposed by the FCBA.[100] Thus, the automatic discovery there is nothing remotely akin to what is contemplated here.

Several of the discovery parameters set out by the *Notice* are impractical. For example, the proposed lists of documents to be produced automatically are very broad. Searches for

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97 *Id.* ¶ 44.

98 *In re Proposals to Reform the Commission's Comparative Hearing Process To Expedite the Resolution of Case*s, Report & Order, 5 FCC Rcd. 157 ¶ 16 (1990) (requiring the submission of, among other things, all formation and organizational documents for the broadcast applicants, all minutes of meetings relating to the application, all documents relating to the rights or plans to purchase or sell an interest in the applicant, all documents relating to pledges, mortgages, or other encumbrances with respect to the applicant, etc.), *modified*, 6 FCC Rcd. 157 ¶ 26 (1991) (issuing erratum addressing other issues).

99 *Id.*

100 *See id.* ¶¶ 23-30.

documents take significant time, and parties typically agree to limit the searches only to a small number of identified individuals and only based on agreed-upon search terms. But these types of limiting agreements are not possible under the proposed rules. In addition, discovery cutoffs must be tailored to each case. The Commission reaffirmed in its recent *WealthTV* ruling that Section 616 claims should be focused "'on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred.'"[101] This is particularly so where a claim may be allowed for an "act alleged to have violated the rules" more than three years after a carriage contract, in which case a three-year rule would bar a defendant from discovery relating to the negotiation of the parties' carriage contract.[102]

In short, automatic document production would lead to more discovery disputes, increased risk of disclosing third-parties' confidential information, and additional significant, and potentially unnecessary, costs and burdens on the parties. The only way an MVPD likely could avoid this outcome would be if it sacrificed its editorial discretion and caved into programmers' demands. MVPDs cannot constitutionally be forced to make such a false choice; in effect, automatic document production would automatically penalize MVPDs for exercising their editorial discretion.

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[101] *WealthTV FCC Order* ¶ 6 (quoting *1993 Program Carriage Order* ¶ 14).

[102] If a complaint is brought more than three years after a contract – which should not be permitted but has been – then a three-year discovery cutoff will place the manner in which the parties' respective rights were obtained outside the scope of discovery. *See infra* Section V.A. Further, an arbitrary discovery cutoff would unfairly advantage a hypothetical complainant who, for example, formulated its allegations years prior to suing, yet knowingly delayed filing its complaint for longer than the length of the discovery cutoff.

3. To the extent the Commission allows for any party-controlled or automatic discovery, it should provide clear guidance and limits on the types of discovery permitted, and it should protect confidential information.

The Commission should reject the proposals to expand discovery and impose automatic discovery. To date, for those cases that were perceived (correctly or not) to present complex issues, the Media Bureau has referred them to an ALJ who has supervised discovery. In Comcast's experience, the party-driven, ALJ-supervised discovery has worked effectively and should not be changed.

To the extent the Commission nonetheless believes that some changes to its discovery rules are necessary, it must be mindful of the burdens such discovery will impose, as well the due process necessary to ensure all parties have an opportunity to make their cases. Accordingly, the Commission should provide clear guidance and limits on the types of discovery permitted, while also ensuring that the parties have the opportunity to object to certain requests and to expand the scope of discovery where appropriate.

Default limits on the number of discovery requests a party can make may be appropriate as long as parties can seek to have an experienced and impartial adjudicator modify those limits. The proposed timetable for discovery requests, however, is backwards. The time-consuming part of the process is not drafting discovery requests, but responding and objecting to them on an informed basis. So instead of twenty days to draft requests and five days to object, a more appropriate approach would be to allow parties five days to draft requests and thirty days to respond. Discovery also should be limited to searching the files of the MVPD defendant (which is the only entity that can violate the program carriage rules); there should be no duty to provide discovery from the programming side of the business. If and to the extent that the affiliated network at issue played any relevant role in the MVPD's carriage decision, that will be reflected in discovery from the MVPD itself.

Most importantly, both fairness and the need to find the truth require that any discovery obligations must be mutual. Any rule imposed on defendants should also be imposed on complainants. The Commission should recognize from its own recent experience that discovery of complainants – including production of their internal documents – can be crucial to testing their allegations (assuming discovery is even warranted in a given case). For example:

- In *WealthTV*, the complainant's own documents played a role in undermining the complainant's allegations in numerous ways.[103]
- In *NFL*, the NFL's internal documents contained the League's admission that a "[m]arket clearing rate reduction would result in wide distribution of NFL Network" and allowed counsel for Comcast to elicit testimony that the NFL owners discussed the connection between lowering the price for the NFL Network and increased distribution.[104]

In cases where discovery is necessary and appropriate, depriving defendants of access to key documents such as these would work an injustice.

Although the *Notice* focuses on discovery, it does not address the problems with lack of disclosure of the complainant's supporting backup data that have beset previous complaint proceedings. If a defendant is required to include with its answer any document on which it relies in the answer, the same requirement surely should apply to the complainant and the complaint. A mutually-imposed obligation is particularly important here to protect a defendant's

[103] *WealthTV ALJ Decision* ¶ 29 ("[M]any of WealthTV's PowerPoint marketing presentations to MVPDs, potential advertisers, and others describe WealthTV as appealing to an audience broader than the claimed target demographic of adult males aged 25 to 49."), *aff'd*, *WealthTV FCC Order* ¶ 22; *see WealthTV ALJ Decision* ¶¶ 27-34. Of course, there was no need for any discovery in the *WealthTV* case to see through WealthTV's baseless claims.

[104] *NFL Enters. v. Comcast Cable Communications*, File No. CSR-7678-P, MB Docket No. 08-214, Tr. 707-708 (Apr. 14, 2009) (public version).

due process rights and to ensure that a defendant can defend itself against baseless claims that directly challenge its editorial decisions.

For example, the *Order* sets out criteria for a complainant to establish whether networks are similarly situated for purposes of establishing a prima facie case, but does not set any baseline for the quality of the evidence that must be advanced to make that showing.[105] Comcast's experience is that complainants have withheld supporting documentation from their complaints and replies – documentation that, if it were timely produced, could have expedited the issuance of a decision by revealing the infirmity of the complaint. The Commission should require that the complainant's full set of backup data supporting its claims be disclosed so that it is subject to testing by the defendant in the answer and the Bureau in determining whether a prima facie showing has been made. This is consistent with the new rule that gives a defendant 60 days to answer, and the rule that requires that the Bureau determine whether a prima facie case has been made solely based on the complaint. Fact witness and expert declarations that do not provide any backup data and instead simply rely on unsubstantiated assertions as to, for example, two networks' similarity – as has been the case in prior complaints – should not be credited.[106]

Finally, the Commission's proposal to adopt a standard protective order is commendable, but may not be able to adequately protect confidential information or third-parties' legitimate

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[105] *See 2011 Program Carriage Order & Notice* ¶ 14.

[106] In *WealthTV*, the Bureau's HDO relied on the "evidence" (devoid of any backup materials) presented in the declarations of purported market research expert Mark Kersey and purported cable industry expert Jedd Palmer to support its determination that WealthTV's cases should proceed. *See Herring Broad., Inc. v. Time Warner Cable Inc.*, Memorandum Opinion & Hearing Designation Order, 23 FCC Rcd. 14787 ¶ 14 & nn.58-59 (Media Bureau 2008). But, at trial, the ALJ deemed Mr. Kersey, based on his deposition and other factors, too unreliable even to testify, and Mr. Palmer's testimony was superseded by another expert witness (and the ALJ found this replacement witness to be not credible or reliable). *See Wealth TV ALJ Decision* ¶ 5 n.18; *id.* ¶ 60 n.238; *id.* ¶ 25.

interests.[107] To date, protective orders have been tailored to each dispute in order to ensure stringent protections for confidential information. That is because parties, especially third parties, have different sensitivities, which reasonably vary based on their relationship to each of the parties in the carriage proceeding, about confidential information as well as who might see that confidential information.[108] In certain cases, the proposed protective orders have failed to protect broadly against disclosure of confidential carriage information to opposing parties' expert consultants that also represent other parties in industry negotiations. Thus, there is no one-size-fits-all answer, and the Commission should refrain from imposing a standard protective order.

B. Damages

The Commission's authority to impose damages, especially punitive damages, for program carriage violations, is questionable at best.[109] Regardless, the creation of a damages remedy likely would increase illegitimate complaints while making settlement less likely. The effect, of course, would be that MVPDs would be further penalized for exercising their editorial discretion, and the penalty would manifest itself well before the Commission ever found a violation by forcing MVPDs to defend against baseless complaints filed in the hopes of a potential windfall. Such a result would fly in the face of the First Amendment and would be the epitome of arbitrary and capricious rulemaking.

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[107] As the *Notice* acknowledges, a petition for reconsideration seeking to protect third-parties' confidential information from disclosure in program access proceedings has been pending for four years without Commission action. *2011 Program Carriage Order & Notice* ¶ 48 & n.186.

[108] The *Notice*'s proposal that, if parties are unable to mutually agree to their own protective order, then they will be "deemed" to have agreed to the standard protective order effectively would give each party a veto over any "nonstandard" term. That would be unfair to parties with legitimate "non-standard" confidentiality needs in a particular case, and would invite gamesmanship.

[109] *Compare* 47 U.S.C. § 208 (expressly allowing for damage claims pertaining to breach of common carrier duties), *with id.* § 536 (no reference to damages).

The *Notice* here again seeks comment on importing rules the Commission has adopted to resolve program access disputes to program carriage cases. And once again, the *Notice* fails to acknowledge that there are significant differences between program access and program carriage. Most notably, while the program access rules expressly grant MVPDs access to certain programming, the program carriage rules do not grant programming networks any right to carriage (or right to be carried at any particular tier position, penetration level, or price). Moreover, a violation of the program carriage discrimination prohibition can occur only if an MVPD's conduct unreasonably restrains the ability of the programming network to compete fairly. Simply because the Commission allowed program access complainants to seek damages does not mean damages would be appropriate in program carriage cases where the issues tend to be more complex and the First Amendment implications of forced carriage cut closer to the bone. To the contrary, the availability of damages would *increase* the potential penalty that an MVPD faces as a result of carrying affiliated networks and, therefore, increase the chilling effect of the program carriage rules on such carriage.[110]

A compensatory damages regime is unwarranted in light of the abundant evidence of marketplace competition that severely limits the ability of any MVPD to affirmatively harm a programming network's ability to compete fairly. Putting aside whether damages would ever be warranted for a proven violation of Section 616, it is clear that the availability of damages would increase the complexity, cost, and conjectural nature of program carriage proceedings. A complainant seeking damages would have to produce evidence regarding the amount of damages and prove that those damages were caused by the program carriage violation. Due process and

[110] In light of programmers' simplistic "carry one, carry all" arguments – i.e., if an MVPD carries one affiliated programming network, then it should be required to carry *all* other programming networks that claim they are similarly situated regardless of consumer demand or the MVPD's editorial desires – MVPDs likely will face significantly more complaints and potential penalties.

respect for First Amendment concerns necessitate that the defendant have an opportunity to test the complainant's evidence, which would require discovery as to the claimed losses, including discovery regarding other potential causes of those losses. Quantifying any damages in a program carriage case would be difficult; quantifying those damages related to a complainant's unreasonably restrained ability to compete fairly for viewers, advertising, or programming, and establishing that those damages were "caused" by discrimination on the basis of affiliation, would be especially complex and highly speculative. Further, establishing damages – which typically entails expert testimony – will further complicate and prolong program carriage proceedings.[111]

The increased complexity resulting from adding a new damages remedy would be inconsistent with the Commission's goal of deciding program carriage cases more quickly and, more particularly, its new limited timetables for program carriage cases. In addition, providing programmers a chance at damages will simply encourage more complainants to file complaints in order to pursue a potential windfall (compensatory and perhaps even punitive damages). In fact, the availability of damages might well provide programmers with the perverse incentive to manufacture program carriage grievances earlier (e.g., declaring an "impasse" when negotiations have just started) in an attempt to start the compensatory damages clock ticking sooner.

With respect to the *Notice*'s questions about damages in the standstill context, this simply underscores why a program carriage standstill was as ill-advised on practical terms as it was on infirm legal ground. Simply put, there is no way to properly compute compensatory damages in a "true-up" situation where an MVPD has been wrongly compelled by the government to carry programming that it wanted to drop after a contract expired. Nor is it possible to compensate an

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[111] Proving damages in civil litigation generally entails expert analysis, and both sides likely would retain experts to address damages issues in a program carriage proceeding.

MVPD for having to forego carriage of a different network on a channel where it was wrongly forced to carry programming under a standstill order. The *Notice*'s query as to whether "a defendant MVPD that ultimately prevails on the merits nonetheless [should] be required to pay for carriage during the standstill period" is ridiculous.[112] The Commission cannot legally expect MVPDs to pay for having the Commission wrongly infringe on their First Amendment rights.

Allowing complainants to seek punitive damages would be especially ill-advised. The Commission's punitive powers lie in the forfeiture provisions of 47 U.S.C. §§ 501-504, and they do not convey authority to impose punitive damages. Nor does Section 616's reference to "penalties" permit punitive damages. Civil penalties and punitive damages, while akin to each other, are distinct.[113] Of particular note, penalties are paid to the government whereas punitive damages generally are paid to a private plaintiff.[114] And, unlike penalties, punitive damages have the potential, indeed likelihood, to make program carriage cases harder to settle. Penalties and punitive damages are both punishments, and it would be improper to punish a defendant twice.

Moreover, punitive damages are warranted only where there is evidence of reprehensible conduct, and there is no evidence whatsoever of such conduct in the program carriage context. As the Supreme Court has held:

> The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused

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112 *See 2011 Program Carriage Order & Notice* ¶ 53.

113 *See, e.g.*, *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996) (holding that one indicium of the excessiveness of a punitive damages award is a comparison of "the punitive damages award" with "the civil or criminal penalties that could be imposed for comparable misconduct").

114 *See, e.g.*, *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) ("A 'civil penalty' is a 'fine assessed for a violation of a statute or regulation,' and as such [is] paid to the government, not to the opposing party or their counsel." (quoting *Black's Law Dictionary* 1168 (8th ed. 2004))).

> was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[115]

By their nature, program carriage decisions do not meet this standard. They obviously do not involve the health or safety of others. Nor is there any evidence that carriage decisions entail "intentional malice, trickery or deceit" or somehow "target" financially vulnerable entities, or that there are repeated instances of program carriage violations.

Punitive damages are particularly disfavored in actions, such as program carriage proceedings, affecting a defendant's First Amendment rights.[116] The prospect of punitive damages could compel an MVPD to carry programming it otherwise would not choose to carry simply to avoid the risk of punitive damages. In addition, the prospect of punitive damages could further deter a vertically integrated MVPD from distributing its affiliated programming broadly, thus chilling free speech and depriving the MVPD and its subscribers of the benefits of vertical integration.

Finally, the *Notice*'s assertion that allowing for the award of damages would "promot[e] settlement of any disputes" is unfounded.[117] To the contrary, the potential for damages would be just one more issue the parties must address in order to reach a settlement, so allowing damages would likely make settlement more difficult. Although the Commission may be assuming that the potential damages exposure will motivate a defendant to settle a potentially meritorious claim

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115 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (internal quotation marks, brackets and citations omitted).

116 *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (restricting the availability of punitive damages and other damages in excess of actual injury in defamation cases because they "inhibit the vigorous exercise of First Amendment freedoms"); 1 *Dobbs Law of Remedies* § 3.11(1), at 461 (2d ed. 1993) ("[C]ourts have denied or circumscribed punitive damages in defamation and other cases implicating a defendant's First Amendment rights, since punitive damages are especially likely to chill speech rights." (footnote omitted)).

117 *2011 Program Carriage Order & Notice* ¶ 51.

more quickly, it is equally (if not more) likely that this prospect may prompt a complainant to place an unrealistically high value on its claim or otherwise unreasonably refuse to settle its claim. The prospect of damages likely would embolden a hypothetical complainant with a weak claim that views the claim as a lottery ticket to pursue its complaint to the end. If the Commission's goal indeed is to expedite resolution of program carriage cases, and if it sought to do so consistent with Congress's expressed intent that the Commission rely on the marketplace to the maximum extent feasible, permitting damages would conflict directly with that goal and Congress's intent and, thus, would be arbitrary and capricious.

C. Mandatory Carriage

The Commission should not adopt its proposal to modify its procedures for staying mandatory carriage orders. Instead, consistent with the First Amendment and due process, the Commission should modify its existing program carriage procedures to conform to the APA and the Communications Act by delaying the effectiveness of *any* remedial order by an ALJ or the staff, including an order mandating carriage, unless and until it is upheld by the Commission.

In a program carriage proceeding, as in other proceedings, any remedial order issued by an ALJ or the staff is subject to review by the Commission.[118] At the same time, the rules provide that a program carriage order is "effective upon release," with an express exception only if the order would cause programming to be deleted from an MVPD's system.[119] The *Notice*, however, proposes to give *immediate effect* to any remedial order issued by an ALJ or the Media Bureau and to eliminate or modify when a defendant MVPD is entitled to an automatic stay. But giving immediate effect to an ALJ's initial decision that is subject to review by the Commission

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118 *See* 47 C.F.R. §§ 1.104, 76.10(c).

119 *See id.* §§ 76.10(c)(2), 76.1302(g)(1).

does not conform to the APA, and giving immediate effect to a staff order that is subject to Commission review is inconsistent with the Communications Act. And the proposal to eliminate or modify the one rule that makes the Commission's current remedy procedures more consistent with the APA and the Communications Act, i.e., granting an automatic stay where mandated carriage would result in deletion of other programming, would only worsen the problem. Instead of adopting the *Notice*'s proposals, the Commission should modify its existing procedures so that *any* order mandating carriage is stayed pending Commission review.

1. The Commission cannot consistent with the APA give immediate effect to an ALJ's initial decision ordering carriage without permitting for immediate judicial review.

Section 10(c) of the APA provides that an agency may make exhaustion of agency appeals a condition to judicial review of agency action only if "the action meanwhile is inoperative."[120] This avoids the "fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective."[121] Consistent with this principle of administrative law, the Commission's rules expressly provide that the effectiveness of an initial decision by an ALJ is stayed by "[t]he timely filing of exceptions."[122]

The Commission's rules, however, appear to have created an exception for certain initial decisions, including decisions in program carriage proceedings, in which initial decisions issued

[120] 5 U.S.C. § 704; *see also* Attorney General's Manual on the Administrative Procedure Act (1947) ("[A]n agency . . . may by rule require a party to appeal to it from an initial decision of a hearing officer only if [the matter] determined upon by the hearing officer is held in abeyance pending the agency's action on the appeal.").

[121] S. Rep. No. 79-752, at 27 (1945).

[122] 47 C.F.R. § 1.276(d) ("The timely filing of exceptions, the further review or consideration of an initial decision on the Commission's initiative, or the taking of action by the Commission under paragraph (c) of this section shall stay the effectiveness of the initial decision until the Commission's review thereof has been completed.").

by an ALJ "will become effective upon release and will remain in effect pending appeal."[123] The courts have explained that, because an initial decision is not, under the Commission's rules, rendered "inoperative" by the filing of exceptions, that initial decision can be immediately subjected to judicial review.[124] Yet, that result is contrary to the Commission's expressed desire that "[a] ruling on the merits by the ALJ *must* be appealed directly to the Commission."[125]

Thus, absent a discretionary stay – which the Commission has made clear "will not be routinely granted"[126] – these provisions place a party aggrieved by an initial decision in a precarious position. Either a party would have to disregard the Commission's mandate that it appeal an initial decision "directly to the Commission" and exercise its right under the APA to obtain immediate judicial review of the initial decision, or the party would have to forego immediate judicial review and comply with an untested initial decision.[127] That is the very result

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123 *See id.* § 76.10(c)(2) ("[I]n proceedings brought pursuant to §§ 76.1003, 76.1302, and 76.1513 of this part, unless a stay is granted by the Commission, the decision of the administrative law judge will become effective upon release and will remain in effect pending appeal."); *id.* § 76.1302(g)(1). As noted above, such a remedial order is automatically stayed if it would require the deletion of programming. *See id.* § 76.1302(g)(1).

124 *See Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

125 *1993 Program Carriage Order* ¶ 34 (emphasis added).

126 *Id.*

127 Where an MVPD also has grounds to seek review of an adverse staff ruling (e.g., an *HDO* that has determined a threshold issue like the statute of limitations) in the same proceeding, then the inconsistency of the Commission's procedures with the APA is even more stark. Under those circumstances, the MVPD would be required to seek Commission review of the initial decision not only by mandate of the Commission, but also by the coercive effect of the Commission's rules, which expressly condition an MVPD's ability to file an application for review of an *HDO* on the filing of exceptions to the initial decision. *See* 47 CFR § 1.115(e)(3). Thus, the MVPD would be forced to give up its right to challenge the HDO's ruling on the threshold issue if the MVPD does not appeal the initial decision directly to the Commission – and, as a practical matter, the Commission has denied the MVPD the ability to seek immediate judicial review of the initial decision. This is not permissible under Section 10(c) of the APA. Under Section 10(c), "[a]gencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be 'inoperative' pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review." *Darby v. Cisneros*, 509 U.S. at 152. But the Commission's rules, inadvertently or not, have frustrated this statutory scheme by providing that an initial decision is, by operation of those rules, effectively non-final, while simultaneously providing that it remains operative pending appeal. The Commission should conform its procedures to the APA by staying the initial decision pending appeal.

that Section 10(c) of the APA was designed to prevent. To avoid forcing parties into this position, the Commission should amend its rules to comply with the APA and to ensure that initial decisions are stayed by "[t]he timely filing of exceptions."[128]

2. The Commission cannot, consistent with the Communications Act, give immediate effect to an order taken pursuant to delegated authority that is subject to Commission review.

Section 5(c)(3) of the Communications Act expressly provides that orders "made or taken" pursuant to delegated authority, "*unless reviewed as provided in paragraph (4) of this subsection*, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders . . . of the Commission."[129] Paragraph (4) of Section 5(c), in turn, provides for Commission review of such orders pursuant to an application for review.[130] Thus, under Section 5(c), an order made or taken pursuant to delegated authority cannot have the force and effect of a Commission order once an application for review has been filed "within such time and in such manner as the Commission" has prescribed.[131] So while a remedial order issued by the Commission in a program carriage case is, as expressly provided in Section 76.1302(g), "effective upon release," such an order issued pursuant to delegated authority cannot, consistent with Section 5(c), be effective immediately where that order is subject to an application for review.[132]

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[128] 47 C.F.R. § 1.276(d) ("The timely filing of exceptions, the further review or consideration of an initial decision on the Commission's initiative, or the taking of action by the Commission under paragraph (c) of this section shall stay the effectiveness of the initial decision until the Commission's review thereof has been completed.").

[129] 47 U.S.C. § 155(c)(3) (emphasis added).

[130] *Id.* § 155(c)(4).

[131] *Id.*

[132] The Commission's contrary interpretation, which has been upheld outside the program carriage context, *see Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986), is based on a misreading of Section 5(c). In particular, the Commission has argued that "reviewed" means "a completed review process – not the mere

Requiring an MVPD aggrieved by a mandatory carriage order to seek a discretionary stay will unnecessarily complicate program carriage proceedings and waste the resources of the parties, the Commission, and the courts. Mandatory carriage orders are especially likely to entail irreparable harm to the MVPD.

Mandatory carriage interferes with an MVPD's exercise of its editorial discretion under the First Amendment, and may constitute a penalty for carriage of affiliated networks. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'"[133] Further, it is disruptive to an MVPD's relationships with its customers to require the provision of programming that subsequently could be removed upon reversal of an initial decision. Also, although payment of money generally does not constitute irreparable harm, a mandatory carriage order would irreparably harm an MVPD by (1) requiring the payment of license fees in the absence of any mechanism for an MVPD to recoup those fees in the event the mandatory carriage order subsequently is reversed and (2) forcing the MVPD to forego carriage of another programming network while the

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commencement of that process." Opposition of FCC to Emergency Request for a Stay Pursuant to the All Writs Act at 17, *Cablevision Sys. Corp. v. FCC,* No. 11-4104 (2d Cir. Oct. 20, 2011). But that reading improperly disregards the full statutory phrase, which is not merely "reviewed," but instead "reviewed as provided in paragraph (4)," 47 U.S.C. § 155(c)(3). *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("The Court does not focus on [a] word . . . in isolation . . . but follows the cardinal rule that statutory language must be read in context." (internal quotation marks omitted)). Paragraph (4) is the statutory provision that authorizes "commencement of [the review] process," whether by the filing of an application of review or upon the Commission's own initiative. 47 U.S.C. § 155(c)(4). Further, the Commission's argument erroneously conflates the term "reviewed" with the separate terms "passed upon" and, more specifically, "grant" or "deny," which Section 5(c) uses to refer to the acts that "complet[e]" the review process. *Id.* § 155(c)(4)-(6). It is well-established that Congress's use of different language in the same statute creates a strong inference that different meanings are intended. *See, e.g.*, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984). Properly construed, Section 5(c) prevents an order from taking effect if such order was taken pursuant to delegated authority and is subject to an application for review filed pursuant to paragraph (4).

133 *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

erroneous mandatory carriage order is in effect.[134] Given the weight of those equities in favor of a stay, it is wasteful to require motion practice to obtain a discretionary stay.

3. The Commission should reject the *Notice*'s proposal to make it harder for an MVPD to obtain a stay of an order mandating carriage.

The Commission's current rule that grants an MVPD an automatic stay when an order mandating carriage would cause programming to be deleted from an MVPD's system and the MVPD appeals that decision to the full Commission is consistent with the APA and Communications Act.[135] The *Notice*, however, proposes to eliminate this rule, or in the alternative, require an additional evidentiary showing or impose an allegedly "similar" rule on programmers.[136] These proposed rules would provide consumers with less protection, raise significant First Amendment concerns, and be impracticable as proposed.

The Commission, MVPDs, and programmers all have a genuine interest in providing consumers with continued access to the programming that they have come to expect. The current rule prevents a staff-level decision from causing deletion of existing programming, which, as the Commission acknowledges, protects consumers.[137] Further, the complainant programmer is not seriously harmed by a stay of any effective date because the rule already provides that, if the Commission upholds the mandatory carriage remedy, the defendant will be required to carry the programming for a period of time equal to what had elapsed during the

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[134] *See Robertson v. Cartinhour*, 429 Fed. Appx. 1, 3 (D.C. Cir. 2011) ("Although the general rule has it that economic harm does not constitute an irreparable injury . . ., the rule is based upon the presumption that 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,' *see Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).").

[135] 47 C.F.R. § 76.1302(g).

[136] *2011 Program Carriage Order & Notice* ¶¶ 57-58.

[137] *Id.* ¶ 56.

period for the Commission's review.[138] As it was promulgated in 1993, this rule balances the equities between MVPDs, consumers, and programmers.[139] This rule remains important today to ensure that the adjudicator made the correct decision – hence, Commission review – before denying consumers access to programming that likely has nothing to do with the dispute.

In addition to protecting consumers, the current rule is necessary to safeguard MVPDs' and other programmers' First Amendment rights.[140] It is indisputable that adjudicator-mandated carriage would directly interfere with an MVPD's First Amendment rights; the adjudicator has overridden the MVPD's editorial discretion as to the programming it chooses to carry, and mandatory carriage both compels speech by the MVPD and penalizes the MVPD for carriage of affiliated programming. Where such carriage requires the deletion of other programming, the adjudicator has, as a practical matter, further restricted the MVPD's speech. Also, such mandated carriage directly implicates the deleted programmer's rights. Given this government intrusion, it is critical in the context of the forced deletion of programming that the Commission review a decision before that decision is effective.

Moreover, in such cases, an automatic stay pending full Commission review is necessary to ensure that the MVPD and the programming network subject to deletion are adequately protected. Requiring MVPDs and programming networks to petition for a stay is inadequate. Given the heightened First Amendment implications, the Commission is right to provide extra protection to MVPDs and the programming networks they choose to carry.

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[138] *1993 Program Carriage Order* ¶ 33.

[139] *Id.*

[140] *Cf. Turner I*, 512 U.S. at 636-37 ("By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining.").

The *Notice* asks whether a defendant should be required to make an evidentiary showing to the adjudicator demonstrating that it would be required to delete programming to accommodate the complainant's programming. But history supplies no basis on which to conclude that such an evidentiary showing should be required. In fact, in the eighteen years since this rule has been in force, it has been invoked only once.[141] Given the infrequency with which this rule has been invoked, there is no justification for any additional burden.

In addition to not being justified, the proposed rule is also impracticable. It creates the possibility that complainants will seek discovery on the issue, which only adds to the burden of program carriage proceedings. Instead, if the Commission is going to require any "evidentiary showing" on this issue, which it should not, it should be sufficient to require a sworn declaration.

The proposed rule also contemplates that an MVPD make this showing in a bifurcated, remedy-type phase *before* a remedy has even been imposed.[142] It would be inappropriate to require an MVPD to have to make this showing during a remedial phase – much less any earlier – before the MVPD has likely even had a chance to determine whether it will seek review of the adjudicator's decision to the Commission. If the Commission decides to require an affirmative showing, the MVPD should be permitted to enter a sworn declaration only *after* it knows what the remedy will be and not prior to the remedy being determined.

The Commission should also reject the *Notice*'s proposal to adopt a rule that would keep a standstill in effect on appeal *even after an adjudicator has found that the MVPD's actions were*

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[141] *See* Application for Review at 1 n.1, *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.* (Nov. 26, 2008) (stating that the Media Bureau's order would require Time Warner Cable to delete existing programming from its systems and, that under 47 C.F.R. § 76.1302(g)(1), the filing of the application for review stayed the effective date of the Bureau's order). Ultimately, the Commission found the complaint to be without merit, and the Bureau order requiring carriage was rescinded. *See TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Memorandum Opinion & Order, 25 FCC Rcd. 18,099 (2010).

[142] *2011 Program Carriage Order & Notice* ¶ 58.

lawful. It is bad enough (and legally indefensible) that an MVPD subject to a standstill may be forced to carry a programmer's network – a form of government-compelled speech – based solely on a preliminary ruling from the Media Bureau, and that it might be required to do so throughout the pendency of the case with no automatic stay from the Commission (as opposed to from a court) or even a definitive or efficient time period for review in order to vindicate its First Amendment rights.[143] But it would be outrageous to perpetuate the compelled carriage of programming *even after an adjudication that the MVPD did not violate the program carriage rules*. Especially after having lost on the merits, the programmer has no legal or legitimate right to continued carriage pending appeal.[144] By contrast, lifting the standstill relieves the MVPD of a government-compelled speech obligation. The Commission should make clear that carriage pursuant to a standstill order, which is premised primarily on the likelihood that the complainant will prevail on the merits, should cease once the Media Bureau or ALJ determines that the complainant has not prevailed on the merits.

D. Scope of Discrimination Provision

The Commission proposes to expand the scope of program carriage liability in two extreme ways that make no sense and would only invite more meritless litigation based on ever more exotic and attenuated theories of misconduct. One proposal would allow a complaint to be filed against an MVPD for its conduct relating to *another* MVPD's affiliated network that competes with the complainant's network.[145] The second proposal (or set of proposals) would

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[143] 47 C.F.R. § 76.10(a). Note that, because a standstill is an interlocutory decision, defendants will have to wait for a decision on the merits in order to appeal any standstill order by the Media Bureau. The interval between a standstill order and a final Commission-level adjudication on the merits could easily be a year or more.

[144] The complainant has no legal right to carriage in the first place. Nor are the complainant's First Amendment rights at stake in program carriage proceedings: to the extent an MVPD is alleged to have violated Section 616, that is a result of private action, not Government action.

[145] *2011 Program Carriage Order & Notice* ¶¶ 74-76.

expand the scope of Section 616 to encompass "relationships . . . other than common ownership or management," including relationships with or ownership interests in "'video programming vendors' that are not necessarily programming networks."[146] Both of these proposals are ill-conceived. The first proposal is a rehash of a theory that the D.C. Circuit rejected in 2001 and that the Commission has rightly declined to adopt in other contexts. The second proposal is so amorphous and outlandish that the *Notice* does not even propose any rule language to give it meaning or effect. Both proposals would expand vastly the scope of the rules beyond what Congress designed when these rules may have been more justifiable back in 1992 and well beyond any demonstrated need for new regulation. Such an expansion would be arbitrary and capricious and burden far more speech than Congress intended or that is necessary to promote competition and diversity.

The *Notice*'s proposal to allow programming networks to file complaints against MVPDs that are in no way affiliated with a similarly situated programming network is wholly without merit, outside of the Commission's statutory authority, and ignores the fact that the marketplace is highly competitive. There is absolutely no evidence that MVPDs discriminate against unaffiliated programming networks in favor of other MVPDs' affiliated programming networks, making this even more speculative than other aspects of the proposed rules. And, as the *Notice* acknowledges, the D.C. Circuit has struck down a Commission order that infers collusion among vertically integrated MVPDs.[147]

The *Notice* premises the need for expanding its rules on the theory that vertically integrated MVPDs that agree to compensate each other for carriage of each others' affiliated

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[146] *Id.* ¶ 78.

[147] *Id.* ¶ 74.

programming networks necessarily are discriminating against an unaffiliated programming network. But there would be nothing special or inappropriate about efficient and mutually beneficial exchanges of value between an MVPD and a programming network affiliated with another MVPD.

There is absolutely no basis (or authority) for the Commission to convert competitive marketplace behavior into a program carriage violation. In fact, in light of the statutory directive to rely on the marketplace to the greatest extent feasible, doing so would be in direct conflict with the 1992 Cable Act as well as arbitrary and capricious. Moreover, the marketplace facts belie the Commission's concern. "Normally, an agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency."[148] Of particular note, when their carriage is compared to the carriage of scores of very successful networks that are not affiliated with any MVPD (including all of the broadly carried and highly successful networks owned by CBS, Disney, Fox, Scripps, Time Warner, and Viacom), MVPD-affiliated networks do not appear to enjoy any special carriage benefit. In the absence of direct evidence of collusion to foreclose an unaffiliated programming network from the marketplace, the Commission should not and cannot lawfully adopt any presumption that mutually beneficial agreements reached through arms-length negotiations are anti-competitive. The *Notice*'s attempt to suggest that Comcast ever took a different position is unavailing.[149]

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[148] *State Farm*, 463 U.S. at 43; *see Kristin Brooks Hope Ctr. v. FCC*, 626 F.3d 586, 588 (D.C. Cir. 2011); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 714 (D.C. Cir. 2011); *see also Time Warner II*, 240 F.3d at 1137 (explaining that "to pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made" (internal quotation marks omitted)).

[149] The *Notice* cites comments from Comcast in its opposition to the horizontal ownership cap as evidence that Comcast supports this broadened interpretation of "affiliation." *2011 Program Carriage Order & Notice* ¶ 75 n.260. Comcast's comments, however, are cited out of context. A primary focus in the horizontal ownership cap case was whether vertically integrated MVPDs collude with each other to discriminate against an unaffiliated network, and the D.C. Circuit determined that there was no evidence of such collusion. *See Time Warner II*, 240 F.3d at 1132-33. Comcast's reference to the program carriage rules as an "alternative, better tailored legal remed[y]

The *Notice*'s proposal to potentially include other upstream relationships in the definition of "affiliated" (including production studios and sports teams that an MVPD may not even have an interest in) is even more unfounded and nonsensical, and well beyond the Commission's authority.[150] The statute cannot be read to further expand regulation to hundreds of other MVPDs whether or not the programming is affiliated with an MVPD defendant. Nothing in Section 616 authorizes the Commission to expand the scope of its program carriage discrimination adjudications in that manner.[151]

How an upstream programming supplier licenses its studio or sports content to other networks (whether affiliated or unaffiliated) is far removed from the statute's concern with how an MVPD may be improperly discriminating "in video programming *distribution* . . . in the selection, terms, or conditions for *carriage*."[152] This core concern about *carriage* of *programming networks* is punctuated throughout the Commission's original implementing order.[153] Indeed, this is how Section 616 has been understood in every program carriage

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. . . to reduce the risk of collusion, even if such a risk were shown to exist," *see* Supplemental Comments of Comcast Corp., MM Docket No. 92-264, at 14-15 (Feb. 14, 2007), refers to cases where there is *direct evidence* of collusion, i.e., two MVPDs expressly agree to discriminate against an unaffiliated programming network in an effort to unreasonably restrain its ability to compete. *See id.* at 15 (referencing antitrust laws' prohibition on horizontal agreements in restraint of trade – "agreements that may be proven either through direct or circumstantial evidence"). The main point now (as then) is that there is no evidence of any collusive behavior and no evidence that MVPDs have either the incentive or the ability to collude, and so there continues to be no justification for any such rule.

[150] *2011 Program Carriage Order & Notice* ¶¶ 75, 78.

[151] *See* S. Rep. No. 102-92 at 73 (1991) ("The term 'video programmer' means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale. This term applies to those video programmers which enter into arrangements with cable operators for carriage of a programming service. For example, the term 'video programmer' applies to Home Box Office (HBO) *but not to those persons who sell movies and other programming to HBO*. It applies to a pay-per-view service *but not to the supplier of the programming for this service*." (defining "video programmer") (emphasis added)).

[152] 47 U.S.C. § 536(a)(3) (emphasis added); *see also 1993 Program Carriage Order* ¶ 29 (instructing that "complaints alleging discriminatory treatment that favors 'affiliated' programming vendors . . . must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor").

[153] *See, e.g., 1993 Program Carriage Order* ¶ 2 ("[V]ertically integrated cable operators have the incentive and ability to favor affiliated *programmers* over unaffiliated *programmers* with respect to *granting carriage* on their

adjudication to date. The Commission does not have unfettered discretion to revisit a statutory interpretation that has remained consistent for nearly two decades, especially where its proposed interpretation would conflict with another statutory directive.[154]

There is no factual basis for the *Notice*'s suggestion that "changes in the marketplace" warrant greater scrutiny of "relationships" – such as the decision to carry an unaffiliated programmer's bundle of programming networks – unrelated to ownership of networks. The legislative history of the 1992 Cable Act demonstrates that then-widespread vertical integration, i.e., shared ownership interests between networks and MVPDs, was the core concern underlying the adoption of Section 616 and other provisions in the 1992 Cable Act.[155] One need only review the types of ownership interests and relationships that could be seen in industry commenters that participated in the Commission's original 1993 program carriage rulemaking proceeding to understand that complex ownership interests and bundled networks are nothing new in the video programming marketplace.[156] Yet the Commission at that time did not see the

systems.") (emphasis added); *id*. ¶ 14 (stating that "we adopt general rules that are consistent with the statute's specific prohibitions regarding *actions between distributors and program vendors in forming carriage agreements*" (emphasis added)).

[154] *See Fox Television Stations*, 129 S. Ct. at 1811 ("An Agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). As a practical matter, expansion of the scope of "affiliation" in the ways proposed would only lead to more fishing expeditions and meritless theories of liability.

[155] *See* S. Rep. No. 102-92, at 25 & accompanying chart (1991).

[156] *See 1993 Program Carriage Order* app. B (listing commenters that filed in response to the NPRM, including Discovery, Liberty, and Viacom, all of which had complex ownership structures at the time). For example, in 1993, Viacom owned and operated "program services, cable systems and other entertainment-related businesses," including (1) Viacom Cable, which owned and operated cable systems serving about 1 million subscribers in Oregon, Washington, Northern California, Tennessee, and Ohio; (2) Showtime Networks Inc., a wholly-owned subsidiary that owned and operated premium channels Showtime, The Movie Channel, and FLIX; (3) MTV Networks, a division of Viacom that owned and operated MTV, VH-1, and Nickelodeon; (4) Showtime Satellite Networks Inc., which distributed the Showtime, MTV Networks, and third-party program services; and (5) Comedy Central, Lifetime Television, All News Channel, and regional sports network Pacific Sports Northwest, in which Viacom had partnership interests. *See* Comments of Viacom International Inc., MM Docket No. 92-265, at 1, 6, & n.1. (Jan. 25, 1993). Liberty Media similarly was an "owner of both cable programming and operating interests," with ownership interests in a number of entities that operated cable systems serving about 3.5 million

purpose in adopting anything broader than the (already broad) attributable interest standard for "affiliation." The Commission has no basis, let alone any statutory authority, to go beyond that standard in its enforcement of Section 616, much less in the virtually unlimited manner it now proposes.

Moreover, the *Notice*'s proposals entirely ignore the benefits of vertical integration, and the ways in which vertical integration may have reduced programming costs or helped spur investment in capacity to allow cable operators to carry many more networks. In 1992, Congress recognized the contributions the cable industry's investments in programming networks had made to competition and diversity. Congress recognized that vertical integration can ensure that MVPDs continue to have incentives to invest in programming networks and improve their services – a policy that the Commission expressly recognized.[157] There is no basis for the Commission to ignore these findings now.

Contrary to Congressional intent, these proposals would also affirmatively harm independent networks. Independent networks that purchase programming from an MVPD-affiliated studio or sports team, and any MVPDs that chose to carry those networks, could suddenly be defendants in program carriage complaints. The networks would be placed in the unenviable position of choosing to forego purchasing the programming they want or taking the risk that any competitor could bring a program carriage complaint against an MVPD that carried

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subscribers; majority interests in Encore (90%) and AMC (50%); minority interests in The Family Channel, QVC, BET, CourtTV, and The Jukebox Network; and indirect ownership interests in various regional sports services. *See* Comments of Liberty Media Corp., MM Docket No. 92-265, at 1-2 (Jan. 25, 1993). Southern Satellite Systems, Inc., the company that carried SuperStation WTBS's signal to the satellite, and X*PRESS Information Services, Ltd., which provided news feed services transmitted via satellite, were also wholly owned subsidiaries of Liberty Media. *Id.* at 2. Discovery Communications was owned by three different cable operators (TCI, Newhouse, and Cox) and owned and operated two cable networks (The Discovery Channel and The Learning Channel). *See* Comments of Discovery Communications, Inc., MM Docket No. 92-265, at 1, 8 (Jan. 25, 1993).

[157] *See* H.R. Rep. No. 102-628, at 47 (1992) (noting that witnesses before the Committee testified that "vertical relationships strongly promote diversity and make the creation of innovative, and risky, programming services possible"); *1993 Program Carriage Order* ¶¶ 14, 17.

the network's programming.[158] Likewise, an MVPD considering carriage of an independent network might be more cautious in negotiations because of the increased exposure to litigation, thus *reducing* the ability of the network to offer incentives in order to grow its carriage.

In sum, besides being bad policy, the *Notice*'s proposal to expand the scope of the discrimination provision to include MVPDs' carriage decisions regarding an unaffiliated programming network or to include MVPD affiliations beyond programming networks would be beyond the Commission's authority. Moreover, the proposal would increase significantly the number of program carriage complaints and impose further unnecessary limitations on the exercise of MVPDs' editorial discretion.

E. Burden of Proof

The *Notice* proposes to codify a new burden-shifting process to clarify which party has the burden of producing evidence to make its case, as well as the burden of persuasion for proving it should win. One proposal the *Notice* proffers is to shift the burden of persuasion to defendants once a complainant establishes a prima facie case. That proposal, however, is contrary to Section 616, the APA, and the First Amendment, and would place an improper thumb on the scale for program carriage complainants.

Centuries of jurisprudence teach that the burden of persuasion rests with the complainant. The APA is explicit in this regard: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[159] Section 616 provides no basis to shift the burden of production or persuasion to defendants. It is true that the program access rules employ a

158 Under a permissive reading of Commission precedent, even a potential competitor that has not yet launched as a network could opportunistically bring a program carriage claim. *See In re Comcast Corp.; Petition for Declaratory Ruling That The America Channel Is Not a Regional Sports Network,* Order, 22 FCC Rcd. 17,938 ¶¶ 20-22 (2007).

159 5 U.S.C. § 556(d).

modified burden-shifting regime, but the reasons for that statutory and policy decision only further illuminate the differences between program access and program carriage.

First, program access discrimination cases center around the legitimacy of price differentials for programming the defendant is *obligated to sell*; the parallel *obligation to carry* does not obtain in program carriage cases. Second, the price, terms, and conditions pursuant to which a program access defendant vendor sells programming to a complainant's competitors often may not be known to or knowable by the complainant MVPD, so the Commission deliberately adopted a relatively low initial burden for a program access complaint to proceed;[160] by contrast, differences in how networks are carried are readily ascertainable. Third, in program access cases, the Commission established specific and relatively clearly defined affirmative defenses to justify price differentials and other legitimate bases to refuse to sell programming to a particular MVPD;[161] the greater complexity and unpredictability of program carriage cases, by contrast, properly dissuaded the Commission in 1993 from establishing per se conduct standards for program carriage (the Commission now has decided that the defendant's evidence of the legitimacy of its carriage decision can simply be ignored at the pleadings stage).[162] In any event, a recent decision by the D.C. Circuit severely constrains how the Commission can employ a burden-shifting regime even in program access cases going forward.[163]

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[160] *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection & Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report & Order, 8 FCC Rcd. 3359 ¶ 126 (1993) ("*1993 Program Access Order*").

[161] *See* 47 C.F.R. §§ 76.1002(b)(1)-(3), 1003(e)(3); *see generally 1993 Program Access Order* ¶¶ 15, 125-133.

[162] *See generally 1993 Program Carriage Order* ¶¶ 14-19.

[163] *See Cablevision*, 649 F.3d at 716 ("Under the APA, agencies may adopt evidentiary presumptions provided that the presumptions (1) shift the burden of production and not the burden of persuasion and (2) are rational."). The court found that, based on the language in the *Terrestrial Order*, the rebuttable presumption the Commission adopted only shifted the burden of production. *See id.* The *Notice*, however, appears to call that finding into question and begs the question of whether the court would have ruled differently had the Commission previously

It makes even less sense to assign the burden of production or persuasion to a program carriage defendant as a result of a "prima facie" determination based on allegations and evidence that the Commission largely presumes are true and that have not been tested by the defendant. Indeed, a fundamental flaw in the Commission's proposals regarding program carriage proceedings is its failure to appreciate the opportunity for a complainant to lead the Media Bureau into error through the untested allegations and evidence in a complaint (as has repeatedly occurred). This is especially imbalanced in light of the fact that, as the recent *Order* codified, there is now essentially no burden for the complainant at the pleadings stage anyway.[164] Take a situation in which (as has happened multiple times before) the result of a Media Bureau determination that the complainant has made out a prime facie case is to refer the case to a full de novo evidentiary hearing. In the scenario that the *Notice* contemplates, the defendant, having had its answer completely ignored by the Bureau for the prima facie determination, would now bear the burden of proving that it did not violate Section 616.

In this regard, the *Notice*'s reliance on Title VII precedent is misplaced because that burden-shifting is done by the trier of fact only *after* adversarial discovery and development of a complete record. Shifting the burden before any opportunity for discovery makes no sense. Discovery could belie the complainant's allegations (as in *WealthTV*), undermining the "prima facie" case and obviating the need for any further showing by the defendant.

Given that MVPD defendants are indisputably First Amendment speakers, and program carriage cases not only scrutinize MVPDs' speech judgments but may also result in speech

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opined that its program access rules shift the burden of persuasion to a defendant after a complainant makes a prima facie showing.

164 *See 2011 Program Carriage Order & Notice* ¶ 67 (noting that "a finding of a *prima facie* violation does not . . . mean that the defendant has violated the Commission's rules" but, rather, "that the complainant has alleged sufficient facts that, *if left unrebutted*, *may* establish a violation" (emphasis added)).

compelled by government order, shifting the burden of proof in this context would be particularly inappropriate. Such a rule would offend the First Amendment in individual cases and in its larger implications. A rule that would require an MVPD defendant to carry the burden of justifying the legitimacy of its judgments before a governmental tribunal each time a complainant has advanced minimal circumstantial evidence of a case would not only burden more speech than necessary but would have a deep chilling effect on an MVPD's exercise of its editorial discretion. Further, in cases in which a remedy is imposed, such burden-shifting likely would result in a record where the complainant has prevailed without proving its violation by (at least) the preponderance of the credible evidence. Under those circumstances, the imposition of any remedy would not withstand scrutiny by a reviewing court, which is obligated "to make an independent examination of the whole record" in order to identify any "forbidden intrusion on the field of free expression."[165]

Rather than shift the burden of proof, the Commission's rules should ensure that, in making a prima facie determination, weight is given to the affirmative evidence presented in the defendant's answer. The Commission should consider the merits of the defendant's evidence of a legitimate business purpose at the pleadings stage, which may negate a prima facie case of discrimination. For example, the Commission could make clear that a prima facie case is rebutted in either of the following situations:

- Where there is a showing that: (i) the license fee being proposed by the complainant is inordinately high; or (ii) the complainant network's value proposition is not commensurate with that of defendant's allegedly similar affiliated network.

- Where three or more other MVPDs serving 1 million or more subscribers/similar to the defendant that are not affiliated with an arguably similar network distribute complainant's network on an equivalent or lesser basis as the defendant.

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165 *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

In the alternative, the Commission should require that, in order to establish a prima facie case, the complainant must include evidence that its license fee is reasonable for the carriage it demands, its value proposition is commensurate with that of the defendant's affiliated network, and that defendant's carriage is unreasonable in light of the carriage afforded by peer MVPDs that do not have an ownership interest in the complainant's network.[166]

F. Retaliation

The *Notice* states that "[p]rogramming vendors have expressed concern that MVPDs will retaliate against them" for filing program carriage complaints and proposes to adopt an anti-retaliation rule to protect future would-be complainants.[167] The proposals in the *Notice* regarding retaliation, however, are far afield of any industry evidence or even credible anecdotal accounts. At the same time, they would seriously distort the existing competitive marketplace while unnecessarily raising questions about the Commission's authority.

1. There is no factual basis for adopting new regulations addressing retaliation.

Notwithstanding that this very issue was raised four years ago in the previous program carriage NPRM,[168] proponents of an anti-retaliation rule have yet to cite to a single instance of retaliation in the history of the program carriage rules. As was evident at the time but is all the more clear in retrospect, each of the parties cited in the *2011 Program Carriage Order & Notice* to justify adding an anti-retaliation provision is not a credible source of evidence:

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[166] The Commission should also make clear that complaints that omit highly-material facts – such as ownership interests by other MVPDs in the complainant's network – do not satisfy the Commission's pleading requirements and therefore should be dismissed. *See* 47 C.F.R. § 1.17(a).

[167] *See 2011 Program Carriage Order & Notice* ¶¶ 60-67.

[168] *See In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage* , Notice of Proposed Rulemaking, 22 FCC Rcd. 11,222 ¶ 16 (2007).

- BTNC urged the adoption of a retaliation provision,[169] but it presented no evidence of retaliation.[170] Whatever difficulties beset BTNC – like so many programmers with initial business models that may or may not take off – retaliation does not appear to be one of BTNC's problems. In fact, BTNC signed a carriage agreement with Comcast in April of 2008, but has yet to launch its service.

- NAMAC expressed concern about retaliation, but it is not a programming network and presented no evidence of retaliation. The two examples cited by NAMAC to support its case only prove the opposite. First, NAMAC cited the Senate Report to the 1992 Cable Act. But the evidence pre-dating 1992 described in that report did not persuade the Commission even in 1993 to adopt an anti-retaliation provision; twenty years later, it is nothing more than a time capsule. Second, NAMAC cited the America Channel. The America Channel, however, has praised Comcast's treatment of independent networks.[171]

- The NFL clearly was not concerned about retaliation since it actually filed a program carriage complaint in 2008 and never suffered any retaliation from Comcast as a result. Neither the NFL's Comments nor its Reply Comments in the prior rulemaking proceeding offered any evidence of retaliation.

- WealthTV and the industry group it sponsors, NAIN, also are repeatedly cited by the *2011 Program Carriage Order & Notice* as providing a basis for an anti-retaliation provision.[172] But, WealthTV offered no evidence of retaliation in any of its filings (nor did NAIN). Simply put, WealthTV has earned the rightful reputation that nothing it says in this area should be believed.

This is no record that justifies constructing a new regulatory edifice that would cause confusion, further burden MVPDs' editorial discretion, lend itself to mischief, and subject the Commission to further questions about overreaching its authority.[173] Comcast does not retaliate – and is not

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[169] *2011 Program Carriage Order & Notice* ¶ 60 nn.223, 224 (citing Comments of BTNC).

[170] Comments of BTNC, MB Docket No. 07-42, at 4 (Sept. 17, 2007).

[171] *See* Letter from Doron Gorshein, CEO, America Channel, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 2 (July 21, 2010). Although the America Channel entered into a carriage agreement with Comcast in 2007, it has not yet launched.

[172] *See 2011 Program Carriage Order & Notice* ¶ 25 n.101; *id.* ¶ 61 n.227.

[173] This is not to say, however, that the Commission must necessarily shut the door to a genuine claim of retaliation that may arise in a particular program carriage case. To the extent that retaliation is cognizable under Section 616, the determination whether to address that count can be made by an adjudicator on a case-by-case basis, and in light of whatever evidence is brought forward in the particular complaint (or subsequently added, if the conduct at issue arises after a complaint has been filed). This case-by-case approach is consistent with the approach set forth in the *1993 Program Carriage Order*. *See 1993 Program Carriage Order* ¶ 27.

aware of any MVPD retaliating – against programmers for asserting their rights under the program carriage rules.

In fact, just the opposite is true, as evidenced by the attestations of some of Comcast's former program carriage litigation adversaries. In a letter filed with the Commission last year, the NFL acknowledged that its carriage dispute with Comcast was "successfully resolved" through a privately negotiated "outcome that was reasonable for both parties."[174] To this day, Comcast provides significantly better carriage of the NFL Network than many of its peer MVPDs. Similarly, America Channel, which was involved in a program carriage arbitration with Comcast in 2007, praised Comcast's subsequent "support for [America Channel's] efforts as an independent content provider" and noted Comcast's "leadership role among MVPDs in providing opportunities for independent programmers in a challenging economic environment."[175] Even the party that pushed hardest for an anti-retaliation provision in the prior rulemaking proceeding – WealthTV – acknowledged in testimony to the Commission that it did not experience retaliation but rather a timely opportunity for reconciliation in response to its threatening to file a carriage complaint against Comcast – an opportunity that WealthTV obstinately rejected.[176]

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174 Letter from Gerald J. Waldron, Covington & Burling LLP, Counsel to the National Football League, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 2 (June 21, 2010).

175 Letter from Doron Gorshein, *supra* note 171, at 2.

176 Live testimony from the principal WealthTV and Comcast witnesses before the ALJ conclusively demonstrated that Comcast – far from retaliating against WealthTV – made a good-faith effort to negotiate a carriage agreement with WealthTV (even though such a deal made little business sense) in an attempt to avoid the threatened litigation. *See WealthTV ALJ Decision* ¶ 45.

2. The anti-retaliation proposals in the *Notice* are legally suspect and likely will increase the number of baseless complaints.

The *Notice*'s efforts to devise specific procedural rules to effectuate the anti-retaliation rule only reinforce that the whole scheme stands on extremely shaky ground. For example, the proposal that an MVPD should be prevented from taking a negative action with respect to any affiliate of a network that files a program carriage complaint would have the perverse effect of encouraging programmers to file groundless complaints.[177] This rule essentially would provide a programmer with a two-year "free pass" across all of its affiliated programming simply for bringing any barely colorable claim with respect to *any* of its programming networks. For example, a company that owns networks X, Y, and Z, and is aware that Network X is underperforming and may soon be deleted or negatively repositioned could file a complaint regarding Network Z so as to gain legal protection against the (wholly justified) action that it fears with respect to Network X. Worse still, the *Notice* also proposes a rule that would conflict with the statutory requirement that a programmer demonstrate that its network that has suffered claimed retaliation has been unreasonably restrained from competing fairly.[178] Putting aside whether the Commission has authority generally to promulgate an anti-retaliation rule, it clearly has no authority to adopt a rule that conflicts with the statute.

The practical effects of a rule of this type would be devastating. It would mean that MVPDs would always be in a defensive stance because, virtually no matter the action, someone

[177] Although the *Notice* cursorily acknowledges that this rule may encourage the filing of frivolous complaints, it suggests that MVPDs' legitimate business decisions will be protected because, in addition to its prohibition on the filing of frivolous claims, the Media Bureau will dismiss frivolous complaints within 140 days. But, in the nearly 20 years since the program carriage rules were first adopted, not a single case has ever been dismissed at the prima facie stage, even though every case that has proceeded to full adjudication has been found to be without merit. Instead, given the new lenient standards for making a prima facie case in the *Order*, prima facie cases will often be found even where the complaint is without merit.

[178] *2011 Program Carriage Order & Notice* ¶ 65.

could characterize it as retaliation. Under constant threat from this rule, MVPDs would no longer have the freedom to make any so-called "adverse carriage decisions," even those expressly negotiated for in contracts or those based on legitimate business reasons and not in any way related to affiliation or non-affiliation, without risking time-consuming, and costly litigation. For example, programming contracts almost always provide MVPDs with a contractual right to terminate the agreement or cease carrying a network if the network fails to meet its programming commitments, such as a sports network's agreement to show live sports events. Under the *Notice*'s proposal, a programmer whose sports network was being carried by an MVPD could file a program carriage complaint against the MVPD for one of the programmer's other networks, e.g., a lifestyle network, and the MVPD then would be prohibited from dropping the sports network even if the programmer decided to turn the sports network into a fashion network. Such a rule would severely infringe on MVPDs' editorial discretion.[179]

The sure result of this rule, which reduces MVPDs' leverage to resist unreasonable demands from sophisticated companies, would be higher costs, less innovation, and larger bundles for consumers – not to mention a chilling effect on MVPDs' exercise of their editorial discretion. Moreover, the proposed rule clearly is overbroad and, thus, arbitrary; as the *Notice* admits, the rule would help protect large programmers.[180] But, given the mature state of the marketplace, these companies are hardly in need of this type of regulatory assistance.

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[179] The *Notice* fails to take into account that, while negative repositioning or deletion of a network is almost always a negative for the network, it often can be pro-consumer and pro-competitive (for example, in order to make way for less expensive and/or more valuable programming in cases where a network's renewal costs are too high and/or its programming has lost significant value).

[180] *2011 Program Carriage Order & Notice* ¶¶ 61, 66.

G. Good-Faith Negotiations

The *Notice*'s proposal to require an MVPD to negotiate in "good-faith" in carriage negotiations addresses a problem that does not exist. Further, importing a good-faith negotiation obligation akin to the Commission's retransmission consent rules would be both outside of the Commission's authority and inappropriate in the program carriage context.

There is absolutely no evidence that MVPDs are not negotiating in good faith with cable networks. Program carriage negotiations are complex and entail vigorous (and occasionally contentious) negotiations regarding numerous terms and conditions. In the normal course, negotiations for programming often take what seems like a very long time, and it is not unusual for successful negotiations to take a year or more. But this can be due to either the MVPD or the programmer, and is not evidence of bad faith. For its part, Comcast takes part in hundreds of negotiations with programmers each year and approaches each of its negotiations in good faith, as a matter of good business practice. It does not engage in delay tactics or make "knowingly inadequate counter-offers," nor does it ignore or fail to respond to requests for carriage.[181] In fact, several programmers publicly have praised Comcast as a positive, willing negotiating partner.[182] Comcast also is unaware of evidence that other MVPDs have engaged in any alleged bad-faith tactics. On top of affirmative evidence that MVPDs are negotiating in good faith, the "evidence" cited as justification for these proposed rules is lacking in substance and

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181 *Id.* ¶ 68.

182 *See*, *e.g.*, Letter from Charles Segars, CEO, Ovation, to Senators John D. Rockefeller and Kay Bailey Hutchison, United States Congress (Mar. 9, 2010) ("We enjoy a relationship [with Comcast] that has required good faith negotiations and we are confident that relationship will continue to grow stronger after the merger."); Letter from Roger Werner, President and CEO, Outdoor Channel, to Chairman Julius Genachowski, FCC, MB Docket No. 10-56 at 1 (Apr. 19, 2010) ("Given my experience in the cable television industry. I can attest that with Comcast, our carriage negotiations, back office functions and day to day dealings have always been reasonable and forthright.").

timeliness.[183] The imposition of new regulatory burdens cannot be based on a record so speculative.

In addition to lacking any evidence that would justify good-faith negotiation rules, the Commission also lacks the authority to impose these rules. Congress knows how to provide the Commission with the authority to require good-faith negotiation. It has done so in two separate contexts: requiring incumbent local exchange carriers and their connecting carriers to negotiate interconnection in good faith and requiring broadcasters and MVPDs to negotiate for retransmission consent in good faith.[184] Nothing in Section 616 of the Communications Act indicates that Congress provided the Commission with the authority to require good-faith negotiations in the program carriage context. With Section 616, Congress required the Commission to prohibit certain specific actions on the part of MVPDs, but it exercised restraint against imposing any further limitations, as the Commission previously has recognized, in order to "preserve[] the ability of affected parties to engage in legitimate, aggressive negotiations."[185]

Further, the situations in which Congress has authorized good-faith negotiation regulations are analytically distinct from the program carriage context, which undermines any suggestion that Congress implicitly has provided such authority. In the interconnection context, the basis for good-faith negotiations is a statutory obligation that the telecommunications carriers will reach an agreement to interconnect their facilities and equipment.[186] The broadcasting regime provides two alternatives: must-carry, which carries with it a statutory carriage

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183 *2011 Program Carriage Order & Notice* ¶ 68 & n.237 (citing 2007 ex parte letters as the basis for proposing these rules).

184 47 U.S.C. §§ 251(c)(1); 325(b)(3)(C)(ii)-(iii).

185 *1993 Program Carriage Order* ¶¶ 14-15.

186 47 U.S.C. §§ 251(a)(1), 251(c)(1).

obligation but presumes that the MVPD would not otherwise carry the programming, and retransmission consent, which does not carry a statutory carriage obligation but presumes that the goal of both parties is carriage. Because the statute in both situations – interconnection and retransmission consent – is based on the idea that both parties want or need to reach a deal, Congress concluded that imposing good-faith negotiation requirements on both sides maintains a level playing field and promotes parties reaching agreement in such circumstances.

In contrast, in the program carriage context, an MVPD has no affirmative obligation to provide any particular level of carriage or carriage at all to any specific cable programmer. An MVPD is free to carry whatever programming it thinks will be valued most by its customers and reject programming that it does not think will be valued by its customers. Where there is no presumption or obligation to carry, a good-faith negotiation requirement would have the effect of chilling an MVPD's ability to decide that it simply does not want to carry a given programmer for legitimate reasons. If good-faith bargaining requirements were to be in place, there would be a much greater risk that a network would construe interactions with an MVPD to be in bad faith, even though it may have never been the MVPD's intention to enter into negotiations in the first place or the MVPD may merely have decided that it did not want to carry a given network for valid business reasons. In fact, as the Commission has acknowledged, the 1992 Cable Act requires a balance between prohibiting "unfair and anticompetitive actions" and not precluding "legitimate business practices common to a competitive marketplace."[187] The adoption of good-faith negotiation regulations would upset that balance by impeding both "legitimate, aggressive

[187] *1993 Program Carriage Order* ¶ 15.

negotiations,"[188] and an MVPD's valid business decision to not engage in negotiations for programming it does not wish to carry.

At a time when the competitive marketplace serves as an effective check against MVPDs making decisions for illegitimate reasons, the government should be reducing its role in this context, not adding ways to second-guess MVPDs' exercise of editorial discretion (which, in the case of a good-faith rule, would happen in the *middle of negotiations*, even before the MVPD has reached a carriage decision). The imposition of a good faith obligation – made worse by the fact that "good faith" is an inherently ambiguous standard – cannot be squared with the narrow tailoring requirements of the First Amendment and APA.

Given the differences between program carriage and the other two contexts in which Congress has authorized good-faith negotiation requirements, the *Notice* obviously is straining to apply good-faith negotiation requirements to program carriage, proposing impractical and highly burdensome regulations on MVPDs that are made all the more inappropriate given the lack of any demonstrated need for, and lack of authority to impose, such rules.

First, it plainly does not make sense to impose a good-faith bargaining requirement only on MVPDs, with no corresponding duty on programmers.[189] In the other two contexts where Commission rules require good-faith bargaining, the duty applies to both sides of the bargaining table.[190] In the program carriage context, when two parties negotiate in order to enter into a mutually acceptable carriage contract, it would be illogical and unfair to impose procedural burdens on one party's negotiations but not the other. If the rules are not imposed symmetrically

188 *Id.* ¶ 14.

189 And while the Commission claims that it is not aware of concerns regarding non-vertically integrated MVPDs, none of the comments cited articulate concerns specific to vertically-integrated MVPDs. *See 2011 Program Carriage Order & Notice* ¶ 69 nn.237-238.

190 *See* 47 C.F.R. §§ 51.301(a)-(b), 76.65(a).

on MVPDs and programmers alike, they will distort the current marketplace-driven negotiating tactics between MVPDs and programmers. MVPDs likely would scale back on aggressive negotiations to avoid the risk of a complaint, while programmers could push even harder to get increased programming fees, with threats to pull programming signals if they do not get their way. The Commission's proposed rules would have the unintended consequence of producing a regulatory windfall for programmers, especially for the large programming groups.

Second, another telltale sign of the impracticality of these rules is that the *Notice* proposes only to impose such a requirement on "similarly situated" programming. Given the subjectivity – and resulting regulatory uncertainty – involved in determining whether programming is similarly situated and even (indirectly) subject to the rules, the proposed rules would, as the Commission queried, "unreasonably interfere with negotiations."[191] An MVPD that neither desires to carry a given network nor believes that network is similarly situated to an affiliated network may nevertheless decide that it was obligated to enter into more extensive negotiations that it would otherwise find productive in an effort to avoid the risk of a meritless program carriage complaint.

Finally, any good-faith negotiation requirements – even if imposed on programmers and MVPDs alike – would have a much greater negative impact on MVPDs than programmers. Unlike retransmission consent negotiations, which are relatively limited in number, MVPDs engage in hundreds of program carriage negotiations in a given year while programmers likely only negotiate with a handful of MVPDs in any given year. It would be extremely burdensome to impose additional formal requirements on these negotiations – burdens that are multiplied many times over when applied to MVPDs. And given the lack of any need for good-faith rules

[191] *2011 Program Carriage Order & Notice* ¶ 69.

to begin with, that they would asymmetrically impact MVPDs makes the extra burden even more unwarranted and fatally overbroad in light of the exacting requirements of the First Amendment.

These unintended consequences, coupled with the lack of evidence of any bad faith on the part of MVPDs and the Commission's lack of authority to impose the proposed rules, more than demonstrate that good-faith negotiation requirements are inappropriate in the program carriage context.

V. IF THE COMMISSION REVISES ITS PROGRAM CARRIAGE RULES, IT SHOULD LIMIT SUCH REVISIONS TO THOSE THAT WOULD IMPROVE AND EXPEDITE THE PROCESS.

Although most of the proposals in the *Notice* are unnecessary and would expand regulation, the *Notice* does propose two areas where clarification and improvement are warranted, though not necessarily in the manner the *Notice* proposes: the statute of limitations rule, 47 C.F.R. § 76.1302(f), and a proposal to have parties submit final offers during a remedy phase of a complaint proceeding.

A. Statute of Limitations

The *Notice* correctly identifies a key problem with the program carriage statute of limitations: Section 76.1302(f) has been misconstrued to allow programmers to file a claim basically at any time by manufacturing a triggering event. The *Notice* also recognizes, as Comcast previously has argued, that the Commission's current rule (as construed by the Media Bureau) "undermines the fundamental purpose of a statute of limitations 'to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.'"[192] Rather than correcting the existing problem,

[192] *Id.* ¶ 38 (citing *Bunker Ramo Corp.*, Memorandum Opinion & Order, 31 FCC 2d 449 ¶ 12 (Review Board 1971)).

however, the new rule the *Notice* proposes would perpetuate the current problematic interpretation that has, in effect, vitiated the time limitations.

The rule proposed in the *Notice* would eliminate the current three-pronged approach set forth in 47 C.F.R. § 76.1302(f) in favor of a blanket rule that "[a]ny 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."[193] But this proposed rule suffers from the same flaw as the Media Bureau's current interpretation of the rule: it effectively eliminates any time limitation by allowing complaints to be filed within one year of any "alleged violation" of the rules without any limitation on what "alleged violations" program carriage claims may be based on.[194] As Comcast and the Commission have seen, under this misinterpretation, a would-be complainant can file a complaint so long as it has sent a pre-filing notice within the prior year to the defendant MVPD about some alleged "act of discrimination" – even if that act is the exercise of a pre-existing contractual right, a refusal to amend an existing carriage contract in a manner that favors the programmer, or a refusal to renegotiate an existing carriage contract. That approach effectively nullifies the one-year limitations period, a fatal flaw that the *Notice*'s proposal fails to rectify.

Nor does the *Notice* fully address the significant unintended consequences that its proposed rule will have on MVPDs and carriage contracts. One such consequence likely would be increased consumer prices. Consumers benefit when MVPDs enter into multi-year contracts with programmers that protect MVPDs (and by extension, their customers) from future price increases. To the extent the proposed rules will provide an avenue for those programmers who

[193] *Id.* ¶ 38, app. D.

[194] *See The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order & Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd. 14,149 ¶¶ 11-16 (Media Bureau 2010).

voluntarily have entered into such contracts to renege on their agreements and impose price increases on MVPDs and their customers, consumers will be harmed.

Another consequence of the proposed rule would be that it likely would force Comcast and other MVPDs to take a much more cautious approach in their dealings with all networks, chilling their editorial discretion in significant ways to the detriment of MVPDs, programmers, and consumers. For example, pursuant to discretionary terms in carriage contracts,[195] programmers regularly ask for better carriage or better terms, and Comcast very often grants these requests, working proactively with programmers to find a balanced exchange of value. Yet the new proposed rule would increase greatly the risk that MVPDs' rejection of (or less-than-100 percent-acquiescence in) such commonplace requests can constitute a relevant triggering event – i.e., an act of omission instead of commission – and MVPDs likely will be wary of including such discretionary terms in their carriage contracts going forward. Omitting discretionary terms from carriage contracts would require MVPDs to engage in burdensome new contract negotiations for every carriage change request, prevent MVPDs from reacting to changing marketplace conditions, reduce the speed (and perhaps likelihood) with which programmers earn enhanced carriage, and prevent consumers from getting access to desired programming.

As the Supreme Court has recognized, limitations periods are "fundamental to a well-ordered judicial system" and provide parties with certainty and finality.[196] This is particularly important for businesses like MVPDs, whose core supply of video programming is governed by

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[195] Discretionary terms typically allow an MVPD to improve its treatment of a network at any time, while still permitting it to decline to do so. In fact, almost all, if not all, of Comcast's contracts with non-premium, non-a la carte channels contain these kinds of discretionary terms. These terms are positive for both parties because they give MVPDs the flexibility to improve carriage of a given network if the marketplace and their customers demand it and can result in increased carriage and often increased revenues for the programmer.

[196] *Board of Regents. v. Tamanio*, 446 U.S. 478, 487 (1980); *see also 3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (statute of limitations provides finality concerning parties' obligations).

foundational contracts that typically cover periods of several years. The most efficient way to foster better negotiations and allow parties to move forward and improve their offerings in the marketplace free of the temptation or threat of litigation would be to clarify and enforce the statute of limitations in such a way that shuts the door to belated claims where a contract already governs the carriage relationship between the parties. The Commission could do so if it merely clarifies that the third prong of the rules – which currently provides that complaints can be filed within one year of when a "party has notified [an MVPD] that it intends to file a complaint"[197] – is limited to instances where the MVPD refuses to negotiate with a programmer, *unconnected to any existing carriage contract*.

In order to provide the necessary certainty and finality to MVPDs, instead of adopting its proposed "streamlined" rule, the Commission should maintain the current three-pronged approach and make modifications only to the third prong, Section 76.1302(f)(3).[198] As originally adopted, the third prong clearly reflected that a refusal to negotiate grounded in a violation of the rules is a cognizable triggering event under the existing program carriage rules.[199] This was the correct approach, and one that the Commission intended to maintain.

Indeed, the Media Bureau's interpretation of the existing regulation as departing from that approach necessarily implies that the Commission in 1994 intended to revise Section 76.1302(f) in a manner that "undermine[d] the fundamental purpose of a statute of

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[197] 47 C.F.R. § 76.1302(f)(3).

[198] *Id.*

[199] The third prong of the limitations rule originally read: "[T]he complainant has notified a[n MVPD] that it intends to file a complaint with the Commission based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged, allegedly in violation of [a program carriage rule]." *Id.* § 76.1302(r)(3) (1993).

limitations."[200] But it is utterly untenable to conclude that the Commission intended to fundamentally undermine its own "statute of limitations" regulation – effectively eviscerating the first prong of the rule – let alone to do so "without explanation."[201] In fact, the Commission made clear in 1994 that the only intent of its amendments to the program carriage rules, including the limitations regulation, was to also include MVPDs as potential complainants.[202] The Commission reiterated in 1999 that the third prong of its limitation regulation embraced only unreasonable refusals to negotiate.[203]

Instead of allowing would-be complainants to manufacture triggering events where there is an existing contract, modifying the third prong to include "unreasonable refusal to deal" language would correct the ambiguity that has led the Media Bureau into error.[204] It would permit a claim by a complainant that an MVPD refused to negotiate or seriously consider an

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200 *2011 Program Carriage Order & Notice* ¶ 38. In 1994, the Commission expanded the third prong in order to permit a competing MVPD to file a complaint for refusals to deal. *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion & Order, 9 FCC Rcd. 4415 ¶ 24 (1994) ("*1994 Program Carriage Order*"). In so doing, however, the Commission adopted language that made the provision's application more ambiguous and allowed some parties to argue that it now applied to an expanded set of situations. Despite clear indications that the 1994 amendment did not expand the scope of the third prong of the limitations regulation, the Media Bureau erroneously has interpreted the revised language of the third prong as the exception that swallows the first prong of the rule.

201 *2011 Program Carriage Order & Notice* ¶ 38 n.159.

202 *1994 Program Carriage Order* ¶ 24 ("The statutory purpose of Section 616 is further served if the Commission is made aware of such violations through complaints by both programming vendors and MVPDs alike."). The program carriage rules originally afforded standing to file a complaint only to an "aggrieved video programming vendor," but in response to a petitioner's request that the Commission amend Section 76.1302 to also afford standing to MVPDs, *see* Petition for Partial Reconsideration of Wireless Cable Association, MM Docket No. 92-265 (Dec. 15, 1993), the Commission afforded standing to MVPDs under the premise that "a cable operator with market power may be able to use this power" to pressure programmers to enter into exclusive deals to the detriment of competing MVPDs. *1994 Program Carriage Order* ¶ 24.

203 *See In re 1998 Biennial Regulatory Review; Part 76 – Cable Television Service Pleading and Complaint Rules*, Order on Reconsideration, 14 FCC Rcd. 16,433 ¶ 5 (1999).

204 This change would also bring the program carriage statute of limitations rule back into alignment with the parallel limitations provisions in the program access and Open Video Systems rules – an alignment that the Commission expressly recognized *subsequent* to making the change to the program carriage rule. *Id.*

offer for carriage of a network that is not already subject to an existing contract, while preventing a spurious claim of a violation when the conduct complained of is valid under a properly negotiated contract that both sides freely entered into if that contract was more than a year old.[205] As an added measure, the Commission should expressly state that a programming network that has entered into a carriage contract that is more than a year old cannot refresh the statute of limitations by demanding that an MVPD renegotiate the terms of the original contract or enter into a new or amended contract before the original contract has expired.

While Comcast commends the Commission for recognizing that the current rules have been subject to disputed interpretations, the Commission should not substitute one ambiguity for another by perpetuating in another form the current misconstruction that effectively eviscerates the statute of limitations. In order for the statute of limitations rules to provide the necessary clarity and finality that businesses need to function, the Commission should simply clarify, consistent with the original understanding and promulgation of the rule, that the third prong only permits complaints regarding an MVPD's refusal to deal separate from any existing carriage contract.

B. Submission of Final Offers

The *Notice* proposes that, after an adjudicator (1) finds a violation of the program carriage rules; and (2) orders the establishment of prices, terms, and conditions for carriage of a complainant's video programming as a remedy, the adjudicator may also order each party to submit a final offer for the prices, terms, and conditions for such carriage. Comcast can tentatively support such a proposal, so long as any remedial phase calling for the submission of

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[205] In the alternative, if – contrary to the arguments above – Subsection (f)(3) is amended to include as a trigger "the act that allegedly violated the program carriage rules," then at a minimum the Commission should specify that such an act must be unrelated to any existing contract or offer. *2011 Program Carriage Order & Notice* ¶ 39. This approach will take the important step of preventing the kind of gamesmanship that has plagued the Commission's complaint process in recent years.

final offers is fully separated from the adjudication on the merits, and so long as the adjudicator is required to select one of the offers in its entirety.

First, it is important to conduct any remedial phase of the adjudication separately from the adjudication on the merits. A rule mandating final offers would only be invoked after an MVPD was found to have violated the rules. If the phases were conducted at the same time, an adjudicator might be more inclined to view the MVPD's final offer as effectively acquiescing in carriage of the network, and this would be prejudicial to the MVPD's case. During this separate remedial phase, the rules should instruct the adjudicator that the remedial phase is only about the appropriate terms and conditions of carriage in order to make clear that the remedy should not reflect punitive measures. Further, the adjudicator should have access to marketplace evidence that will assist in assessing the fair market value and reasonableness of each offer. Thereafter, the adjudicator's decision regarding the remedy should be appealable in conjunction with any appeal of the liability judgment in the case in order to ensure that the fair market value is accurately reflected.

Second, any rules adopted should also make it clear that the adjudicator must pick one or the other final offer in its entirety, using the baseball-style arbitration approach in program access arbitrations.[206] As the Commission has recognized, blending the offers – either by selecting from different parties' offers on an issue-by-issue basis or by permitting the adjudicator to select a middle ground between two terms – defeats the purpose of driving the parties to make

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[206] *See In re General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation Ltd., Transferee, for Authority To Transfer Control*, Memorandum Opinion & Order, 19 FCC Rcd. 473, ¶¶ 174-177 (2004) ("*News Corp.-Hughes Order*"). In the *Local Competition Order*, which implements Section 252 of the 1996 Telecommunications Act, the Commission permits arbitrators to select from either of the parties' final offers or choose different parties' proposals on an issue-by-issue basis. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report & Order, 11 FCC Rcd. 15,499 ¶ 39 (1996).

reasonable proposals and will drive the parties' offers further apart.[207] If the adjudicator could select terms individually, the resulting carriage contract would likely vary wildly from the actual fair market value because the terms are all interrelated. For example, the price that an MVPD is willing to pay, or that the programmer is willing to sell for, is highly dependent on non-price terms such as the level of geographic distribution and tier placement. Although blending offers might offer an adjudicator more flexibility, it would likely cause both parties to present proposals that are more extreme – rather than ones that closely approximate fair market value. Ultimately, if the resulting contracts stray too far from market rates, these over-market rates could be passed along to consumers in the form of higher cable prices.

VI. THE PROPOSED RULES VIOLATE THE PAPERWORK REDUCTION ACT.

The foregoing discussion has demonstrated how the proposals in the *Notice* are utterly unnecessary and inappropriate in light of the marketplace circumstances and statutory and constitutional constraints. The Paperwork Reduction Act of 1995 ("PRA") is a further constraint on the Commission's authority in this area.[208]

Virtually all of the proposed rules would impose massive paperwork burdens on industry that would constitute "a collection of information" within the meaning of the PRA.[209] The Commission has a statutory duty to ensure that all information collections it imposes are "necessary for the proper performance of the functions of the agency," and designed to "reduce to the extent practicable and appropriate the burden on persons who shall provide information to

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207 *See News Corp.-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.'" (citation omitted)).

208 *See* 44 U.S.C. §§ 3501-3520.

209 *See id.* § 3502(3); *see also* 5 C.F.R. § 1320.3(c), (h). These burdens would be on top of those already imposed by the *Order*. *See* Paperwork Reduction Act Comments of NCTA, OMB No. 3060-0888, at 1-2, 5-8 (Nov. 7, 2011).

or for the agency."[210] Office of Management and Budget ("OMB") regulations provide further that the Commission must "take[] every reasonable step to ensure that" its information collections are "the least burdensome necessary for the proper performance of the agency's functions."[211] In addition, there is a heightened burden under OMB regulations to justify any information collection requirements that require responses in less than 30 days.[212] The proposals in the *Notice* fail all of these tests.

VII. CONCLUSION

The vast majority of the proposals in the *Notice* are ill-advised, out of step with current marketplace realities, and inconsistent with statutory and constitutional constraints. There is no factual or legal basis for the Commission to make itself an even more inviting forum for program carriage complaints, or to expand its role in superintending the program carriage decisions that MVPDs make in a highly competitive marketplace. Expanding the Commission's role in this

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210 *See* 44 U.S.C. §§ 3506(c)(3)(A), (C).

211 5 C.F.R. § 1320.5(d)(1)(i).

212 *See id.*; *see also id.* § 1320.5(d)(2)(ii) ("Unless the agency is able to demonstrate, in its submission for OMB clearance, that such characteristic of the collection of information is necessary to satisfy statutory requirements or other substantial need, OMB will not approve a collection of information . . . [r]equiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it . . . .").

process would be arbitrary and capricious, contrary to the statute and the First Amendment, and inimical to consumers' interests.

Respectfully submitted,

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