

**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
	)	
	)	
Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage	)	MB Docket No. 07-42
	)	

**REPLY COMMENTS OF BLOOMBERG L.P.**

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## SUMMARY

Bloomberg continues to support the proposals of the Federal Communications Commission (“Commission”) and suggestions from parties commenting in this proceeding that would expedite the program carriage complaint process and promote a more level playing field among parties to program carriage disputes. As the recent ALJ decision in the Tennis Channel matter proves, program carriage discrimination exists and the Commission must use this proceeding to promote the as yet unfulfilled promise of the 1992 Cable Act.

One way to expedite the carriage complaint process is to avoid referral of cases to an administrative law judge (“ALJ”). The process adds significant time to the overall review process which works to the MVPD’s benefit while depriving independent programmers of much needed revenue. The Commission should empower the Media Bureau to conduct the discovery necessary to resolve complaints. The Bureau is in the best position to determine the information it needs to resolve disputes, and such a process would eliminate the inevitable discovery disputes, and attendant delays that would result if party-to-party discovery and numerical limits on discovery are adopted. Adoption of a standard protective order would further streamline the process.

Adopting compensatory damages would further the Commission’s goals and the goals of the 1992 Cable Act deterring MVPDs from conduct that violates the Commission’s rules. Arguments from MVPDs that the award of damages will encourage the filing of frivolous complaints are exaggerated. Between the risk of retaliation from MVPDs and the significant resources needed to initiate a program carriage complaint, no independent programmer would opt to file a complaint unless it had no other option. Moreover, compensatory damages would only approximate making the programmer whole as if the violation had not occurred. Punitive damages should be permitted, however, when the MVPD’s conduct is egregious and the Commission’s maximum enforcement penalties are low. In the recent Tennis Channel decision, the ALJ assessed the maximum forfeiture

of \$375,000 allowed by statute for program carriage rule violations, but that amount was less than a fraction of one percent of the billions in revenue Comcast Corp. generated last year.

The Commission should maintain the existing statute of limitations rule and clarify other rules to ensure that they provide a fair forum for independent programmers to bring complaints. The Commission should not clarify the statute of limitations without allowing for the fact that programmers often do not know exactly when carriage is denied or discrimination occurs. Similarly, programmers should not be required to reimburse MVPDs for carriage during a standstill order, because such an order would unjustly enrich the MVPD that will be paid under the terms of the existing agreement between the parties. Submission of final offers and baseball-style arbitration will encourage all parties to make their most reasonable offer and will accelerate case processing and facilitate settlement. Mandatory carriage orders should become effective automatically so MVPDs are not encouraged to bring frivolous appeals simply to delay the implementation of a mandatory carriage order. Adoption of an antiretaliation rule, requiring good faith negotiations, and interpreting the statutory discrimination provision broadly would promote the goals of the 1992 Cable Act and reduce the inherent inequality between programmers and MVPDs. Clearly allocating the burden of proof in program carriage complaints would provide clarity for prospective complainants and defendants, thereby reducing uncertainty and delays associated with resolution of that issue. Finally, the Commission should adopt its proposed definition of affiliate so that the rules more accurately define the parties the statute was designed to protect.

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**REPLY COMMENTS OF BLOOMBERG L.P.**

Bloomberg L.P. (“Bloomberg”) hereby submits its reply comments in the Federal Communications Commission’s (“Commission” or “FCC”) program carriage rulemaking.<sup>1</sup>

**I. INTRODUCTION**

As Bloomberg’s Comments<sup>2</sup> in this proceeding indicated, Bloomberg supports the Commission’s proposals to attain the goals of the 1992 Cable Act,<sup>3</sup> including “promot[ing] the availability to the public of a diversity of views and information through cable television and other video distribution media.”<sup>4</sup> The Commission must ensure that MVPDs do not engage in conduct that would have the impact of discriminating against programmers unaffiliated with MVPDs or

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<sup>1</sup> *Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494 (2011) (“Second Report and Order” or “NPRM”). These reply comments are timely filed. *See* FCC Public Notice, “Media Bureau Announces Comment and Reply Comment Deadlines For the Notice of Proposed Rulemaking Regarding Revision of the Commission’s Program Carriage Rules,” 26 FCC Rcd 13500 (2011).

<sup>2</sup> Comments of Bloomberg L.P., MB Dkt. Nos. 11-131 & 07-42 (filed on Nov. 28, 2011) (“Bloomberg Comments”).

<sup>3</sup> Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385 (“1992 Cable Act” or “Act”).

<sup>4</sup> H.R. Rep. No. 102-862 at 4.

integrated programming networks.<sup>5</sup> Bloomberg’s comments also noted that the 1992 Cable Act’s requirement of “expedited review” of program carriage complaints<sup>6</sup> has yet to be fully realized and that changes to the Commission’s rules are necessary. Since that time, however, the Administrative Law Judge (“ALJ”) Sippel released a decision in *Tennis Channel v. Comcast Cable Communications* that concluded that Comcast engaged in discrimination in the selection, terms, or conditions of carriage on the basis of its non-affiliation with Tennis Channel, and Comcast unreasonably restrained Tennis Channel’s ability to compete fairly.<sup>7</sup> The Tennis Channel Initial Decision assessed the largest fine permitted under current FCC rules, and mandated carriage of the Tennis Channel on terms equivalent to that of Comcast’s affiliated sports programming.

The ALJ’s decision highlights concerns raised during the now-consummated Comcast/NBCU merger transaction, which culminated in several conditions to protect independent programmers, including the news neighborhooding condition. The Commission noted that

based on the record, and consistent with concerns about vertical integration addressed by Congress in Section 616 of the Cable Act, we find that the combination of Comcast, the nation’s largest cable service provider and a producer of its own content, with NBCU, the nation’s fourth largest owner of national cable networks, will result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks.<sup>8</sup>

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<sup>5</sup> See generally 47 U.S.C. § 536(a)(3).

<sup>6</sup> 47 U.S.C. § 536(a)(4). The Senate Report to the Cable Act states with respect to other expedited procedures that “[T]he goal of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy, start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit.” S. Rep. No. 102-92 at 30.

<sup>7</sup> *Tennis Channel v. Comcast Cable Communications L.L.C.*, Initial Decision, FCC 11D-01, at 53-54 (rel. Dec. 20, 2011) (“Tennis Channel Initial Decision”).

<sup>8</sup> *Applications of Comcast Corp., General Electric Company and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 116 (2011) (“Merger Order”).

The Commission's concern that vertical consolidation would mean increased incentive and ability to abuse independent programmers was correct, and is now underscored by the ALJ's finding of wrongdoing by Comcast against the Tennis Channel.

Programming vendors continue to be dependent on MVPDs for distribution of their programming. Accordingly, Bloomberg supports the Commission's efforts to streamline the program carriage complaint process by refraining from referring cases to ALJs and empowering the Media Bureau to conduct discovery. In the alternative, if the Commission declines to adopt Bureau-initiated discovery, it should streamline discovery by adopting an automatic document production rule, a standard protective order, and time limits for discovery responses. The Commission can also further streamline the carriage complaint process by adopting rules allowing the award of damages; requiring the submission of final offers and using "baseball-style" arbitration; making all mandatory carriage orders effective automatically; adopting a strong antiretaliation rule; requiring good faith negotiations; interpreting the discrimination rule broadly; and clarifying the burden of proof in program carriage cases. Bloomberg supports the proposals set forth in the NPRM and related comments that will expedite the program carriage complaint process and ameliorate the competitive imbalance between affiliated MVPDs and independent programmers.

## **II. THE COMMISSION SHOULD ADOPT DISCOVERY PROPOSALS THAT WILL LEAD TO EXPEDITIOUS RESOLUTION OF PROGRAM CARRIAGE COMPLAINTS**

Bloomberg supports the adoption of those proposed discovery procedures for program carriage complaints that will expedite resolution of program carriage complaints.

Bloomberg supports Media Access Project's and Public Knowledge's (collectively, "MAP") observation that referral of cases to an ALJ substantially adds to the time to resolve program carriage complaints and should be avoided wherever possible. MAP notes that the Commission's proposal of an additional 240 day "clock" that only starts after the parties determine not to

participate in alternative dispute resolution or the parties inform the ALJ that they failed to resolve their complaint. This process “provides no assurance that complaints will be heard in a timely manner,” which is not consistent with the Congressional mandate to ensure expedited review. This concept is best demonstrated by the recent ALJ decision in the Tennis Channel proceeding. From the time of filing in July 2010 to the ALJ’s decision took almost 18 months. Comcast has an additional 30 days in which to appeal the decision. As a result, even when all parties are working quickly towards resolution, full-blown trial-type proceedings do not result in the expeditious review required by statute. Therefore, the Commission should adopt proposals that will facilitate Media Bureau resolution of complaints whenever possible.

Bloomberg supports the proposals by the Joint Commenters, one of which is the Tennis Channel, to allow the Bureau to direct discovery to obtain information it needs to expeditiously review and resolve complaints.<sup>9</sup> The Bureau is in the best position to know what information it needs to resolve the complaint and can quickly make relevant requests. In any event, the parties to the dispute must have full access to any documents requested and received by the Bureau in discovery.

If the Commission does not limit discovery to the Bureau, it should adopt as many procedures as possible to streamline the discovery process, including the automatic document production rule, and a standard protective order. Such proposals would streamline the discovery process and eliminate unnecessary delays in resolution of complaints. Crown Media supports automatic document production.<sup>10</sup> The Joint Commenters support a standard discovery order that would include documents “relevant to resolution of the complaint and would be easily retrievable

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<sup>9</sup> Comments of Current TV LLC, Game Show Network LLC, NFL Enterprises LLC, and The Tennis Channel (collectively, “the Joint Commenters”), MB Dkt. No. 11-131 at 18 (filed on Nov. 28, 2011) (“Joint Commenters Comments”).

<sup>10</sup> Comments of Crown Media Holdings Inc. (“Crown Media”), MB Dkt. No. 11-131, at 10-13 (filed on Nov. 28, 2011) (“Crown Media Comments”).

without extensive searching by the parties.”<sup>11</sup> Bloomberg supports MASN’s suggestion that the Commission adopt reasonable time limits for discovery responses.<sup>12</sup>

### **III. BLOOMBERG OPPOSES THE PROPOSED CLARIFICATION OF THE STATUTE OF LIMITATIONS FOR FILING PROGRAM CARRIAGE COMPLAINTS**

The Commission proposed to clarify the statute of limitations to eliminate ambiguity. However, its proposed language unintentionally harms the interests of programmers by eliminating the necessary and significant time for a programmer to investigate and determine if it has a legitimate complaint. Specifically, Bloomberg opposes the proposed clarification of the statute of limitations for filing a complaint because the exact date of the carriage denial may be unclear. As MASN noted, a programmer often lacks the information necessary to determine exactly when an illegal denial of carriage has occurred.<sup>13</sup> For example, “cable operators have historically strung out negotiations with unaffiliated programmers, permitting them to discriminate against unaffiliated vendors without ever having to issue a formal denial [so] it often remains unclear to programming vendors exactly when an illegal carriage denial has occurred.”<sup>14</sup> As a result, the statute of limitations should not begin to run from the date of carriage denial, but from the date it becomes reasonably apparent that a defendant MVPD has denied carriage or otherwise engaged in prohibited discrimination.

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<sup>11</sup> Joint Commenters Comments at 21.

<sup>12</sup> Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network (“MASN”), MB Dkt. No. 11-131 at 30 (filed on Nov. 28, 2011) (“MASN Comments”).

<sup>13</sup> MASN Comments at 20.

<sup>14</sup> *Id.*

#### **IV. COMPENSATORY DAMAGES WILL LEVEL THE NEGOTIATION PLAYING FIELD, FACILITATE SETTLEMENT, AND DETER ANTICOMPETITIVE CONDUCT**

Bloomberg supports the Commission’s proposal to adopt compensatory damages, but also believes that punitive damages should be an option when a complainant prevails in a program carriage complaint proceeding. Numerous parties, including Crown Media,<sup>15</sup> the Joint Commenters<sup>16</sup>, HDNet<sup>17</sup>, and MASN<sup>18</sup>, support the award of compensatory damages in program carriage disputes. As Crown Media notes, “[T]he 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.”<sup>19</sup>

The Commission should reject the argument made by some MVPDs that the award of damages will increase the incentive to file complaints, or encourage the filing of frivolous complaints. As documented in this proceeding,<sup>20</sup> an independent programmer runs the risk of retaliation for even suggesting it will file a complaint. Filing such complaints involves the

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<sup>15</sup> Crown Media Comments at 3.

<sup>16</sup> Joint Commenters Comments at iii, 28.

<sup>17</sup> Comments of HDNet Entertainment LLC (“HDNet”), MB Dkt. Nos. 11-131 & 07-42 at 15 (filed on Nov. 28, 2011) (“HDNet Comments”).

<sup>18</sup> MASN Comments at 28.

<sup>19</sup> Crown Media Comments at 5.

<sup>20</sup> “Programming vendors have expressed concern that MVPDs will retaliate against them for filing program carriage complaints. They state that the fear of retaliation is preventing programming vendors from filing legitimate program carriage complaints.” NPRM, ¶ 60 (internal citations omitted). “Programming vendors’ concerns regarding retaliation, however, extend beyond the period while a complaint is pending and beyond the particular programming that is the subject of the complaint. They fear that an MVPD will seek to punish a programming vendor for availing itself of the program carriage rules after the complaint has been resolved. Another potential form of retaliation could impact programming vendors owning more than one video programming network.” *Id.*, ¶ 61 (internal citations omitted).

investment of considerable time, resources, and expense. As was amply demonstrated by MASN,<sup>21</sup> the MVPD is the sole party that benefits from delaying program carriage complaint proceedings. In contrast, the programmer is not generating revenue through subscriber fees or advertising if it is not carried on an MVPD's system. As a result, the programmer is highly motivated to reach a carriage agreement. To suggest that a programmer would opt to expend substantial time, money, and resources on a program carriage complaint with no certain outcome simply to obtain damages ignores the economic reality of a programmer's business which makes a complaint a viable alternative only in certain limited circumstances.

Further, the possibility of the award of damages merely levels the playing field between MVPDs and programmers because the MVPDs have the relative strength in negotiations under the current system. With a more level playing field, the likelihood of settlement will increase because the parties are more likely to make reasonable offers to resolve outstanding issues. Moreover, MVPDs will have less incentive to engage in delaying tactics if there is a possibility they will need to pay damages for illegal conduct. Bloomberg joins the Joint Commenters and HDNet to support the award of punitive damages in egregious cases.<sup>22</sup>

The Commission should reject arguments that the award of damages penalizes MVPDs' editorial discretion and implicates the First Amendment. The Commission clearly has authority to award such damages as Section 616 of the statute is not limited to the six enumerated subjects. As the Commission itself noted,

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<sup>21</sup> "Given that [currently] the only remedy for a violation of the program-carriage rules is an order requiring carriage, cable operators benefit from their discrimination for as long as they can get away with it. Accordingly, the Commission should clarify that monetary damages for discriminatory withholding of carriage are available to an injured programmer. Such damages – which are available in program-access cases – would disincentivize carriers from discriminating against independent programmers by imposing a cost for past refusals to carry." MASN Comments at 28.

<sup>22</sup> Joint Commenters Comments at 28; HDNet Comments at 15-16.

Section 616 contains broad language directing the Commission to ‘establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors’ and then lists six specific requirements that the Commission’s program carriage regulations ‘shall provide for,’ ‘shall contain,’ or ‘shall include.’ While there is no specific statutory provision prohibiting MVPDs from retaliating against programming vendors for filing complaints, the statute does not preclude the Commission from adopting additional requirements beyond the six listed in the statute. Thus, we believe that we have authority to adopt a rule prohibiting retaliatory carriage practices.<sup>23</sup>

Moreover, damages would only be awarded when the Commission finds that an MVPD violated the Commission’s rules. The Commission relied on similar language to find that it had such authority in the program access context. “Although the program carriage statute does not explicitly direct the Commission to allow for the award of damages as a remedy for a program carriage violation, the statute does require the Commission to adopt ‘appropriate . . . remedies.’”<sup>24</sup> The Commission has interpreted this same term as used in the program access statute, which was adopted at the same time as the carriage statute, to be broad enough to include a remedy of damages, stating that:

Although petitioners are correct that the statute does not expressly use the term “damages,” it does expressly empower the Commission to order “appropriate remedies.” Because the statute does not limit the Commission’s authority to determine what is an appropriate remedy, and damages are clearly a form of remedy, the plain language of this part of Section 628(e) is consistent with a finding that the Commission has authority to afford relief in the form of damages. (internal citations omitted; emphasis supplied).<sup>25</sup>

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<sup>23</sup> NPRM, ¶ 65.

<sup>24</sup> NPRM, ¶ 14 (alteration in original).

<sup>25</sup> See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, ¶ 17 (1994).

Consequently, the award of damages would not infringe on any MVPD rights. To accept the MVPDs' First Amendment arguments on this matter is to concede that the Commission has no authority to enforce its own rules at all in this area.

**V. PROGRAMMERS SHOULD NOT BE REQUIRED TO REIMBURSE AN MVPD FOR FEES PAID DURING THE PENDENCY OF A STANDSTILL ORDER**

Bloomberg partially supports the Commission's proposal to require the parties to submit information to "true up" fees paid during the pendency of a standstill order. However, such fees should not be paid by the programmer to the MVPD if the programmer's complaint is unsuccessful. As Crown Media noted, such a requirement "would penalize programmers for filing good faith, but ultimately unsuccessful, program carriage complaints."<sup>26</sup> The threat of having to repay large sums "could deter the filing of meritorious complaints or deter networks from seeking restoration or preservation of service levels."<sup>27</sup> A threat that a programmer would pay if it were unsuccessful in a carriage dispute would have a chilling effect on the entire complaint process. Perhaps more importantly, however, as noted by HDNet, it would result in unjust enrichment.<sup>28</sup> The MVPD will continue to collect its costs through its charge to subscribers during the standstill period. If the programmer were required to reimburse the MVPD for that time period, the MVPD would be unjustly enriched. Consequently, the Commission should not allow MVPDs to submit "true-up" and make programmers pay if their complaint is not successful.

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<sup>26</sup> Crown Media Comments at 6.

<sup>27</sup> Joint Commenters Comments at 15.

<sup>28</sup> HDNet Comments at 21.

**VI. REQUIRING THE SUBMISSION OF FINAL OFFERS AND USE OF “BASEBALL-STYLE” ARBITRATION WILL ACCELERATE CASE PROCESSING TIME AND ENCOURAGE SETTLEMENT**

Bloomberg urges the Commission to adopt a rule requiring parties to submit final offers on rates, terms and conditions. Bloomberg joins Crown Media, the Joint Commenters, MAP, and MASN in their support for the submission of final offers and the selection of one of those offers.<sup>29</sup> Generally, the requirement to submit such offers provides the incentive for both sides to submit reasonable offers and to settle cases. These offers also have the benefit of streamlining the carriage complaint process, which is a major obstacle for programmers attempting to use the process for legitimate complaints. Even Comcast recognizes that such a system “would improve and expedite the program carriage complaint process.” However, Bloomberg disagrees with Comcast that such offers should only be required in a separate remedial phase of a carriage complaint process. Such a process would only create additional delay to the benefit of the MVPD. Rather, such offers should be required at the beginning of the complaint process and at any time the adjudicator requests such offers during the complaint process in order to conserve Commission resources and to increase the incentives to resolve a dispute short of litigation through all possible appeals.

Bloomberg also agrees that the Commission and all parties will derive the most value from such a rule if the adjudicator is required to select one offer in its entirety. That result is the only way to encourage the parties to submit the most reasonable proposals. Comcast conceded the logic of requiring baseball-style offers:

[A]ny 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. As

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<sup>29</sup> Crown Media Comments at 13-14; Joint Commenters Comments at 32-34; Comments of Media Access Project and Public Knowledge (collectively, “MAP”), MB Dkt. No. 11-131 at 22-23 (filed on Nov. 28, 2011) (“MAP Comments”); MASN Comments at 30-31.

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 reasonable proposals and will drive the parties’ offers further apart.<sup>30</sup>

As MAP stated:

[R]equiring the adjudicator to select one of the two offers as the final remedy best promotes the interests behind Section 616 .... The application of ‘baseball-style’ mandatory arbitration best serves the public interest by efficiently and equitably promoting competition and diversity in video programming. It encourages both parties to submit realistic offers facilitating dispute resolution. . . [and] avoids the need for the adjudicator to fashion a detailed remedy concerning the specific compensation rates and terms of carriage of the programming service, while giving the adjudicator the benefit of the parties’ expertise.<sup>31</sup>

Further, as MASN noted,

Although providing an adjudicator with discretion to combine elements of both final offers may provide ‘greater flexibility,’ such a rule would sacrifice the predictability created by a rule requiring an adjudicator to pick one of the offers. It also incentivizes a defendant MVPD to impose a large number of draconian contract terms in the hope that the adjudicator will ‘split the difference’ in a way that harms even the successful programmer. The ‘baseball style’ arbitration adopted in the *Adelphia Order* creates incentives for both sides to minimize the points of contention by offering final ‘best offers’ that create the least amount of commercial friction.<sup>32</sup>

By nearly all accounts, baseball style arbitration will clearly further the Commission’s goals.

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<sup>30</sup> Comcast Comments at 80-81.

<sup>31</sup> MAP Comments at 23.

<sup>32</sup> MASN Comments at 31.

## VII. MANDATORY CARRIAGE ORDERS SHOULD BECOME EFFECTIVE AUTOMATICALLY

Under the current carriage rules, the remedy ordered by the adjudicator is effective upon release of the decision except when the adjudicator orders mandatory carriage and the MVPD must “delete existing programming from its system...”<sup>33</sup> in order to fulfill the mandate. If the defendant MVPD seeks Commission review of such a decision, mandatory carriage does not take effect until the decision is upheld by the Commission. Bloomberg continues to believe that all mandatory carriage orders should become effective automatically. The Commission’s current rule, which allows a delay in the remedy during an appeal (the “automatic stay”) undermines the entire complaint process by introducing critical delay into the carriage complaint process. The Commission should eliminate this rule. As noted in the NPRM and recommended by Bloomberg in its comments, MVPDs have the right to seek a stay under the well-established *Virginia Petroleum Jobbers* standard adopted by the Commission, denial of which should require compliance with the order.<sup>34</sup>

As noted by MASN and others in the comments in this proceeding,<sup>35</sup> delay tends to favor MVPDs, so allowing another avenue for avoiding its obligations under the rules is damaging to all programmers. Moreover, the rule is based on what is now an antiquated version of technology. With the advent of digital cable and other digital delivery systems, the likelihood of true “deletion” of other programming is essentially nonexistent.

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<sup>33</sup> NPRM, ¶ 56; see 47 C.F.R. § 76.1302(g)(1).

<sup>34</sup> See generally *Virginia Petroleum Jobbers v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958), and as adopted by the Commission. See generally *Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998 Personal Communications Service Block C Election in WT Docket No. 97-821*, Order, 12 FCC Rcd 1180 (1998).

<sup>35</sup> See MASN Comments at 26 (“This stay provision significantly prolongs the period in which cable operators are able to discriminate against unaffiliated vendors, thereby both exacerbating the harm suffered by independent programmers and consumers, and enhancing the profits generated for the cable operators through their discrimination.”).

In the event that the Commission retains the automatic stay rule, Bloomberg joins the Joint Commenters and MASN in supporting a requirement that an MVPD must prove that it must delete programming in response to a mandatory carriage order in order to obtain the benefit of the rule.<sup>36</sup> Bloomberg believes that deletion of programming is highly unlikely in the current digital MVPD environment. Bloomberg also echoes the request that the Commission clarify that movement to a different programming tier is not a deletion that allows an MVPD to take advantage of the automatic stay rule.<sup>37</sup>

### **VIII. THE COMMENTS SUPPORT THE ADOPTION OF A STRONG ANTIRETALIATION RULE TO PREVENT CIRCUMVENTION OF THE 1992 CABLE ACT AND COMMISSION RULES**

Bloomberg commented in favor of a strong antiretaliation rule because it will prohibit an MVPD from taking adverse action against a programming vendor and any of its owned or affiliated programming because the programming vendor availed itself of the program carriage rules. While the Commission's ability to issue a standstill order is helpful in some cases, in others, it is of no value to programmers, such as when they do not have carriage or are victims of discrimination against other programming they own. Moreover, in light of the difficulty in proving retaliation, the Commission should adopt a presumption that any adverse action taken by a cable operator against a

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<sup>36</sup> Joint Commenters Comments at 29; MASN Comments at 26-27.

<sup>37</sup> *See, e.g.*, Joint Commenters Comments at 28-29 (“Distributors should not be able to avoid their obligations pursuant to such orders by simply asserting, without proof, that the carriage ordered would result in a deletion of existing programming....The Commission also should clarify that a ‘deletion’ cannot be shown when programming is simply retiered in a manner that does not implicate bandwidth considerations.”); MASN Comments at 27 (“If the Commission nonetheless retains the automatic stay, it should at the very least clarify that merely moving existing programming to a less penetrated tier does not constitute the ‘deletion’ necessary to stay the implementation of a carriage remedy. Many carriage disputes involve not an outright denial of carriage but an offer to carry unaffiliated programming only on an inferior tier; in such cases, a carriage remedy may require a defendant MVPD to migrate existing analog channels to the digital tier. As was true in MASN’s dispute with TWC, a defendant MVPD may very well be able to effect such a channel migration with no contractual consequences. This should not trigger the automatic stay provision . . . . Programming that remains on a cable operator’s system – albeit on a less penetrated tier – is self-evidently not ‘deleted’ from that ‘system’.”).

programmer for at least five years after the programmer files a complaint constitutes retaliation and require an MVPD to rebut that presumption by providing a reasonable and non-retaliatory justification for its action.<sup>38</sup> The comments filed by Crown Media, the Joint Commenters, HDNet, and MASN also support a strong antiretaliation rule.<sup>39</sup>

Crown Media supports “(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.”<sup>40</sup> Crown Media also notes that “the antiretaliation rule must enable a complainant to proceed in the absence of direct evidence of retaliation.”<sup>41</sup> Similarly, the Joint Commenters and HDNet encourage the Commission to adopt an antiretaliation rule that prohibits “MVPDs from taking adverse carriage actions against programming vendors that avail themselves of the program carriage rules.”<sup>42</sup> Bloomberg agrees with the Joint Commenters and HDNet and emphasizes the importance of the Commission’s recognition of retaliation as a form of discrimination by adopting a strong antiretaliation rule.<sup>43</sup> HDNet and MASN support the adoption of a presumption that any adverse action taken by a cable operator against a programmer for at least

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<sup>38</sup> *National Mining Ass’n v. Dept’ of Interior*, 177 F.3d 1 (D.C. Cir. 1999) (stating a presumption is permissible “if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.” (internal citations omitted)(alteration in original)).

<sup>39</sup> Crown Media Comments at 7; Joint Commenters Comments at 14; HDNet Comments at 9; MASN Comments at 23.

<sup>40</sup> Crown Media Comments at 7.

<sup>41</sup> *Id.*

<sup>42</sup> Joint Commenters Comments at 14; HDNet Comments at 9 (“The Commission should adopt a rule prohibiting any MVPD from taking adverse carriage actions against a programmer because that programmer has taken advantage of the carriage complaint rules or raised the possibility of doing so.”).

<sup>43</sup> Joint Commenters Comments at 14-15; HDNet Comments at 9-10.

two years after the programmer files a complaint constitutes retaliation and require an MVPD to rebut that presumption by providing a reasonable non-retaliatory justification for its conduct.<sup>44</sup>

Bloomberg prefers a five year presumption.<sup>45</sup>

Contrary to the comments filed by the Programmers, Comcast, Time Warner, DirecTV, Cablevision and NCTA argue that retaliation is only a “possibility” and that an antiretaliation rule would encourage the filing of frivolous complaints.<sup>46</sup> Retaliation is a genuine problem. MASN describes in its comments Comcast’s retaliatory acts after Comcast was ordered by the Commission in 2007 to carry MASN:

After MASN’s initial carriage complaint forced Comcast to agree to carry MASN in 2007, Comcast responded by raising its rates by *more* than what MASN charged Comcast, and then publicly blaming MASN for the rate increase in a direct mail campaign to its subscribers. It then raised the rates charged to other MVPDs for its affiliated RSN Comcast SportsNet Mid- Atlantic (“CSN-MA”), to an amount far greater than that charged by MASN, despite the fact that CSN-MA was showing about one-third fewer games than it had been showing when it had the rights to broadcast Orioles games.”<sup>47</sup>

Clearly, retaliation is a problem and MVPDs have the ability to use their position in the marketplace to harm independent programmers. This conduct could be discouraged through the adoption of an

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<sup>44</sup> HDNet Comments at 10 (three years); MASN Comments at 23 (“[T]he Commission should establish that any adverse action taken within two years of the resolution of a complaint constitutes *prima facie* evidence of retaliation. . . .for if a defendant MVPD has a legitimate nonretaliatory reason for taking an adverse action against a complainant vendor so soon after the resolution of a carriage dispute, it should have little trouble demonstrating that reason.”).

<sup>45</sup> Bloomberg Comments at 17.

<sup>46</sup> Comcast Comments at 64; Comments of Time Warner Cable Inc., MB Dkt. No. 11-131 at 10 (filed on Nov. 28, 2011) (“Time Warner Comments”); Comments of DirecTV Inc., MB Dkt. No. 11-131 at 20 (filed on Nov. 28, 2011) (“DirecTV Comments”); Comments of Cablevision Systems Corp., MB Dkt. Nos. 11-131 & 07-42 at 15 (filed on Nov. 28, 2011) (“Cablevision Comments”); Comments of The National Cable & Telecommunications Assoc. (“NCTA”), MB Dkt. No. 11-131 at 18-22 (filed on Nov. 28, 2011) (“NCTA Comments”).

<sup>47</sup> MASN Comments at 22.

antiretaliation rule by the Commission and the threat of significant damages and/or forfeitures for violation.

The allegation that an antiretaliation rule will encourage the filing of frivolous complaints is false. The decision to file a program carriage complaint requires the commitment of significant resources, since the time and the expense involved in preparing, filing and prosecuting a program carriage complaint is burdensome.<sup>48</sup> A programmer would much rather negotiate a carriage agreement with an MVPD rather than wait more than a year for the Commission to act on its complaint.<sup>49</sup>

#### **IX. GOOD FAITH NEGOTIATIONS WITH UNAFFILIATED PROGRAMMERS SHOULD BE REQUIRED TO ENSURE FAIRNESS**

The FCC proposed adopting a rule that would require a vertically integrated MVPD to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD. Bloomberg supports the comments filed by Crown Media, the Joint Commenters, HDNet and MASN, all of whom encourage the Commission to adopt a requirement to negotiate in good faith.<sup>50</sup> Crown Media states, and Bloomberg agrees, that MVPDs do not make or respond to offers until a contract is almost up or make inadequate offers,<sup>51</sup> thus impairing the programmer's ability to expand advertising, invest in

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<sup>48</sup> MAP Comments at 8 (“Recent and ongoing program carriage complaints demonstrate that the length and expense of the complaint process has likely discouraged programmers from bringing even meritorious complaints.”).

<sup>49</sup> See Tennis Channel Initial Decision at 1 (The complaint was filed on July 5, 2010, and the Initial Decision, which is not a final order, was released December 20, 2011, a delay of nearly 18 months.).

<sup>50</sup> Crown Media Comments at 3; Joint Commenters Comments at 30; HDNet Comments at ii; MASN Comments at 15.

<sup>51</sup> MASN Comments at 17 (“Simply making one unreasonable ‘take it or leave it’ offer – such as an offer to carry unaffiliated programming only on an inferior tier – should not discharge a cable operator’s obligation to negotiate in good faith.”).

new programming and raise capital.<sup>52</sup> Bloomberg supports a requirement to negotiate in good faith because it will help ameliorate these MVPD practices.<sup>53</sup> The Joint Commenters and MASN also support good faith negotiations: “Imposing a good faith negotiation obligation on MVPDs would help create balance in the negotiation process. It also would advance one of the goals Congress set forth in adopting Section 616 — the promotion of diversity and independent voices.”<sup>54</sup> MASN further argues, and Bloomberg supports, the recommendation that “[a] vertically integrated MVPD should not be permitted to proffer ‘business justifications’ for non-carriage of an independent programmer that it does not apply to its own programming affiliates.”<sup>55</sup>

By contrast, Comcast, Time Warner, Verizon, MSG and Cablevision do not support good faith negotiations and argued that such a rule is not needed; the FCC did not provide any evidence of discrimination against similarly situated unaffiliated programming vendors; the FCC has no legal authority to adopt such a rule; and it is inappropriate for the program carriage process.<sup>56</sup> NCTA also argues that a good faith negotiation rule is unnecessary because there is no evidence of widespread favoritism of affiliated programming: “Even the Commission concedes that there has been no evidence of such ‘I’ll favor yours if you’ll favor mine’ agreements – either tacit or explicit – between vertically integrated MVPDs.”<sup>57</sup> NCTA’s statement is inaccurate. MASN provides an example of

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<sup>52</sup> Crown Media Comments at 4 (“[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.”).

<sup>53</sup> *See id.* at 3-4.

<sup>54</sup> Joint Commenters Comments at 30; MASN Comments at 15-20.

<sup>55</sup> MASN Comments at 20.

<sup>56</sup> Comcast Comments at 69-74; Time Warner Comments at 12; Comments of Verizon, MB Dkt. No. 11-131 at 3 (filed on Nov. 28, 2011) (“Verizon Comments”); Comments of MSG Holdings L.P. and Music Choice (collectively, “MSG”), MB Dkt. Nos. 11-131 & 07-42 at 13-14 (filed on Nov. 28, 2011) (“MSG Comments”); Cablevision Comments at 11.

<sup>57</sup> *Compare* NCTA Comments at 8 *with* MASN Comments at 15-16 (“An MVPD’s refusal to engage in genuine carriage negotiations can be as harmful to independent programmers as the ultimate

such conduct: Comcast's RSNs charge higher fees than MASN for carriage but the Comcast's RSNs are more widely carried, arguably because MVPDs with affiliated programming want to ensure that their affiliated programming will be carried by Comcast.<sup>58</sup> Further, in the Tennis Channel Initial Decision, the ALJ concluded that "[s]ubstantial record evidence shows that MVPDs are influenced by the carriage decisions of other MVPDs"<sup>59</sup> and "the weight of the reliable record evidence demonstrates that the differences in channel placement and penetration level are based upon affiliation."<sup>60</sup> The ALJ was able to reach these conclusions even though Comcast was adamant in its comments that "[t]he proposal to require good-faith negotiations in carriage negotiations addresses a problem that *does not exist*"<sup>61</sup> and "[t]here is absolutely no evidence that MVPDs are not negotiating in good faith with cable networks."<sup>62</sup>

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decision to refuse carriage...By indefinitely stringing out 'negotiations'...cable operators have been able effectively to deny carriage to unaffiliated programming without ever having to articulate a firm reason for doing so.") and MAP Comments at 12 ("Independent programmers are clearly denied a fair opportunity to enter the marketplace if MVPDs give preference to their own affiliated programming, but independent programmers are equally harmed when MVPDs make a private deal to discriminate against unaffiliated programmers in favor of each other's affiliated programming. Either way, the independent programmer is denied even a seat at the negotiating table. . . .").

<sup>58</sup> See MASN Comments at 6; see also MAP Comments at 10 ("In a landscape with more vertically integrated MVPDs, a vertically integrated MVPD has both increased incentives to discriminate against competing video programmers and increased opportunities to discriminate in more subtle ways. Since the vertically integrated MVPD owns video programming that directly or indirectly competes with that of an independent programmer, the MVPD has motivation to discriminate against competing programming.").

<sup>59</sup> Tennis Channel Initial Decision at 30. The ALJ also reasoned: "Thus, when one MVPD carries a network at a particular level of distribution, it has a [CONFIDENTIAL] that make it more likely that other MVPDs will carry the network at the same level of distribution. Because Comcast Cable is the largest MVPD in the United States, its carriage decisions have a strong influence on other MVPDs." *Id.*

<sup>60</sup> Tennis Channel Initial Decision at 27.

<sup>61</sup> Comcast Comments at 6 (emphasis added); see also Time Warner Comments at 12 ("For similar reasons, the Commission should be wary of imposing a 'good faith' negotiation requirement, especially without any empirically based finding of market failure.").

<sup>62</sup> Comcast Comments at 69. Comcast also states: "The imposition of new regulatory burdens cannot be based on a record so speculative." *Id.* at 70. But the findings in the Tennis Channel Initial

Bloomberg supports the requirement of good faith negotiations and, as evidence, points to the MASN Comments and the Tennis Channel Initial Decision. Comcast, the largest MVPD, discriminates against unaffiliated programming, does not negotiate in good faith and uses its position as the largest MVPD to negotiate more favorable programming carriage agreements for its affiliated programming.<sup>63</sup> Thus, the Commission has ample evidence that such a good faith requirement is justified.

#### **X. INTERPRETING THE DISCRIMINATION PROVISION BROADLY SUPPORTS THE LETTER AND INTENT OF THE ACT**

The FCC proposed to clarify its rule so that the discrimination provision precludes a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD. Section 616(a)(3) of the Act requires that the Commission's rules "prevent a multichannel video programming distributor 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 of vendors..."<sup>64</sup> Bloomberg supports the Commission's proposal and reiterates the importance of broadly interpreting the discrimination provision in Section 616(a)(3) to make clear that a cable operator discriminating against an independent programmer is a violation of the Act.<sup>65</sup> As evidenced by the Tennis Channel Initial Decision, such discrimination is occurring today. The

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Decision clearly show that there is nothing speculative about Comcast's disparate treatment of unaffiliated programmers during program carriage negotiations. Tennis Channel Initial Decision at 38.

<sup>63</sup> MASN Comments at 21-23; Tennis Channel Initial Decision at 48.

<sup>64</sup> 47 U.S.C. § 536(a)(3).

<sup>65</sup> Bloomberg Comments at 17.

FCC needs to strength its discrimination rule to prevent this type of discrimination since in the future it could take a variety of different forms.<sup>66</sup>

Comcast, Time Warner, Cox, DirecTV, Verizon, ACA and NCTA opposed any expansion of the Commission discrimination rules, arguing that the FCC lacks any factual or legal basis for such a proposal; the D.C. Circuit already rejected a similar rule; the number of programming carriage complaints would increase; and independent programming networks would be harmed.<sup>67</sup> These arguments lack merit. As evidenced by the findings in the recent Tennis Channel Initial Decision, discrimination against unaffiliated programming is occurring.<sup>68</sup> The D.C. Circuit previously rejected a similar rule because, at the time, there was no demonstrated need for such a rule. The recent Tennis Channel Initial Decision adds new information to the record that demonstrates that such a rule is needed.<sup>69</sup> In that decision, the ALJ found documented evidence that Comcast favors affiliated networks during the program carriage process and even directed its local cable systems to carry affiliated programming on certain tiers so Comcast could negotiate preferential carriage agreements for its affiliated programming with unaffiliated MVPD systems.<sup>70</sup>

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<sup>66</sup> Tennis Channel Initial Decision at 48.

<sup>67</sup> Comcast Comments at 5; Time Warner Comments at 7 (“[T]here is no reason to believe that an MVPD would unreasonably discriminate in favor of a programming provider that is vertically integrated with some other MVPD.”); Comments of Cox Communications Inc. (“Cox”), MB Dkt. No. 11-131 at 3 (filed on Nov. 28, 2011) (“Cox Comments”); DirecTV Comments at 1-5; Verizon Comments at 2-4; Comments of American Cable Assoc. (“ACA”), MB Dkt. Nos. 11-131 & 07-42 at 4-6 (filed on Nov. 28, 2011) (“ACA Comments”); NCTA Comments 9-10 & 16.

<sup>68</sup> Tennis Channel Initial Decision at 48.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 48 (“Substantial record evidence also shows Comcast Cable gives special assistance or favors to its affiliated sports networks that it does not provide to unaffiliated networks. For example, Comcast Cable took steps to ensure that Versus fulfilled distribution requirements in a contract for valuable programming rights; a Comcast Cable executive represented Versus in its carriage negotiations with another MVPD; and another Comcast Cable executive assisted Versus in obtaining favorable channel placement on Comcast Cable’s systems.”).

The Joint Commenters, HDNet, and MAP support clarification of the rule to preclude MVPDs from discriminating in favor of programmers affiliated with other MVPDs to the detriment of unaffiliated programmers.<sup>71</sup> Bloomberg reiterates the importance of broadly interpreting the discrimination provisions in order to level the playing field between affiliated and unaffiliated programming during program carriage negotiations.<sup>72</sup> It is critical that the Commission interpret Section 616(a)(3) in accordance with its plain meaning in order to prevent discrimination by MVPDs in carriage decisions in favor of large, integrated networks of channels with superior market power over independent competitors.<sup>73</sup> Both the MASN comments and the Tennis Channel Initial Decision provide evidence of MVPD discrimination against programmers and illustrate the different forms such discrimination may take.<sup>74</sup> MASN explains that Comcast told its subscribers that MASN raised its carriage rates and then passed an even higher increase onto its customers.<sup>75</sup> At the same time, Comcast demanded even higher fees, well above what MASN charged Comcast, from other MVPDs in order to carry Comcast's RSNs.<sup>76</sup> The Tennis Channel Initial Decision findings support

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<sup>71</sup> Joint Commenters Comments at 13 (supports “the Commission’s proposed clarification that the program carriage rules preclude discrimination on the basis of a programming network’s affiliation, or lack thereof, even if the relevant affiliation is with another MVPD that has received favorable reciprocal treatment unjustified by the performance of its affiliated programming entities”); HDNet Comments at 11-13; MAP Comments at 11-13.

<sup>72</sup> Bloomberg Comments at 17-19; *see also* HDNet Comments at 11 (“HDNet urges the FCC to not only adopt this rule, but to go further and prohibit *all* discrimination that violates the statute based on *any* form of affiliation or non-affiliation.” (emphasis in original)).

<sup>73</sup> Bloomberg Comments at 18; HDNet Comments at 13 (“The FCC should recognize the incentive for MVPDs to favor not only their own content, but also the content of other major players. . .”).

<sup>74</sup> MASN Comments at 6; Tennis Channel Initial Decision at 48.

<sup>75</sup> MASN Comments at 22.

<sup>76</sup> *Id.*

the conclusion that MVPDs discriminate against unaffiliated programmers and use their market position to influence competing MVPD carriage decisions.<sup>77</sup>

## **XI. CLEAR RULES REGARDING ALLOCATION OF THE BURDEN OF PROOF WOULD ELIMINATE CONTROVERSY AND FURTHER STREAMLINE THE ADJUDICATION PROCESS**

The Commission proposed to codify which party bears the burden of proof in program carriage discrimination cases. Bloomberg favors adoption of a framework similar to the program access rules, whereby once the complainant establishes a *prima facie* case of discrimination with either direct or circumstantial evidence, the burdens of production and persuasion shift to the defendant to establish nondiscriminatory reasons for such action. Crown Media, the Joint Commenters, HDNet, MAP, and MASN all support a similar burden shifting methodology.<sup>78</sup> This method is more consistent with the statutory scheme of Section 616(a)(3), its underlying policy objectives, and its legislative history. Programmers will rarely have direct evidence of discrimination since the cable operator is the party that possesses the information as to why it made a particular carriage decision.<sup>79</sup>

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<sup>77</sup> Tennis Channel Initial Decision at 48-49. For example, the ALJ noted that significant evidence was presented to show that Comcast favors its affiliated programming with respect to channel placement, distribution levels and license fee arrangements. *Id.* It also offers more favorable programming carriage terms to networks that offer Comcast an equity interest in the network during carriage negotiations. *Id.* at 29.

<sup>78</sup> Crown Media Comments at 9-13; Joint Commenters Comments at 10-11; HDNet Comments at 5-7; MAP Comments at 15-18; MASN Comments at 11 (“The program-access and program-carriage rules serve complimentary ends: both rules address the incentive and ability of cable operators to abuse their vertical integration in the parallel markets in which they operate.”).

<sup>79</sup> HDNet Comments at 3-5 (“Independent programmers suffer from a severe informational disadvantage both in negotiating with MVPDs and in attempting to exercise their rights under Section 616. MVPDs typically require non-disclosure clauses in connection with their carriage negotiations and in their carriage agreements, which make it hard for independent programmers to learn and compare what terms and conditions are available in the current universe of carriage contracts. The MVPD . . . [knows] the terms of its deals with every network it carries and of its offers or negotiations with even more networks, but it may also get information about the deals that programmers have with *other* MVPDs through ‘most-favored nations’ clauses . . .”).

In addition, MVPDs should be required to provide details of all carriage contracts automatically, in order to establish a reasonable license fee.

Comcast and Time Warner oppose any burden shifting that would cause them to defend a complaint solely based on the programmer's *prima facie* showing before an evidentiary record was developed, arguing that such a framework violates the Administrative Procedure Act, Section 616 of the Cable Act, and the First Amendment, and tilts the balance of the complaint process in favor of programmers.<sup>80</sup> Comcast also argued that the FCC needs to review more carefully an MVPD's answer to the complaint before concluding the programmer has made a *prima facie* showing of discrimination, consider more carefully the MVPD's business case for the alleged discrimination and require programmers to submit evidence that its license fee is reasonable.<sup>81</sup> This view fails to recognize that MVPDs, not programmers, have the documents and information needed for the Commission to determine if a business case or license fee is reasonable. A programmer cannot make a showing that its licensee fee is reasonable until the MVPD provides details of all carriage contracts. For these reasons, the burden of proof must shift from the programmer to MVPDs since only the MVPD has the information to determine whether its carriage decisions are discriminatory.

## **XII. THE PROPOSED DEFINITION OF AFFILIATE SHOULD BE ADOPTED**

Bloomberg supports the Commission's proposed change, which would expand the definition of affiliate to include a programmer if that programmer and an MVPD entered into a carriage contract that requires the carriage of commonly owned channels and adversely affects the ability of other programmers to obtain carriage.

Charter, Cox, DirecTV, and Cablevision oppose the Commission's proposed changes to the definition of affiliate. They argue that the changes are contrary to Section 616 of the Cable Act, will

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<sup>80</sup> Comcast Comments at 5; Time Warner at 11-12.

<sup>81</sup> Comcast Comments at 63.

disrupt the marketplace, are contrary to Congressional intent, would unfairly favor unaffiliated programmers in negotiations and no longer reflect marketplace realities.<sup>82</sup> NCTA, Charter and Cox oppose changes to the meaning of affiliation because it would bring in relations that all programmers have with MVPDs, i.e., agreements to carry programming, which would “distort the [programming] market by giving program vendors new leverage in negotiations that are now driven by Charter’s independent evaluation of customer value.”<sup>83</sup> Cablevision argues that [e]xpanding the concept of ‘affiliation’ to include a programming service affiliated with *any* MVPD would give independent programmers an expansive pool of programming services to which they could assert similarity – and thus claim rights under Section 616.”<sup>84</sup> Contrary to these allegations, the Commission’s proposed changes to the definition of affiliate will prevent business arrangements from being used to shield discriminatory conduct that would otherwise not be actionable.

### **XIII. CONCLUSION**

The Commission’s recent action adopting timeframes for resolving program carriage disputes is a positive first step in fixing the program carriage regime. The proposals in the NPRM that remove uncertainty from the program carriage complaint process, level the playing field with respect to the imbalance between MVPDs and independent programmers, and facilitate prompt resolution of program carriage complaints are an important next step to fulfill the 1992 Cable Act’s mandate of expeditiously resolving such complaints and protecting independent programmers from

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<sup>82</sup> Comments of Charter Communications (“Charter”), MB Dkt. Nos. 11-131 & 07-42 at 1-2 (filed on Nov. 28, 2011) (“Charter Communications”); Cox Comments at 3-4; DirecTV Comments at 1; Cablevision Comments at 15; MSG Comments at 3 (For example, Cablevision and MSG are separate public companies but, for purposes of the FCC’s attribution rules, are attributable.).

<sup>83</sup> NCTA Comments at 7-10; Charter Comments at 2; Cox Comments at 3-4 (“Rather than creating a fairer cable programming market, these changes would bring further distortion to an already challenging programming market and encourage programmers to seek carriage through the Commission rather than through good-faith negotiation with cable operators.”).

<sup>84</sup> Cablevision Comments at 2.

discrimination. In particular, adopting rules requiring parties to carriage complaint proceedings to submit final offers and participate in baseball-style arbitration, providing for compensatory and punitive damages, providing for automatic document production, and preventing retaliation would all further the Act's goal of expeditious resolution of program carriage complaints and protecting independent programmers from discrimination. Making all mandatory carriage orders automatically effective would also make the carriage complaint process more fair. Interpreting the discrimination provision broadly, and clarifying the burden of proof in program carriage complaint proceedings would lend certainty to the process and eliminate the need to litigate those issues. Bloomberg encourages the Commission to adopt these proposals promptly to facilitate fair and expeditious review of program carriage complaints.

Respectfully submitted,



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