

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

In the Matter of)
)
Revision of the Commission's)
Program Carriage Rules) MB Docket No. 11-131
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COMMENTS OF CROWN MEDIA HOLDINGS, INC.

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Crown Media Holdings, Inc. ("Crown Media"), which owns and operates the Hallmark Channel and Hallmark Movie Channel, submits these comments in response to the Commission's notice of proposed rulemaking regarding its program carriage rules. *See Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, Notice of Proposed Rulemaking in MB Docket No. 11-131*, MB Docket No. 11-131, FCC 11-119 (rel. Aug. 1, 2011) ("Notice"). As set forth below, the Commission should adopt program carriage rules that will deter program carriage violations by multichannel video programming distributors ("MVPDs") and provide for the more efficient management of program carriage complaint proceedings.

INTRODUCTION AND SUMMARY

Both the Hallmark Channel and Hallmark Movie Channel offer high-quality entertainment programming for adults and families. The Hallmark Channel is a 24 hour destination for family friendly programming and a leader in the production of original movies for television. It also airs home and lifestyle programming, including the Emmy Award

winning *Martha Stewart Show*. The Hallmark Channel currently has 87 million subscribers and, according to Nielsen Media Research, was among the top 25 channels for prime time ratings during the third quarter of this year.

The Hallmark Movie Channel also is a full-time channel airing movies and other long-form programming appropriate for the entire family. Hallmark Movie Channel content features a mix of Hallmark Channel original movies, classical theatrical and television films, Hallmark Hall of Fame presentations and special events. The channel is available in 43 million homes and is one of the fastest-growing programming services. According to an E-Source Brand Study conducted in December 2010 and January 2011, the Hallmark Channel and Hallmark Movie Channel are America's first and second most trusted advertiser-supported, family friendly cable networks.

In short, Crown Media Family Networks provide valuable, high demand programming that is popular with viewers in all age groups. Nevertheless, as an independent programmer without significant leverage in its negotiations with MVPDs, Crown Media is sometimes subject to discrimination in the terms of carriage offered. In these circumstances, the carriage complaint process may be its only recourse. Without unlimited resources, however, Crown Media views the Commission's program carriage complaint process with some trepidation. When considering a program carriage complaint, an independent programmer must assess significant concerns such as cost (including legal fees, key personnel time expenditures and business opportunity costs) and the potential for retaliation by the MVPDs which are the subject of the complaint. Consequently, program carriage rules should minimize program carriage disputes by deterring discrimination in the carriage terms offered by MVPDs and providing an effective remedy when such discrimination occurs, *i.e.* a program carriage

complaint process that will operate quickly, efficiently and at a minimal cost to the programmer.

Crown Media urges the Commission to: (1) require vertically-integrated MVPDs to negotiate with independent programmers in good faith; (2) permit the award of compensatory damages for program carriage violations; (3) adopt an anti-retaliation rule; and (4) properly interpret the statutory anti-discrimination provision to expand its scope. Finally, to foster a more efficient and cost effective program carriage complaint process, the Commission generally should adopt its proposals for party-to-party discovery, including automatic document production (subject to appropriate limitations to avoid the potential for abuse) and “final offer” submissions.

I. The Commission Should Adopt Rules That Would Further Deter Program Carriage Violations.

A. *The Commission Should Require Vertically-Integrated MVPDs to Negotiate with Independent Programmers in Good Faith.*

Crown Media supports the Commission’s proposal to require vertically-integrated MVPDs to negotiate in good faith with unaffiliated video programmers. *See* Notice at ¶¶68-71. Such an explicit good faith negotiation requirement in the Commission’s rules may lessen the need for full-blown program carriage disputes and the resulting expenditure of parties’ time and money. Of course, the avoidance of any program carriage dispute also would conserve the Commission’s administrative resources.

As the Commission observed in its Notice, MVPDs may harm independent programmers in “more subtle” ways than overtly denying carriage requests. *See* Notice at ¶68. Crown Media previously has described to the Commission its experiences with MVPDs’ discriminatory conduct toward independent programmers:

[S]ome MVPDs frequently fail to make carriage offers or respond to an independent programmer's offers until just before an existing agreement is set to expire, effectively turning post-expiration carriage into a month-to-month proposition. A corollary practice having the same effect involves the making of knowingly inadequate offers that give the superficial appearance of good faith negotiation but that are not intended or expected to be accepted, let alone thought responsive to programmers' offers.

See *Crown Media Holdings, Inc., Notice of Ex Parte Communications*, Nov. 20, 2007, at 1. Crown Media also stated that such practices "undercut[] a programmer's ability to attract new investors or to reassure existing investors that the entity's business prospects are stable" and "impede[] business planning...with respect to making investments in new content and other service enhancements." *Id.* The express requirement to negotiate in good faith may minimize these MVPD practices.

The Commission should base these good faith negotiation requirements on the well-established good faith negotiation factors in its retransmission consent rules. See 47 C.F.R. §76.65(b)(1). As the Commission recognized in its rulemaking requiring good faith negotiations for retransmission consent, it would not "sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD." See *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445 (2000), at ¶23. However, the Commission determined that it would "develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process." *Id.* at ¶24. For example, the Commission requires both parties "to put forth more than a single, unilateral proposal" without unreasonable delay and to engage in actual negotiations, explaining their "reasons for the rejection of any such proposal." See

47 C.F.R. §76.65(b)(1)(iii), (iv) and (v). Although neither MVPDs nor independent programmers want the Commission to intrude in private program carriage negotiations between them, good faith negotiation requirements should facilitate more even-handed marketplace negotiations.

Crown Media opposes the Commission's proposed limitation of the good faith negotiation requirement to negotiations involving video programming "similarly situated" to video programming affiliated with an MVPD. See Notice at ¶69. In response to the Commission's inquiry, Crown Media believes that this approach is unnecessarily narrow and likely would be "unworkable." *Id.* Such a requirement would subject the good faith negotiation obligation to a detailed threshold factual review of a range of factors such as genre, ratings, license fee, target audience, target advertisers and target programming. Simply put, this complicated preliminary factual analysis would undermine the benefits in the marketplace of an express Commission good faith negotiation requirement.¹

B. The Commission Should Permit the Award of Damages for Program Carriage Violations.

Crown Media concurs with the Commission's view that a damages remedy "would be useful in deterring program carriage violations and promoting settlement of any disputes." See Notice at ¶51. Specifically, the prospect of a Commission-imposed damages remedy will have a positive deterrent impact on MVPD behavior in carriage negotiations with independent programmers, thereby ultimately decreasing the number of program carriage complaints filed at the Commission by independent programmers. Any limitation of the remedy to prospective

¹ The Commission has the statutory authority to adopt good faith negotiation requirements. Section 616(a) of the Communications Act, as amended, confers broad authority upon the Commission apart from the six enumerated regulatory requirements to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors." See 47 U.S.C. §536(a).

injunctive relief effectively would encourage complaint proceedings and the resulting delay because the MVPD effectively would have a safe haven during the proceeding. The MVPD ultimately would be required to do only that which it should have done from the outset. A damages remedy presents a real downside and, therefore, a deterrent to bad behavior.

Crown Media supports the Commission's decision to allow program carriage complainants to petition the Commission for a temporary standstill pending resolution of the program carriage complaint. Without this kind of standstill, major MVPDs may assert overwhelming pressure in the form of threats of immediate deletion absent resolution of the dispute.

The Commission's "true-up" proposal addressing compensation of the parties during a standstill period (Notice at ¶53) would harm unsuccessful program carriage complainants, and may discourage independent programmers from filing program carriage complaints in the first instance. Specifically, a requirement that the unsuccessful programmer complainant repay carriage fees it received from an MVPD during the standstill period effectively would penalize programmers for filing good faith, but ultimately unsuccessful, program carriage complaints with the Commission. A repayment requirement also would ignore the fact that the MVPD received the benefit of providing the programming to its subscribers during such interim period.

C. The Commission Should Prohibit MVPDs From Retaliating Against Programmers That Have Filed Program Carriage Complaints.

In the Notice, the Commission has identified the fundamental concern of independent programmers filing program carriage complaints against MVPDs -- potential retaliation by an MVPD against the programmer or a related programming service after final resolution of the complaint by the Commission. See Notice at ¶61. Crown Media supports the Commission's

proposal to address these concerns by: (1) adopting a rule that prohibits MVPDs from taking adverse carriage actions against programmers for filing program carriage complaints; and (2) extending this prohibition to the programming service at issue and all commonly-owned and affiliated programming services. *See* Notice at ¶64.

Crown Media believes that the Commission correctly has invoked Section 616(a) of the Communications Act, as amended, as authority for adopting an anti-retaliation rule. *See* Notice at ¶65. Section 616(a) plainly confers broad authority upon the Commission apart from the six enumerated regulatory requirements to “establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors.” *See* 47 U.S.C. §536(a). Further, the prohibition in Section 616(a)(3) on discrimination on the “basis of affiliation or non-affiliation” provides specific authority for an anti-retaliation rule directed to an MVPD that retaliates against an unaffiliated programmer. *See* 47 U.S.C. §536(a)(3).

The Commission proposes that any adverse carriage action taken by a defendant MVPD against a complainant programmer unrelated to the initial program carriage complaint that occurs during the complaint proceeding, or within two years after its resolution, would constitute a *prima facie* violation of the anti-retaliation rule.² *See* Notice at ¶¶66-67. As the Commission notes, “acts of retaliation” seldom are overt. *Id.* at ¶66. Thus, the anti-retaliation rule must enable a complainant to proceed “in the absence of direct evidence of retaliation.” *Id.* For example, adverse re-tiering to a less penetrated package or tier of programming services or adverse channel repositioning should not require additional evidence

² Under this approach, a “finding of *prima facie* violation” means that the “complainant has alleged sufficient facts that, if left unrebutted, may establish a violation of the program carriage rules and thus parties may proceed to discovery (if necessary) and a decision on the merits.” *See* Notice at ¶67.

of intent. In the context of a complaint proceeding, the MVPD should be required to show that such acts do not constitute a violation of the Commission's rules.

Crown Media believes that such a *prima facie* approach is essential for a viable anti-retaliation complaint process. Application of the anti-retaliation prohibition during the two year period after resolution of the initial program carriage complaint strikes the appropriate balance between meaningful deterrence of future retaliation and non-interference with an MVPD's legitimate carriage decisions commencing at an appropriate time following resolution of the program carriage complaint.

D. The Commission Should Apply the Section 616(a)(3) Anti-Discrimination Remedy Broadly.

Crown Media supports the Commission's proposal to interpret the Section 616(a)(3) anti-discrimination provision to "preclude a vertically-integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD." *See* Notice at ¶72. As Crown Media explained in its 2007 reply comments, "an MVPD can have an incentive to advantage the affiliated services of other vertically-integrated MVPDs, over independent services, in exchange for favorable treatment when the first MVPD seeks to obtain carriage of its own affiliated services by the second MVPD." *See* Crown Media Reply Comments in MB Docket No. 07-42, filed Oct. 12, 2007 ("Crown Media Reply Comments"), at 8 n.16.

The proposed broader interpretation would address a potential incentive for discriminatory conduct on the part of MVPDs. Such an interpretation is "reasonable" given the express statutory direction that the Commission adopt regulations to prevent an MVPD from "engaging in conduct...to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on

the basis of *affiliation or nonaffiliation of vendors.*” See 47 U.S.C. §536(a)(3)(emphasis added); Notice at ¶75. Further, as the Commission has noted, the broader interpretation of the anti-discrimination provision accords with both the statutory goal of providing “the widest possible diversity of information sources...to the public” and the program access prohibitions, which prohibit “exclusive contracts and discriminatory conduct between a cable operator and any cable-affiliated programmer, not just its own affiliated programmer.” See 47 U.S.C. §521(4); Notice at ¶76 (*italics in original*).

II. The Commission’s Regulations Should Facilitate the Efficient Management of Program Carriage Complaint Proceedings.

A. *The Commission Should Adopt a Burden Shifting Framework for Program Carriage Complaints.*

The Commission seeks comment regarding the proper burden of proof in program carriage discrimination cases after the complainant establishes a *prima facie* case of program carriage discrimination. See Notice at ¶¶79-81. Crown Media urges the Commission to adopt the burden shifting framework that it instituted in its first program access order in 1993. After a complainant states a *prima facie* claim, the burden of persuasion shifts to the defendant. See *Video Programming Distribution and Carriage (Implementation of 1992 Cable Act Provisions)*, 8 FCC Rcd. 3359 (1993), at ¶15 (“When evaluating a discrimination complaint, we will initially focus on the difference in price paid by (or offered to) the complainant as compared to that paid by (or offered to) a competing distributor.... In all cases, the programmer will bear the burden to establish that the price differential is adequately explained by the statutory factors”). Thus, “after a complainant establishes a *prima facie* case of discrimination based on either direct or circumstantial evidence, the burdens of production and persuasion shift to the

defendant to establish legitimate and non-discriminatory reasons for its carriage decision.” See Notice at ¶80.

Adoption of the program access burden shifting standard in program carriage complaint proceedings will clearly assign the evidentiary burdens in program carriage proceedings. Further, although the statutory language of Section 616(a)(3) does not “compel” the adoption of the program access framework (Notice at ¶81), harmonizing the burden of proof standards for program access and program carriage proceedings makes conceptual sense because both statutory provisions address the potential harmful effects of vertical integration in the MVPD/programmer marketplace.

B. Crown Media Generally Supports the Expanded Discovery and Automatic Document Production Procedures Set Forth in the Notice.

For program carriage complaints to be decided by the Media Bureau after discovery, the Commission proposes to adopt: (1) expanded discovery procedures similar to those applicable to program access complaints; and (2) an “automatic” but narrowly-tailored document production process. See Notice at ¶¶42-48. Crown Media generally supports both proposals and believes that they will facilitate the Commission’s goal of “establish[ing] a discovery process that ensures expeditious resolution of complaints while also ensuring fairness to all parties.” See Notice at ¶41. As Crown Media noted in its 2007 Reply Comments, the discovery process should be an equitable one that assists the decision maker in achieving a “fair, marketplace-driven result.” See Crown Media Reply Comments at 19.

Accordingly, Crown Media urges the Commission to adopt the following expanded discovery procedures modeled on the program access framework for program carriage complaints to be decided by the Media Bureau: (1) if a defendant references and relies upon a document in asserting a defense or responding to a material allegation, the defendant must

include such document as part of the answer; (2) parties to a program carriage complaint may serve discovery requests directly on opposing parties rather than relying on Media Bureau staff to obtain discovery through letters of inquiry or document requests; (3) the respondent may object to any request for documents that are not in its control or relevant to the dispute; (4) the obligation to produce the disputed material is suspended until the Commission rules on the objection; and (5) any party who fails to provide timely discovery requested by the opposing party to which it has not objected, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice. *See* Notice at ¶42.

The adoption of expanded discovery procedures need not affect compliance with the Commission's 150 calendar day deadline for resolution of a program carriage complaint following the Media Bureau's *prima facie* determination. Crown Media shares the Commission's concern that expanded discovery procedures may trigger "overbroad discovery requests and extended disputes pertaining to relevance." *See* Notice at ¶43. In response, the Commission should adopt specific numerical limitations on the number of document requests, interrogatories, and deposition notices that a party may serve on the other, without leave of the Commission, in order to expedite the complaint proceeding and prevent potential abusive litigation tactics. Further, in the interest of an orderly and predictable expanded discovery process, the Commission should adopt specific deadlines following the Media Bureau's *prima facie* determination for the submission of discovery requests, objections and replies, a "meet and confer" meeting among the parties if necessary to resolve discovery

disputes, discovery completion, and the submission of post-discovery briefs and reply briefs (if ordered by the Commission). *See* Notice at ¶43.

The Commission's proposed automatic document production approach would require both parties to produce specific classes of documents within a set time following a Media Bureau determination that the program carriage complaint contains sufficient evidence to establish a *prima facie* discrimination case and that the Media Bureau will rule on the complaint following discovery. *See* Notice at ¶¶44-47. Crown Media supports the Commission's automatic document production proposal. The certainty afforded by the identification of specific documents to be produced in connection with program carriage discrimination claims should expedite the discovery process for the reasons cited by the Commission.³ In particular, the advance notice regarding required documents should enable parties to obtain any necessary third party consents to production of documents, thereby alleviating delays that often arise when third party consents are required prior to the production of commercially sensitive documents such as affiliation agreements. *Id.* at ¶45. For these reasons, the Commission should reject its alternative proposal for the Media Bureau to require the production of specific documents based upon the "facts of the case" as part of its *prima facie* decision. *Id.* at ¶47. Such a fact-based approach to document discovery inevitably will create uncertainty regarding the discovery process and delay the complaint proceeding.

The Commission should adopt its proposed list of relevant documents for discrimination claims in its automatic document production regulations. *See* Notice at ¶46. In addition, consistent with Crown Media's recommendation in its Reply Comments, the Commission

³ As noted by the Commission, automatic document production should: (1) minimize debates regarding relevancy by establishing certain documents as presumptively relevant; (2) enable parties to identify potential deponents early in the discovery process; and (3) facilitate prompt document production through advance notice of relevant documents. *See* Notice at ¶45.

should consider designating as relevant documents reflecting the compensation paid by the defendant MVPD to programming services affiliated with other MVPDs. Because large MVPDs may provide preferential treatment to services owned by other large MVPDs in an implicit exchange for preferential treatment for their own services, the Commission should deem documents regarding the terms of carriage of other programming services relevant. *See* Crown Media Reply Comments at 20. Although some types of older documents will have limited utility in establishing fair market value of programming at issue, agreements presently in effect should be responsive regardless of execution date.⁴

C. The Adjudicator in Program Carriage Proceedings Should Have Discretion to Order Each Party to Submit Their "Final Offer" for the Rates, Terms and Conditions for the Video Programming at Issue.

Under the Commission's revised program carriage regulations, available remedies for program carriage violations include the "establishment of prices, terms, and conditions of carriage for the carriage of the video programming vendor's programming." *See* 47 C.F.R. §76.1302(j)(1). Crown Media supports the Commission's proposal that the program carriage complaint adjudicator (either the Media Bureau or an administrative law judge) have discretion to order each party to submit its "final offer" for the rates, terms, and conditions for the video programming at issue. *See* Notice at ¶¶54-55. The Commission's final offer proposal accords with the "baseball-style" arbitration approach for independent programmer-MVPD negotiating impasses that Crown Media set forth in its Reply Comments at 6-7.

⁴ Crown Media also generally supports the Commission's proposal to adopt a standard protective order for program carriage complaint proceedings. *See* Notice at ¶48. However, rather than incorporating the standard program access proceeding protective order into program carriage proceedings, the Commission should use two separate confidentiality designations: Confidential Information and Highly Confidential Information. The Commission has used this two-tier confidentiality designation approach in program carriage and major transaction proceedings. Crown Media believes that the "Highly Confidential Information" designation will provide the necessary confidentiality assurance to third parties and thus will facilitate the production of third party documents in program carriage proceedings.

Providing the adjudicator with discretion to require “final offers” from the parties has several advantages. First, Crown Media believes that the preparation and submission of final offers by the parties necessarily will encourage the parties to attempt to resolve their dispute privately. Second, if the parties cannot resolve their dispute, the final offer requirement should spur the parties to prepare realistic and reasonable final offers.

Crown Media urges the Commission to refrain from adopting a final offer procedure that allows the adjudicator “discretion to craft a remedy that combines elements of both final offers or contains other terms that the adjudicator finds to be appropriate.” *See* Notice at ¶55. There are several drawbacks to affording such discretion to the adjudicator. First, adjudicator discretion to determine the specific final terms and conditions of carriage would sacrifice the inherent administrative efficiency of the final offer approach, and may delay resolution of the program carriage proceeding. Second, rather than “provid[ing] greater flexibility” to reach a “more appropriate remedy,” adjudicator discretion likely will undermine the parties’ incentive to propose realistic, market-based final offers. Further, such flexibility may undermine the incentive to pursue a settlement outside the framework of the program carriage proceeding.

CONCLUSION

In enacting Section 616, Congress determined that vertically-integrated MVPDs have the incentive and ability to favor affiliated programmers over unaffiliated programmers in granting carriage on their systems. Congress therefore directed the Commission to adopt regulations to prevent discrimination and to provide appropriate remedies and expedited review of program carriage complaints. Consistent with this statutory directive to prevent and remedy discrimination, the Commission should use this proceeding to ensure a balanced remedial procedure between large MVPDs with extensive resources and smaller independent

programmers such as Crown Media. Adopting regulations that further deter program carriage disputes and encourage the quick and cost-effective resolution of program carriage complaints will help to accomplish these goals and foster the programming diversity offered by independent programmers.

Respectfully submitted,

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