

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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

**REPLY COMMENTS OF COMCAST CORPORATION**

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January 11, 2012

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**COMMENTS OF COMCAST CORPORATION**

Comcast Corporation (“Comcast”) hereby responds to the above captioned Notice of Proposed Rulemaking (“*Notice*”).<sup>1</sup> The first round of comments largely confirms that there are no factual or legal bases for adopting the expansive regulatory proposals in the *Notice*, and that doing so would infringe on multichannel video programming distributors’ (“MVPDs”) First Amendment rights. Accordingly, as the majority of commenters urged, the Commission should refrain from adopting any proposals that would increase regulatory burdens and should confine its actions to clarifying its existing rules to bring more certainty to program carriage proceedings.

**I. INTRODUCTION AND SUMMARY**

The programmers and advocacy groups that filed comments in support of increased regulation nearly uniformly confirm what Comcast explained in its comments – that certain programmers consider the program carriage rules (and the *Notice*’s proposals) a means to distort marketplace negotiations and maximize their leverage rather than a vehicle to remedy actual harms Section 616 of the Communications Act was intended to address. Not a single proponent of the rules put forth legitimate, concrete examples of problems or holes left by the current

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<sup>1</sup> *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*”). Unless otherwise indicated, all comments cited to herein refer to comments filed on or around November 28, 2011 in MB Docket No. 11-131.

program carriage rules that the *Notice*'s proposals would fix or fill. Notably, every one of the networks that filed comments in support of the *Notice*'s proposals is available currently on multiple platforms to virtually every consumer in America. It follows then, that the 1992 Cable Act's directive to "rely on the marketplace to the maximum extent feasible" has been and remains sound and effective.<sup>2</sup>

Today's robust, vibrant marketplace ensures that there is a broad "diversity of views and information [available] through cable television and other video distribution media."<sup>3</sup> Indeed, arguments by programmers that the video programming marketplace suffers for lack of competition ring hollow and are unsupported by the record. Comcast and numerous commenters highlighted the vast changes that have taken place over the past two decades, making today's marketplace virtually unrecognizable as compared to that in 1992. As the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") recently concluded, the record is "replete with evidence of ever increasing competition among video providers" and "[c]able operators, therefore, no longer have bottleneck power over programming that concerned Congress in 1992."<sup>4</sup>

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

<sup>3</sup> *Id.* § 2(b)(1). Certain commenters highlight that one of the policies underlying the 1992 Cable Act was to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." *See, e.g.*, Bloomberg Comments at 2 (quoting H.R. Conf. Rep. No. 102-862, at 4 (1992)). Although that was *one* of the policies underlying the 1992 Cable Act, these same commenters conveniently omit that the *very next* policy enumerated in that Act was "to rely on the marketplace, to the maximum extent feasible, to achieve that availability." 1992 Cable Act § 2(b)(2), 106 Stat. at 1463. As explained below, given that the marketplace is competitive and there is more diversity of views and information on cable television and other video distribution media than ever before, the first policy of the 1992 Cable Act has been accomplished and the Commission should adhere to the congressional directive to "rely on the marketplace," as well as the policy codified in Section 601 of the Communications Act that it "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6).

<sup>4</sup> *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

In such a competitive marketplace, it makes no sense for the Commission to interfere in the marketplace in a manner that tips the scales by creating new, artificial incentives or leverage for programmers. And that is particularly true in this era of rising programming costs and rapid change within the industry: Comcast and other MVPDs must retain the latitude to reach deals that make economic sense across the board, which means having the ability to resist unreasonable pricing and tier demands. Proposals that would facilitate litigation over every such decision would distort the marketplace and seriously impair First Amendment freedoms.

There is no valid need for regulation – much less expanded regulation – in this area. Tellingly, Comcast struck deals with and currently carries every one of the programmers that claims more regulation is needed to protect them – Bloomberg, Crown Media (Hallmark), Current TV, GSN, HDNet, MASN, NFL Network, and Tennis Channel.

The vast majority of the *Notice*'s proposals are not only unnecessary and antithetical to competition, but their adoption is also beyond the Commission's authority under Section 616 and the Administrative Procedure Act ("APA") and would infringe upon MVPDs' First Amendment rights. Commenters eager for more regulation ignore these legal constraints, and instead premise their arguments on numerous myths about the marketplace and the nature of the program carriage rules that are easily dispelled. Indeed, the record shows that the vast majority of the *Notice*'s proposals are misguided, flawed, and will inevitably lead to meritless litigation and higher costs for consumers:

- Implementing expanded discovery and automatic document production will broaden discovery requests, increase costs and delays, and impose unnecessary burdens on complainants and defendants alike.
- Allowing complainants to seek damages for program carriage violations likely will impede the opportunity to settle cases and result in programmers using the program carriage complaint process to exert unfair pressure in and distort negotiations.

- Providing for mandatory carriage immediately upon an initial determination of a program carriage violation would violate Section 616 and the APA, and would infringe upon MVPDs' First Amendment rights.
- Adopting an "anti-retaliation" rule is unnecessary, would exceed the Commission's authority, and would invite all manner of unwarranted and overbroad interference with MVPDs' editorial decision-making.
- Implementing a "good-faith" negotiation requirement is beyond the Commission's authority because there is no obligation for MVPDs to negotiate with or carry unaffiliated programming in the first place, and it would unfairly increase programmers' leverage in otherwise even-handed, commercial negotiations without providing any benefits to consumers.
- Expanding the scope of "affiliation" would go well beyond the concerns that Section 616 was intended to address and would involve the Commission in the litigation of wholly speculative theories of anti-competitive behavior.
- Shifting the burden of proof and persuasion to a defendant MVPD after the complainant establishes a prima facie case would violate Section 616 and the APA and would create a presumption in favor of compelled speech that is inconsistent with the First Amendment.

To the extent the Commission does revise its program carriage rules, it should only adopt proposals that would improve and expedite the complaint process – namely, clarifying the statute of limitations to prevent complainants from manufacturing belated triggering events and allowing submission of final offers in a separate remedy phase if mandatory carriage is ordered.

The rest of the *Notice's* proposals simply cannot be justified.

## **II. THERE IS NO FACTUAL BASIS OR STATUTORY AUTHORITY FOR ADOPTING THE *NOTICE'S* PROPOSALS, AND DOING SO WOULD VIOLATE THE APA AND THE FIRST AMENDMENT.**

Absent from the comments is any genuine evidence of harms in the marketplace that need to be remedied or deficiencies in the program carriage rules that need to be fixed. Instead, like the *Notice*, comments supporting increased regulation are filled with conclusory assertions, mischaracterizations of past disputes, and convoluted and strained interpretations of (or simply ignoring) applicable legal constraints. Pervasive in those comments is a casual assumption that today's video marketplace is effectively the same as the video marketplace that concerned

Congress nearly two decades ago, and that whatever intrusive steps the Commission takes today to address Congress's concerns back in 1992 will be perfectly justified, within its authority, and consistent with the First Amendment. As Comcast and others demonstrated in their comments, exactly the opposite is true.

**A. No Factual Evidence Exists To Support the Notice's Proposed Expansion of the Program Carriage Rules.**

The APA and First Amendment both require that an agency promulgating rules put forth record evidence of actual problems that it seeks to fix and not simply posit a hypothetical harm to be cured.<sup>5</sup> Such evidence is entirely lacking in the record of this proceeding.<sup>6</sup> Not one commenter put forth concrete facts demonstrating that the current program carriage rules have holes that need to be filled or have caused problems that the *Notice's* proposals will fix. Instead, such proponents rely on conjectural and speculative concerns about what *could* happen if the rules are not adopted, despite the fact that they cannot point to legitimate instances of these concerns having come to fruition in the past 20 years.<sup>7</sup>

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<sup>5</sup> See Comcast Comments at 13 (citing *Time Warner Entm't v. FCC*, 240 F.3d 1126, 1132-36 (D.C. Cir. 2001) ("*Time Warner I*")); MSG & Music Choice Comments at 5 ("One of the hallmarks of sound regulation, and a basic prerequisite for lawful agency action (particularly where speech interests are implicated), is that agency rules address real harms, not speculative or conjectural concerns." (citing *Time Warner II*, 240 F.3d at 1130 and *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977))); Time Warner Cable ("TWC") Comments at 8 (noting that the Commission "must do more than simply 'posit the existence of the disease sought to be cured' . . . . Rather, the Commission may draw reasonable inferences only when supported with substantial evidence." (citations omitted)).

<sup>6</sup> See Cablevision Comments at 18 ("[E]ach of the proposals is based on the speculation and conjecture of a small number of disgruntled networks, rather than on any record assembled after careful inquiry."); MSG & Music Choice Comments at 6-7 ("There is not a scintilla of evidence to suggest that the sort of inter-MVPD coordination of program carriage decisions fancifully conjured by a single programmer actually takes place in the real world."); TWC Comments at 10 ("[T]he NPRM accepts without question that programming vendors are not filing more complaints out of 'fear of retaliation' and thus does not consider instead whether the concerns leading Congress to enact Section 616 are no longer present.").

<sup>7</sup> For example, Bloomberg asserts that "some cable operators have indicated they will not negotiate with programmers that file complaints," but does not provide a single example of such refusals. Bloomberg Comments at 15. Crown Media suggests that "the fundamental concern of independent programmers filing program carriage complaints against MVPDs [is] potential retaliation . . . after final resolution of the complaint by the Commission," but it similarly does not provide a single example of retaliation of any kind ever having occurred. Crown Media

Certain commenters claim that vertically-integrated MVPDs have the incentive and are likely to engage in a wide range of conduct the Commission should limit, ranging from retaliating against programmers for filing complaints to discriminating on the basis of a programmer's affiliation with another MVPD to unnecessarily delaying discovery.<sup>8</sup> Yet, as discussed with respect to each of the proposals below, not one commenter cited a single concrete example of such behavior having occurred *in the absence* of such rules, nor does any commenter ever attempt to explain why this behavior will suddenly start to occur *now* or if such rules are adopted.<sup>9</sup>

As multiple commenters stressed, reasoned decision-making under the APA requires an agency to “examine the relevant data and articulate a satisfactory explanation for its action

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Comments at 6. And, even when a commenter cites to a study that arguably provides circumstantial evidence of a potential problem that needs to be cured, *see* Current TV et. al (“Joint Commenters”) Comments at 12 n.18 (citing to a 2005 study on “reciprocal carriage”), it is apparent that, as the Commission notes in the *Notice*, the study's conclusions are based on outdated data from 1999 that is in no way relevant to today's marketplace. *See 2011 Program Carriage Order & Notice* ¶ 74 n.258; *see also* DirecTV Comments at 10 (noting that this study relied on decade-old data and was published prior to the Commission's decision on remand of the cable ownership cap).

<sup>8</sup> *See, e.g.*, Bloomberg Comments at 10 (arguing that a damages remedy would provide a “much needed” incentive to comply with the program carriage rules because “[u]nder the current regime, MVPDs have *no incentive* to [comply] voluntarily” (emphasis added)); Crown Media Comments at 6 (arguing that, without a temporary standstill, MVPDs will “assert overwhelming pressure” and threaten to delete programming); Joint Commenters Comments at 12 (suggesting that vertically integrated MVPDs will enter into carriage arrangements with other MVPDs to mutually benefit their affiliated programming entities); *id.* at 19 (suggesting that MVPDs abuse the discovery process); HDNet Comments at 10-11 (arguing that, without protection from MVPD retaliation, programmers will be hesitant to bring complaints); TRC Sports Broad. Holding, L.L.P., d/b/a Mid-Atlantic Sports Network (“MASN”) Comments at 28 (suggesting that MVPDs need a damages deterrent to prevent them from “flouting the program carriage rules”).

<sup>9</sup> Interestingly, Bloomberg asserts that the lack of any program carriage decision on the merits finding that an MVPD violated the rules is itself “strong evidence” that the current procedures have failed, and that the increase in the number of complaints since 2007 “is likely the result of increased media concentration and vertical integration of cable operators and programmers.” *See* Bloomberg Comments at 4. That is inconsistent with longstanding credible data. As NCTA explains, “The most reasonable conclusion that could be drawn . . . is that the problem that Congress intended to address when it enacted the program carriage provisions . . . was – or at least soon became – illusory. . . . With the disappearance of the market conditions that made unfair and anticompetitive discrimination based on affiliation worrisome to Congress, it is not surprising that there have been few complaints and no adjudicated violations of the rules.” NCTA Comments at 1, 3. In addition, any increase in media concentration has been expressly approved to be in the public interest by the Commission, and where the Commission perceived harms from such concentration, it adopted conditions to address those potential harms. Finally, up until last January when the Commission approved the Comcast-NBCUniversal transaction, vertical integration between programmers and cable operators had declined steadily and precipitously. *See, e.g.*, MSG & Music Choice Comments at 2.

including a rational connection between the facts found and the choice made.”<sup>10</sup> The Supreme Court has made clear that, under the First Amendment, when the government defends a regulation on speech, “it must do more than simply posit the existence of the disease sought to be cured” but, instead, “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.”<sup>11</sup> It is difficult to imagine how, given the dearth of facts suggesting any harms truly exist that the proposed rules will address, the Commission could meet either of these standards on judicial review.

**B. The Commission’s Authority To Adopt Many of the *Notice*’s Proposals Is Highly Questionable and Doing So Likely Would Violate the First Amendment.**

The *Notice* proposes a broad array of new rules and seeks comment on the Commission’s authority to adopt the proposals. Yet only *one* proponent of increased regulation even discussed the Commission’s general authority under Section 616 to expand the program carriage rules as proposed in the *Notice*, asserting (with no credible legal support) that the Commission’s authority is far broader than the statutory language and includes authority to adopt any rules it deems “necessary to address the reality of MVPDs’ market power against independent programmers.”<sup>12</sup> A few others, when discussing specific proposals, simply echo the Commission’s statement in the *Notice* that Section 616 contains broad language to “establish

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<sup>10</sup> See DirecTV Comments at 7 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983)); Comcast Comments at 13-14 (citing same).

<sup>11</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (“*Turner I*”) (internal quotations omitted); see Comcast Comments at 23 (quoting *Turner I*); Cablevision Comments at 18 (citing same); NCTA Comments at 4 (citing same).

<sup>12</sup> Media Access Project and Public Knowledge (“MAP & PK”) Comments at 5.

regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors.”<sup>13</sup>

Reliance on the language of Section 616 as a broad grant of authority is misplaced. Unlike the program access provisions of the Communications Act, which the *Notice* and proponents of regulation eagerly cite as support for many of the *Notice*’s proposals, Section 616 does not contain a broad grant of authority followed by a list of “*Minimum Contents of Regulations*.”<sup>14</sup> Rather, Section 616 is very clear about what the Commission’s program carriage regulations “shall” contain, i.e., six specific, enumerated requirements (only three of which regulate MVPD conduct).<sup>15</sup> Commenters’ claim that Section 616(a) provides a broad grant of authority for the Commission to adopt any rule it wants related to program carriage agreements cannot be squared with the statutory language and would have no limiting principle.

Also notably missing from the comments encouraging more regulation was any reference to the First Amendment, let alone any meaningful discussion of First Amendment constraints on such an activist government role in MVPDs’ editorial decision-making. Comcast and others cautioned in their comments that the *Notice* severely shortchanges consideration of the First Amendment, despite the fact that the Supreme Court has made clear that “[c]able programmers and cable operators engage in and transmit speech, and [] are entitled to the protection of the speech and press provisions of the First Amendment.”<sup>16</sup> Just as they largely ignore the question

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<sup>13</sup> 2011 Program Carriage Order & Notice ¶ 65; see Crown Media Comments at 5 n.1 (claiming that the Commission has broad authority to adopt a good-faith negotiation requirement); Joint Commenters Comments at 14 (claiming that the Commission has ample authority under Sections 616 and 4(i) to adopt an anti-retaliation rule).

<sup>14</sup> 47 U.S.C. § 548(c)(2) (emphasis added).

<sup>15</sup> See 47 U.S.C. § 536(a).

<sup>16</sup> Comcast Comments at 20 (quoting *Turner I*, 512 U.S. at 636); Cablevision Comments at 16 (quoting same); see also TWC Comments at 2-6; NCTA Comments at 4.

of statutory authority, proponents of increased regulation appear oblivious to the First Amendment concerns raised by the proposed rules.<sup>17</sup> In fact, based on recent case law, it is not at all clear that any program carriage regulations can be justified under the First Amendment in today's competitive marketplace.<sup>18</sup>

As Comcast explained in its initial comments, even if the *Notice's* proposals are subject to only intermediate rather than strict scrutiny,<sup>19</sup> none of those proposals advances important governmental interests, nor are they narrowly-tailored.<sup>20</sup> To be sure, competition and diversity in carriage of programming are important values, but there is no longer the need for government intervention to advance those interests. Indeed, today's competitive marketplace ensures that diversity and competition are robust, thereby negating any justification for greater – or, indeed, any – government involvement in program carriage marketplace negotiations. The lack of

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<sup>17</sup> Media Access Project and Public Knowledge adopt a novel interpretation of the First Amendment that, in effect, requires the language of the First Amendment to read: “Congress shall make such laws as are necessary to compel MVPDs to carry any programming network any viewer wants.” See MAP & PK Comments at 1. The Constitution of the United States has never been interpreted to constrain the conduct of private speakers. Rather, as the words of the Constitution make clear – “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” – the First Amendment is intended to constrain *government* action. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) (noting that the guarantee of free speech guards “only against encroachment by the government and ‘erect[s] no shield against merely private conduct’” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (“It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.”); *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 114 (1973) (“That ‘Congress shall make no law . . . abridging the freedom of speech, or of the press’ is a restraint on government action, not that of private persons.”). And, only where government action meets the relevant First Amendment scrutiny can such regulation be justified.

<sup>18</sup> See Comcast Comments at 18-28; TWC Comments at 6 (“In the face of increasing competition among video distributors, the last thing the Commission should do is to elevate its own role in choosing speakers and compelling speech.”).

<sup>19</sup> Comcast and others stressed in their comments that, unlike leased access or must-carry, the program carriage rules are not content-neutral. To the contrary, they allow the Commission to directly evaluate an MVPD's assessment of programming networks' merits and value and the “comparability” of different aggregations of programs. See Comcast Comments at 21-22; TWC Comments at 2, 3-4. And, the *Order's* amendments explicitly invite comparison between programming based on “genre,” “target programming,” and other factors that will necessarily entail government judgments about the content of the programming. Thus, the rules should be examined under strict scrutiny. See Comcast Comments at 22; TWC Comments at 4.

<sup>20</sup> See Comcast Comments at 22-23.

evidence of harms that the proposed rules would actually address only reinforces this reality. As the D.C. Circuit has made clear, when the First Amendment is at stake, an agency cannot impose prophylactic measures to protect against hypothetical harms; its rules must reflect the reality of the current marketplace.<sup>21</sup> Yet the Commission’s proposed rules would impinge broadly and unnecessarily on MVPDs’ editorial discretion and are a far cry from the narrow, well-tailored rules the First Amendment demands.

**C. Comments Supporting Increased Regulation Appear To Labor Under Several Myths That Are Easily Dispelled.**

Not only do the comments praising more regulation short-change the above-noted legal constraints, but they also appear to be premised on numerous “myths.” The Commission should not give credence to these misconstructions of the marketplace and of the program carriage rules.

**MYTH #1: The video programming marketplace suffers from lack of competition.**

The comments in support of the *Notice*’s proposals uniformly ignore the current realities of a competitive video programming and distribution marketplace.<sup>22</sup> In their view, the marketplace is dominated by MVPDs – particularly, vertically integrated cable operators – that are unchecked by any meaningful competitors.<sup>23</sup> Indeed, some commenters argue that *nothing* has changed since 1992 and even imply that today’s marketplace might be less competitive than

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<sup>21</sup> See *id.* at 26.

<sup>22</sup> See, e.g., Bloomberg Comments at 5 (suggesting that cable operators continue to dominate the delivery of video programming); MASN Comments at 3 (arguing that the “danger” of vertically integrated cable operators withholding carriage from independent programmers “remains real today”); MAP & PK Comments at 3 (“The relevance of the program carriage rules . . . only ha[s] increased with the prominence of vertically integrated MVPDs and their dominion over today’s video programming marketplace.”).

<sup>23</sup> See Bloomberg Comments at 5 (“[D]espite numerous new media outlets, MVPDs and cable operators in particular continue to dominate the delivery of video programming.”). Ironically, Bloomberg makes Bloomberg TV available live online for free. See Bloomberg, Bloomberg Television Live, <http://www.bloomberg.com/tv/> (last visited Jan. 10, 2012).

in 1992.<sup>24</sup> As the Commission itself has recognized repeatedly, and the D.C. Circuit has confirmed, nothing could be further from the truth.

NCTA explained this particularly well. In 1992, very few communities were served by more than one MVPD (and that MVPD was almost always the locally franchised cable operator), cable systems could only provide a limited number of channels, and a majority of the programming networks provided were owned by cable operators.<sup>25</sup> Those days are no longer. Over the intervening two decades, “new competition – from DBS and telco operators to the multiple emerging sources of video content online – [has developed] at rapid pace”;<sup>26</sup> today, virtually every consumer can choose from at least three or more different MVPDs;<sup>27</sup> and “channel capacity on MVPD platforms has expanded substantially, the portion of cable-owned programming networks . . . has dropped precipitously, and the number of non-cable affiliated program networks . . . carried by distributors has risen considerably.”<sup>28</sup> Moreover, as commenters pointed out, the D.C. Circuit has concluded that the record is “replete with evidence of ever increasing competition among video providers” and that “[c]able operators no longer have the bottleneck power over programming that concerned Congress in 1992.”<sup>29</sup> In this

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<sup>24</sup> See, e.g., Bloomberg Comments at 6 (“Programming vendors continue to be dependent on MVPDs for the distribution essential for commercial viability – even more than they were when the 1992 Cable Act was enacted.”); Joint Commenters Comments at 1-2 (discussing the concerns Congress addressed in 1992 and suggesting that such concerns are as bad as – or worse – in today’s marketplace); MASN Comments at 3 (arguing that the danger that compelled Congress to act in 1992 “remains real today”); MAP & PK Comments at 3 (suggesting that the relevance of the program carriage rules has, if anything, increased since 1992 because of vertically integrated MVPDs “dominion over today’s video programming marketplace”). To the extent these commenters address video programming on the Internet, they do so only to call for more regulation. See MAP & PK Comments at 23-25.

<sup>25</sup> See NCTA Comments at 2.

<sup>26</sup> Cablevision Comments at 3.

<sup>27</sup> See NCTA Comments at 3; see also Cablevision Comments at 3-6; Comcast Comments at 9.

<sup>28</sup> MSG & Music Choice Comments at 2.

<sup>29</sup> Comcast, 579 F.3d at 8; see NCTA Comments at 3 (citing same); Comcast Comments at 9 (citing same).

marketplace, programmers themselves have become formidable players that can exert considerable pressure in negotiations. This is precisely the type of competition that Media Access Project and Public Knowledge said Congress “prescribed [as] an antidote against the ecosystem harms caused by powerful cable programmers acting to maximize their own benefit at the public’s expense.”<sup>30</sup>

Despite this vibrant competition, certain commenters assume, without any evidence, that MVPDs – whether affiliated with a programming network or not – collude to foreclose “independent” programmers from competing fairly in the marketplace or act unilaterally to unreasonably restrain the ability of a network to compete fairly.<sup>31</sup> This simply is not the case.<sup>32</sup> There is absolutely no evidence that MVPDs collude, and as the D.C. Circuit has made clear, the Commission cannot legally promulgate new regulations based on *theories* of collusion that are unsupported by marketplace evidence, especially where such regulation implicates First

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<sup>30</sup> MAP & PK Comments at 5. Comcast Cable recently, through marketplace negotiations, reached a landmark carriage agreement with Disney, signing an extended contract that covers numerous platforms and networks, including networks that compete with NBCUniversal networks. See Ryan Lawler, *Comcast Strikes Deal To Bring ABC, Disney & ESPN to All Screens*, Gigaom, Jan. 4., 2012, available at <http://gigaom.com/video/comcast-disney-tv-everywhere/>.

<sup>31</sup> See, e.g., Bloomberg Comments at 17-18; Crown Media Comments at 8-9; Joint Commenters Comments at 12 (“Joint Commenters believe that it is common for vertically-integrated MVPDs to enter into carriage agreements with other MVPDs that mutually benefit their affiliated program entities . . .”).

<sup>32</sup> See Comcast Comments at 2 (“[T]he evolution of the marketplace . . . has made it impossible for any MVPD to unreasonably restrain a programming network’s ability to compete fairly.”); Cablevision Comments at 6 (“In this environment, the affiliation of any given network does not drive program carriage decisions. MVPDs must offer the best possible programming packages to attract and retain subscribers.”); DirecTV Comments at 1, 4 (“[The Commission] has found repeatedly as a factual matter that MVPDs simply do not collude to favor one another’s programming.”); MSG & Music Choice Comments at 6 (“Neither MSG nor Music Choice derive any benefit in the marketplace merely by virtue of the fact that they are deemed to be ‘affiliated’ with cable operators . . . and are aware of no instance in which the mere fact of such affiliation has provided a programmer with favorable treatment. . . . Feverish speculation regarding collusion proffered by unaffiliated programmers is no substitute for evidence[.]”); NCTA Comments at 8 (“But even the Commission concedes that there has been no evidence of such ‘I’ll favor yours if you favor mine’ agreements – either tacit or explicit – between vertically integrated MVPDs.”).

Amendment concerns.<sup>33</sup> Moreover, there is no evidence in the record (nor could there be based on the vibrant competition in the marketplace) that any single MVPD has sufficient market power to unreasonably restrain a programming network's ability to compete fairly.<sup>34</sup>

As the D.C. Circuit explained in *Time Warner II*, “the assessment of a real risk of anti-competitive behavior – collusive or not – is itself dependent on an understanding of market power, and the Commission’s statements . . . seem to ignore the true relevance of competition.”<sup>35</sup> There are an ever-increasing number of options for a programming vendor to disseminate content to consumers, including via other MVPDs, online distributors, and other Internet-based platforms that cut out any distributor all together.<sup>36</sup> This increases enormously the already powerful force of the competition the D.C. Circuit began to recognize ten years ago: “If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch.”<sup>37</sup> Neither the *Notice* nor any commenter “shows . . . why this logic does not apply to

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<sup>33</sup> See *Time Warner II*, 240 F.3d at 1130 (“But while collusion is a form of anti-competitive behavior that implicates an important government interest, the FCC has not presented the ‘substantial evidence’ required by *Turner I* and *Turner II* that such collusion has in fact occurred or is likely to occur; so its assumptions are pure conjecture.”); see also *2011 Program Carriage Order & Notice* ¶ 74 (noting that the D.C. Circuit “struck down the Commission’s horizontal ownership cap based in part on the Commission’s failure to provide support for the concept that cable operators ‘have incentives to agree to buy their programming from one another’” (quoting *Time Warner II*, 240 F.3d at 1132)); NCTA Comments at 8 (noting same); Cox Comments at 4 (“[B]oth the D.C. Circuit and previous Commission decisions have concluded that no support exists for the conclusion that cable operators are likely to engage in [quid pro quo] behavior.” (citing *Time Warner II*, 240 F.3d at 1132 and *In re Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order, 23 FCC Rcd. 2134 ¶¶ 63-66 (2008), *vacated*, *Comcast*, 579 F.3d 1(D.C. Cir. 2009))).

<sup>34</sup> Although this may be debatable for a network that is limited to a particular local market, it is undeniable for national programming networks.

<sup>35</sup> *Time Warner II*, 240 F.3d at 1134.

<sup>36</sup> For example, comedian Louis C.K. recently distributed a comedy special, *Louis C.K.: Live at the Beacon Theater*, directly to consumers, via his own website, charging consumers \$5 via PayPal. See Louis CK: Live at the Beacon Theater, Home Page, <https://buy.louisck.net/> (last visited Jan. 10, 2012). Sales exceeded \$1 million in a matter of days, enough to recover the costs of creating the video, and recompense him for his work, and pay generous bonuses to staff, and make generous donations to charity. See *id.*, News Page. No network, and no MVPD, stood between Louis C.K. and his audience.

<sup>37</sup> *Time Warner II*, 240 F.3d at 1134.

the cable industry. Indeed, [the Commission’s] most recent competition report suggests that it does.”<sup>38</sup>

**MYTH #2: Vertical integration and MVPD concentration have increased dramatically since 1992.**

To justify their arguments for more regulation, certain commenters claim that the video marketplace is more concentrated and more vertically integrated today than in 1992.<sup>39</sup> As the Commission has documented, and the D.C. Circuit has confirmed, these assertions are patently false.<sup>40</sup>

Although Comcast’s recent transaction with NBCUniversal resulted in some increase in vertical integration, the majority of previously-vertically integrated media companies have de-integrated their programming and distribution businesses over the past twenty years.<sup>41</sup> And, as Cablevision, Comcast, and others explained in their comments, today, “the number of programming networks owned by an MVPD on its own service is typically a tiny fraction of the total [networks] offered.”<sup>42</sup> In fact, according to the Commission’s most recent video competition report, of the 500-plus national programming networks in existence, only about 15%

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<sup>38</sup> *Id.*

<sup>39</sup> See Joint Commenters Comments at 2 (“Since the 1992 Cable Act was passed, the industry has become both more consolidated and more vertically integrated, and history has shown that MVPDs can ignore with impunity the limits imposed by the statute.”); MAP & PK Comments at 3 (“The relevance of the program carriage rules, and the need for a fair and effective process, only have increased with the prominence of vertically integrated MVPDs and their dominion over today’s video programming marketplace.”).

<sup>40</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd. 542 ¶ 185 (2009) (“*Thirteenth Video Competition Report*”); *Comcast*, 579 F.3d at 8; *Cablevision v. FCC*, 597 F.3d 1306, 1309 (D.C. Cir. 2010).

<sup>41</sup> For example, Time Warner Inc. spun off its cable assets two years ago; Cablevision recently spun off its programming arm, Rainbow Media; and, as of 2008, News Corporation was no longer affiliated with DirecTV.

<sup>42</sup> Cablevision Comments at 6.

are affiliated with cable operators.<sup>43</sup> By contrast, in 1992, only 68 national programming networks existed, and 57% of those were vertically integrated with cable operators.<sup>44</sup> These numbers belie the notion that vertical integration is more significant or problematic today than it was two decades ago. And while there has been some consolidation of cable systems and customers, at the same time, the total number of cable customers has been declining for several years as consumers have chosen alternative MVPDs. Notably, no single cable operator (or other MVPD) has ever reached the 30 percent concentration level that the Commission previously (and without adequate justification) determined would enable a cable operator to foreclose a programming network from being viable in the marketplace.<sup>45</sup>

**MYTH #3: Section 616 was enacted (and empowers the Commission) to revamp the commercial marketplace by artificially inflating the leverage programming networks can exert over MVPDs.**

Certain commenters urge the Commission to adopt the *Notice*'s proposals in order to, among other things, "ameliorate the competitive imbalance between vertically integrated MVPDs and independent programmers,"<sup>46</sup> "put additional weight on the independent programmers' side of the scale and partially rectify the imbalance,"<sup>47</sup> "create balance in the

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<sup>43</sup> *Thirteenth Video Competition Report* ¶¶ 20, 184 & app. C; NCTA 2011 Video Competition Comments, MB Docket No. 07-269, at 14 (June 8, 2011).

<sup>44</sup> Comcast Comments at 10 (citing H.R. Rep. No. 102-628, at 49 (1992)).

<sup>45</sup> Between 1990 and 1997, TCI, the largest MVPD at the time, saw its share of MVPD customers grow from 24 percent to 29.3 percent, where it peaked before declining. *Compare In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442 ¶ 143 (1994), with *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd. 1034 ¶ 150 n.534 (1998). Comcast, as the largest MVPD today, now serves approximately 22 percent of all MVPD customers.

<sup>46</sup> Bloomberg Comments at i.

<sup>47</sup> *Id.* at 12.

negotiation process,”<sup>48</sup> and equalize the “informational disadvantage” independent programmers suffer from.<sup>49</sup> Congress, however, did not enact Section 616 in order to empower the Commission to replace rational marketplace-based decision-making with a process by which programming networks’ are provided with artificially inflated negotiating leverage at the expense of MVPDs and their customers. Nor is there any basis in this record or any other Commission proceeding to conclude that there is an imbalance of negotiating leverage between programmers and MVPDs that needs to be “fixed.”

The program carriage rules were not intended to distort how the marketplace has apportioned bargaining power between any given programmer and a particular MVPD.<sup>50</sup> To the contrary, Congress left no doubt that the Commission must “rely on the marketplace, to the maximum extent feasible.”<sup>51</sup> The House Report made clear that the program carriage rules were intended “to reduce the potential for *abusive* or *anticompetitive* actions or practices by cable operators against programming entities”<sup>52</sup> – not prohibit actions or practices that are consistent

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<sup>48</sup> Joint Commenters Comments at 30.

<sup>49</sup> HDNet Comments at 3-5.

<sup>50</sup> Joint Commenters, citing to the 1991 Senate Report of the Committee on Commerce, Science, and Transportation, claim that, “[i]n enacting Section 616, Congress concluded that cable operators are able to ‘abuse [their] locally-derived market power to the detriment of programmers and competitors,’ and that ‘Congress considered banning vertical integration in the cable industry altogether.’” Joint Commenters Comments at 1-2 (quoting S. Rep. No. 102-92, at 24 (1991)). The Senate Commerce Committee, however, is not “Congress,” and no such conclusion was included in the subsequent House Conference Report that reconciled the House and Senate versions of the 1992 Cable Act. Moreover, Congress firmly rejected any proposal to ban vertical integration and the Senate, in the very same report Joint Commenters cite to, made clear that “there are many other factors that affect the bargaining between the programmer and the cable operator [and that some of] [t]hese factors counterbalance some of the Committee’s concerns regarding the market power of the cable operator vis-a-vis the programmer.” S. Rep. No. 102-92, at 24.

<sup>51</sup> 1992 Cable Act § 2(b).

<sup>52</sup> H.R. Rep. No. 102-628, at 43 (1992) (emphasis added).

with rational, commercial marketplace negotiations and decisions. To that end, Section 616 specified the three – *and only three* – types of conduct that the Commission “shall” prohibit.<sup>53</sup>

In other words, Congress enacted Section 616 to ensure that cable operators, due to their perceived market power in 1992, did not use whatever leverage they had (which was far greater than any they have today) in an anticompetitive manner, i.e., to demand equity or exclusivity as a condition of carriage or to discriminate on the basis of affiliation or nonaffiliation. There is absolutely no evidence or legislative history that indicates that Congress intended for the program carriage rules to *otherwise* interfere with marketplace negotiations, or to artificially increase programming networks’ leverage – often to the detriment of consumers – in all aspects of their negotiations with MVPDs. Nor is there any evidence or legislative history that indicates that Congress intended the program carriage rules to be used to equalize the “informational disadvantage” HDNet claims independent programmers suffer from.<sup>54</sup>

**MYTH #4: Program carriage cases have increased in recent years because of an increase in vertical integration and MVPD misbehavior.**

Bloomberg suggests that the number of program carriage complaints have increased since 2007 because MVPDs have an increased incentive and ability to discriminate against unaffiliated programming vendors.<sup>55</sup> This simply is not the case. None of the program carriage complaints filed in this period was related to vertical integration that occurred after 2007. Instead, the increase in program carriage complaints coincides with the Commission’s 2007 NPRM seeking

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<sup>53</sup> 47 U.S.C. § 536(a)(1)-(3).

<sup>54</sup> See HDNet Comments at 3-5. As explained below, HDNet’s request that the Commission equalize the “informational disadvantage” independent programmers suffer from should be rejected for what it is, i.e., an attempt to obtain access to confidential carriage information to use as leverage in carriage negotiations. See *infra* Section III.A.

<sup>55</sup> See Bloomberg Comments at 4 (arguing that the increase in program carriage cases filed in the past few years is likely the result of increased media concentration and vertical integration).

comment on how it could “improve” the program carriage rules for programmers, which effectively put out the “welcome mat” for program carriage complaints. The only reason program carriage complaints have increased in recent years is because the Commission has been viewed as a hospitable forum for programmers to use regulatory processes to unfairly increase their negotiation leverage.<sup>56</sup> Given the current marketplace, where hundreds of networks are seeking to secure higher fees and better carriage and customers are increasingly demanding innovative packaging of programming, the Commission can expect that, unless it pulls back the welcome mat, programmers increasingly will use the complaint process as a means to secure higher fees and/or more favorable tier positions when such results are not warranted in the marketplace.

**MYTH #5: Program carriage is the mirror image of program access.**

Certain commenters credulously gravitated to the *Notice*’s analogizing program carriage to program access.<sup>57</sup> Although these commenters may argue that the program access and

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<sup>56</sup> See NCTA Comments at 3-4 (noting that a number of the *Notice*’s proposals will make it “easier and less risky” to file non-meritorious program carriage complaints).

<sup>57</sup> See Bloomberg Comments at 10-11 (arguing that the Commission should adopt a program carriage damages remedy identical to that in the program access context); *id.* at 20 (arguing that the Commission should adopt a “burden-shifting” framework similar to the program access rules); Crown Media Comments at 9-11 (asking the Commission to adopt an expanded discovery framework modeled on the program access rules and to adopt the program access “burden-shifting” framework); Joint Commenters Comments at 11 (arguing that because both program access and program carriage “are intended to curb the ability of vertically-integrated MVPDs to use one arm of their businesses to bestow benefits on the other [,] . . . [t]here is no reason in law or fact” to apply different burden of proof regimes); HDNet Comments at 8 (supporting adoption of the program access burden of proof framework); MASN Comments at 11 (arguing that the program access and program carriage rules serve “complimentary ends”). It is ironic that MASN appears to believe that program carriage should be just like program access in every respect except for the statute of limitations, where the Commission expressly said that the limitation periods were to be congruent. Compare MASN Comments at 21 (outlining its proposal for a statute of limitations provision that mirrors the federal “discovery” rule, which is different from the program *access* statute of limitations rule), with *In re 1998 Biennial Regulatory Review; Part 76 –Cable Television Service Pleading and Complaint Rules*, Order on Reconsideration, 14 FCC Rcd. 16433 ¶ 5 (1999) (recognizing that the statute of limitations provision in the program carriage rules was parallel to the statute of limitations provisions in the program access and Open Video Systems rules).

program carriage rules serve “complimentary ends,”<sup>58</sup> in reality, these commenters’ analogies are misplaced and intended only to serve their own ends.

As Comcast explained in detail in its comments, there are key distinctions between program carriage and program access that counsel against adoption of program access procedures in the program carriage context.<sup>59</sup> Most notably, in the program access context, a vendor generally is already under an obligation not to withhold its network and to offer it for sale on nondiscriminatory terms; in the program carriage context, there is *no duty* to carry a network in the first place.<sup>60</sup> Indeed, the Commission recently stressed in the U.S. Court of Appeals for the Fourth Circuit that the program carriage rules do not obligate MVPDs to carry unaffiliated programming.<sup>61</sup> And, as noted above, Section 628 contains a general grant of authority that has no counterpart in Section 616.<sup>62</sup> As discussed further below, commenters’ failed attempt to justify importing a burden of proof mechanism from program access to program carriage only reinforces the material distinctions between these two regimes.<sup>63</sup>

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<sup>58</sup> MASN Comments at 11.

<sup>59</sup> See Comcast Comments at 31-33, 42, 61-62.

<sup>60</sup> See NCTA Comments at 6 (“The program carriage rules impose no obligation on an MVPD to carry [similarly situated, unaffiliated] networks; they only prohibit MVPDs from refusing to carry them *because* they are unaffiliated.” (emphasis in original)); Comcast Comments at 61 (“[P]rogram 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” (emphasis in original)).

<sup>61</sup> Brief for Respondents at 27, *TCR Sports Broad. Holding, L.L.P. v. FCC.*, No. 11-1151 (4th Cir. May 26, 2011) (“Under the program carriage statute, a cable operator may permissibly choose to carry an affiliated network rather than an unaffiliated network for reasons independent of the networks’ affiliation status . . . .”); *id.* at 28-29 (“[A] cable operator . . . is free to exercise its discretion to carry or not carry any cable network it chooses, so long as it does not discriminate ‘on the basis of’ video programmers’ ‘affiliation or non-affiliation’ . . . .”).

<sup>62</sup> See *supra* notes 14-15 and accompanying text; compare 47 U.S.C. § 548(b), with 47 U.S.C. § 536.

<sup>63</sup> See *infra* Section III.G.

### **III. THE *NOTICE'S* PROPOSALS TO INCREASE REGULATION ARE MISGUIDED AND FLAWED, AND INEVITABLY WILL LEAD TO BASELESS COMPLAINTS AND HIGHER PROGRAMMING COSTS.**

Although the record in this proceeding lacks evidence demonstrating a need for the Commission to adopt the *Notice's* proposals to increase regulation, what is not lacking is evidence – through express admissions – that certain commenters have recognized this proceeding as an opportunity to advocate for regulations that will tilt the scales in their favor in negotiations with MVPDs. As Comcast explained, and other commenters confirmed, with few exceptions, the *Notice's* proposals are not likely to advance Congress's or the Commission's goals, would be arbitrary and capricious under the APA, would not be narrowly tailored as required by the First Amendment, and will lead to more meritless program carriage complaints and drawn-out adjudications.<sup>64</sup>

#### **A. Discovery**

Comcast, other MVPDs, and programmers are in broad agreement that the Commission should decline to adopt the *Notice's* proposal for “expanded party-to-party” discovery or automatic document production.<sup>65</sup> Even certain commenters who argued that the Commission should adopt new rules urged the Commission to reject these discovery proposals.<sup>66</sup> The few commenters that argued in favor of expanded discovery and automatic document production left little doubt that either they have never participated in a program carriage complaint proceeding

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<sup>64</sup> See Cablevision Comments at 1; Comcast Comments at 13-14, 16, 18, 29; DirecTV Comments at 7, 10; MSG & Music Choice Comments at 1-2; NCTA Comments at 4; TWC Comments at 2-6.

<sup>65</sup> See, e.g., MSG & Music Choice Comments at 15-16; Comcast Comments at 31-37; DirecTV Comments at 13-16 (noting the inconsistency of the *Notice's* stated goal to have expedited procedures and its proposal to expand discovery, as well as critiquing the burden on MVPDs that would have to “begin a wide-ranging discovery process before the Commission has even determined that the complainant has presented a *prima facie* case”); NCTA Comments at 10-13.

<sup>66</sup> Joint Commenters Comments at 19-20 (critiquing both the proposals for “party-to-party” discovery and automatic “production of broad categories of documents within ten days of a *prima facie* finding of discrimination”).

or simply want to use the discovery process to “level the informational playing field between programmers and cable operators.”<sup>67</sup> But the rules are not designed to produce an informational free-for-all, or to destroy the confidentiality of what has long been recognized by the Commission as valuable, proprietary business information. Any discovery rules need to be tailored to what litigants actually need to prove or defend against a program carriage complaint – and that is how the current rules function.

As to automatic document production, Current TV, GSN, NFL Network, and Tennis Channel (the “Joint Commenters”) confirm Comcast’s observation that requiring documents to be produced ten days after the Media Bureau determines that a complainant has made a *prima facie* case would require parties to start collecting and preparing to produce documents long before any such determination, entailing effort and expense by both parties that would be entirely wasted if the Bureau determines that a *prima facie* case was not made.<sup>68</sup> In the program carriage proceedings to date, discovery led by the parties and administered by the ALJ successfully has provided litigants access to the documents and information they (and the ALJ) believed were needed to prove their cases. By allowing the parties, who best know their case, to navigate discovery, the process has generally worked quickly and smoothly and allowed for well-argued cases to reach the ALJ.

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<sup>67</sup> MASN Comments at 29; *see* HDNet Comments at i (“It is crucial that in addressing the current NPRM the Commission fully appreciate and take into account the vastly disparate access that MVPDs and most independent programmers have to crucial information [and] the major difference in leverage this provides to MVPDs . . .”).

<sup>68</sup> Joint Commenters Comments at 21 (“[I]n order for parties to be ready to produce documents within ten days of a *prima facie* determination, they would need to begin preparing to meet their production obligations well in advance of a threshold finding. If the Media Bureau eventually concluded that the complainant had not made out a *prima facie* case the parties would have wasted significant resources preparing for a production that would never happen.”).

Although some commenters vaguely hint – without examples – at the possibility of uncooperative MVPDs artificially slowing down the discovery process,<sup>69</sup> even commenters who have been complainants against Comcast acknowledge that Comcast voluntarily agreed with them in the discovery phase “to impose numerical limits on discovery, to set reasonable discovery deadlines, and to meet-and-confer with one another to resolve discovery disputes” under the supervision of the ALJ.<sup>70</sup> This process mirrors discovery procedure in trial courts,<sup>71</sup> and, to date, has allowed for reasonable discovery in program carriage complaints.

The advantages of parties crafting discovery requests and working out differences also would be lost if the Commission imposed a “Standard Discovery Order,” as the Joint Commenters propose. Should discovery be warranted after a prima facie ruling, the most reasonable approach is to allow for party-controlled discovery supervised by the ALJ so that parties can tailor their requests to the needs of their particular case and work out their differences before the ALJ, as they have done in the past. Because a standard discovery order, by definition, is not tailored to a particular case, it would almost certainly be unduly burdensome.

The “Standard Discovery Order” proposed by the Joint Commenters highlights the significant flaws of a one-size-fits-all approach. That order would require the production of documents relating to “the independent network *and any MVPD-affiliated networks at issue in*

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<sup>69</sup> See Joint Commenters Comments at 17. In reality, as Joint Commenters are well aware, Comcast’s discovery requests have mirrored those of the complainants it has faced in both breadth and reach. Discovery disputes during program carriage cases primarily have been the result of programmers making overly broad document requests, sometimes even making such requests after the agreed-upon close of the discovery period. See Comcast Opposition to Tennis Channel Motion to Compel, *Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, MB Docket No. 10-204, File No. CSR-8258-P (Feb. 18, 2011) (contesting complainant’s “supplemental” document requests after the agreed upon close of discovery); Defendants Opposition to Motion to Compel, *Herring Broad., Inc. v. Time Warner Cable Inc.*, File Nos. CSR-7709-P et al. (Mar. 6, 2009) (explaining that, late in the discovery process, complainant WealthTV requested defendants search the files of 340 individuals, most of whom had no contact with WealthTV or any matter related to the litigation).

<sup>70</sup> Joint Commenters Comments at 24 n.38.

<sup>71</sup> See generally Fed. R. Civ. Pro 26(b).

*the litigation.*”<sup>72</sup> But which affiliated networks are properly “at issue” in a proceeding, and which affiliated networks should be the subject of discovery as to particular issues, have been the subject of disputes in the past. And the parties should be responsible for resolving those disputes – or at least for narrowing them before they are presented to an adjudicator – because the parties are in the best position to balance the potential benefits and burdens of discovery regarding particular networks and particular issues. That is the genius of the adversarial system of discovery, and it has worked well in past program carriage proceedings.<sup>73</sup> It should not be replaced with “standard” discovery orders that ignore the significant differences from one dispute to the next.<sup>74</sup>

Any attempt to predetermine what the relevant documents are would encounter similar problems. By continuing to allow the parties to craft their own requests, such gaps in the record are less likely to occur. The Joint Commenters admit as much.<sup>75</sup> As the Joint Commenters

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<sup>72</sup> Joint Commenters Comments at 22 (emphasis added).

<sup>73</sup> For example, in the *Tennis Channel* proceeding, Tennis Channel’s document requests defined “Affiliated Networks” to include 17 specified Comcast-affiliated networks plus “any other program services in which Comcast holds a financial interests that broadcast programming relating to sporting events,” and then incorporated that definition into nine of its 12 document requests. See Document Requests of the Tennis Channel, Inc., *Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, MB Docket No. 10-204, File No. CSR-8258-P, Sched. B, § 1 (Dec. 17, 2010). Through negotiation, the parties agreed to narrow the definition of affiliated networks significantly, and tailored that narrowing by document request, leaving a dispute only as to a single document request. See Comcast Opposition to Tennis Channel Motion to Compel at 8 & n.18, *Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, MB Docket No. 10-204, File No. CSR-8258-P (Feb. 18, 2011).

<sup>74</sup> Other flaws in Joint Commenters’ proposed “Standard Discovery Order” arise from the undue emphasis on ratings, the requirement that the parties produce specified Nielsen ratings, and the proposed order’s definition of the relevant timeframe. Although ratings can play a role in carriage decisions, MVPDs are in the business of attracting and retaining subscribers, so MVPDs focus on the intensity of subscriber demand for a network, a factor not measured by ratings. See, e.g., Proposed Reply Findings of Fact of Defendant Comcast Cable Communications, L.L.C. ¶ 94, *Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, MB Docket No. 10-204, File No. CSR-8258-P (June 21, 2011). In addition, the proposed order’s definition of the relevant time period potentially could obscure crucial information, such as evidence that relates to whether a complainant that believed it had a program carriage claim against an MVPD and repeatedly formulated its claim in writing deliberately chose for tactical reasons to sit on its claim for several years before asserting it.

<sup>75</sup> See Joint Commenters Comments at 31 (noting that determining “[w]hether two programming networks are ‘similarly situated’ is a fact-intensive inquiry requiring consideration of a combination of factors, including, for instance, the network’s genre, ratings, license fee, target audience, target advertisers, and target programming”).

alluded to, their list is non-exhaustive and other factors may prove important or even decisive in particular cases. The litigants are in the best position to identify such factors in particular cases.<sup>76</sup>

HDNet urges the Commission to modify its discovery procedures on the grounds that “[i]ndependent programmers should not be further burdened in attempting to enforce their rights because they lack access to information that they have no reasonable means of acquiring, and which often has been actively concealed.”<sup>77</sup> But that is precisely what discovery is for, i.e., to provide a reasonable means of acquiring the information needed to make one’s case. And, contrary to HDNet’s claims, discovery is not designed to help a programmer learn more about an MVPD’s “circumstances and negotiating latitude [including its] budget for programming, channel capacity, schedule of availability, [or] the audience on their systems for the networks that it carries, including, potentially, of the independent network with whom it is negotiating.”<sup>78</sup> Although one can understand why a network might like to have all this information from an MVPD with which it is negotiating, just as the MVPD might like to know all of the network’s business plans and strategies and agreements with other MVPDs, requiring the exchange of confidential business information is not the Commission’s job. Discovery should be limited to that which is reasonably necessary to prove or disprove unlawful discrimination under the program carriage rules.

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<sup>76</sup> DirecTV, an investor in three of the Joint Commenters, concurs with this analysis. *See* DirecTV Comments at 15-16 (“[A]utomatic discovery is far too blunt a tool for the task at hand. Program carriage proceedings always involve fact-intensive inquiries, each of which turns on the unique facts and circumstances presented in a particular case. The proposed automatic discovery provisions cannot provide the necessary flexibility for handling discovery in such varying circumstances. In the end, it simply is not possible to reduce such a fact-intensive inquiry to a one-size-fits-all list of items that must be produced in all cases.”).

<sup>77</sup> HDNet Comments at 7.

<sup>78</sup> *Id.* at 3.

Finally, Comcast reiterates its previous comments regarding the lack of need for a standardized protective order, as the circumstances of each case may well dictate different protections in different circumstances.<sup>79</sup> These customized protective orders should be approved by the ALJ or Media Bureau in each case only if they include a category for “Highly Confidential” information, which can be shared with no more than one designated party at the litigant, and build in protection for third parties, including objection rights.<sup>80</sup>

## **B. Damages**

In pressing for the availability of compensatory and punitive damages, commenters advocating for increased regulation provide no evidence of harm to programmers that would justify the availability of a damages remedy,<sup>81</sup> nor do they offer a source of authority that would allow the Commission to impose damages.<sup>82</sup> In particular, there is no evidence that MVPDs need, in Bloomberg’s words, an “*additional* incentive . . . to comply with the Commission’s rules.”<sup>83</sup> To the contrary, the available evidence shows that vigorous competition among

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<sup>79</sup> See Comcast Comments at 40-41.

<sup>80</sup> The Joint Commenters agree with the need to designate information as “Highly Confidential.” See Joint Commenters Comments at 24-25.

<sup>81</sup> Nor do commenters advocating for punitive damages cite to evidence of the factors that the United States Supreme Court has identified as potentially justifying punitive damages, i.e., some indication that defendant’s conduct was reprehensible. See Comcast Comments at 44-45 (quoting *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)). Rather, as Bloomberg candidly asserts, it seeks punitive damages in order to “put additional weight on the independent programmers’ side of the scale” in carriage negotiations. Bloomberg Comments at 12.

<sup>82</sup> As Comcast explained in its initial comments, the Commission’s authority to award damages for program carriage violations, especially punitive damages, is questionable at best. See Comcast Comments at 41 & n.109 (comparing 47 U.S.C. § 208, which expressly allows for damage claims pertaining to breach of common carrier duties, with 47 U.S.C. § 536, which has no reference to damages).

<sup>83</sup> Bloomberg Comments at 10 (emphasis added).

MVPDs in the marketplace already significantly limits the incentive and the ability of any MVPD to harm a programming network’s ability to compete fairly.<sup>84</sup>

Perceiving “differences in power and information between MVPDs and independent programmers,” HDNet argues that the availability of damages would “exer[t] pressure” on MVPDs and “balance the scales.”<sup>85</sup> Similarly, Bloomberg asserts that the prospect of punitive damages would “put additional weight on the independent programmers’ side of the scale” in carriage negotiations.<sup>86</sup> As set forth above, distorting the marketplace in order to increase programmers’ leverage is not what Congress intended – or authorized – in enacting Section 616.

Section 616 is explicit and limited in the conduct it proscribes to further the goal of “reduc[ing] the potential for abusive or anticompetitive actions or practices by cable operators against programming entities.”<sup>87</sup> Beyond these specific prohibitions, neither the statutory text nor the legislative history suggests that Congress intended to otherwise interfere with rational marketplace negotiations. Thus, placing a thumb on the scale during negotiations would exceed the Commission’s authority under Section 616. Moreover, it would be inconsistent with Congress’s mandate to “rely on the marketplace to the greatest extent possible,” and would lead to higher prices for consumers and lower program quality. And, by candidly acknowledging the *in terrorem* effect of damages,<sup>88</sup> these commenters tacitly concede that adding damages to the

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<sup>84</sup> See Comcast Comments at 2-3.

<sup>85</sup> HDNet Comments at 15, 16.

<sup>86</sup> Bloomberg Comments at 12.

<sup>87</sup> H.R. Rep. No. 102-628, at 43.

<sup>88</sup> See HDNet Comments at 16; Crown Media Comments at 5; Joint Commenters Comments at 28.

program carriage rules would increase the chilling effect of those rules on MVPDs' exercise of their protected editorial discretion under the First Amendment.<sup>89</sup>

There is no support for programmers' argument that the availability of damages would "promot[e] settlement" and "decreas[e] the number of program carriage complaints."<sup>90</sup> In fact, the opposite is likely true, as the promise of damages would increase the incentives for filing and pursuing non-meritorious program carriage complaints. The Joint Commenters claim that the availability of damages "could encourage an otherwise unwilling MVPD to come to the [settlement] table."<sup>91</sup> But once the MVPD is at the settlement table, it very well may find that the prospect of damages has inflated the complainant's assessment of the value of litigation – thereby inflating the complainant's demands – making the complainant less likely to consider settlement. Indeed, if damages were available, then an MVPD's agreement to satisfy the complainant's carriage demands may not be enough to settle the complaint, and complainants may be emboldened to (improperly) seek damages for a pre-settlement time period.<sup>92</sup> Plus, as Cablevision observes, "[a]uthorizing damages in program carriage complaints would push MVPDs to consider accepting unreasonable terms, including payment of higher affiliate fees that will be passed through to consumers, rather than risk extensive damages."<sup>93</sup>

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<sup>89</sup> See Comcast Comments at 41-43.

<sup>90</sup> Crown Media Comments at 5.

<sup>91</sup> Joint Commenters Comments at 28.

<sup>92</sup> For similar reasons (and with a similar result of inflating the number of complaints), a complainant may even seek to file a complaint *after* an MVPD has met its carriage demands, on an (improper) theory that it is owed damages for alleged discrimination prior to execution of the carriage agreement incorporating the complainant's demands.

<sup>93</sup> Cablevision Comments at 2.

Finally, the comments confirm that, as Comcast observed, “the availability of damages would increase the complexity, cost, and conjectural nature of program carriage proceedings.”<sup>94</sup> Bloomberg explicitly acknowledges the potential that litigating damages will “delay” the proceedings,<sup>95</sup> while none of the other programmers who argue for damages explain how litigating and calculating them would be consistent with the Commission’s goal of expeditious proceedings.

### **C. Mandatory Carriage Remedy**

As many commenters noted, the *Notice*’s proposal to require mandatory carriage immediately upon an initial determination of a program carriage violation should not be adopted.<sup>96</sup> Such a rule would violate the APA, the Communications Act, and the First Amendment for the reasons laid out in Comcast’s initial comments.<sup>97</sup> Indeed, these laws require that a stay pending appeal be granted for any mandatory carriage remedy regardless of its effect on other programming.<sup>98</sup>

The commenters supporting this rule offer no argument to explain how the *Notice*’s proposal can be adopted consistent with the APA’s requirement that exhaustion of agency appeals be a condition precedent to judicial review only if “the action meanwhile is inoperative.”<sup>99</sup> Nor does any commenter explain how the *Notice*’s proposal can be adopted

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<sup>94</sup> Comcast Comments at 42.

<sup>95</sup> See Bloomberg Comments at 11 (noting that bifurcation of the violation and damages determinations will “delay the Commission’s ultimate decision”).

<sup>96</sup> See Comcast Comments at 46-54; Cablevision Comments at 24; TWC Comments at 11-12; NCTA Comments at 16-17.

<sup>97</sup> See Comcast Comments at 46-51; see also TWC Comments at 11-12; NCTA Comments at 16-17.

<sup>98</sup> See Comcast Comments at 46-51.

<sup>99</sup> 5 U.S.C. § 704; see Comcast Comments at 48-49.

consistent with the Communications Act’s restriction that orders “made or taken” pursuant to delegated authority shall not “have the same force and effect, and shall [not] be made, evidenced, and enforced in the same manner, as orders . . . of the Commission” if a party files a timely petition for review of the order.<sup>100</sup> Perhaps the most remarkable deficiency in comments urging adoption of the *Notice*’s proposal is the noticeable absence of any discussion addressing the serious First Amendment issues raised by an order of mandatory carriage.<sup>101</sup>

Bloomberg’s complaint that a regime that imposes an automatic stay for defendants but not complainants is somehow unbalanced ignores the fact that a mandatory carriage order implicates the defendant MVPD’s First Amendment rights, whereas a denial of mandatory carriage does not implicate the complainant’s First Amendment rights.<sup>102</sup> Bloomberg’s analogy to civil litigation is similarly inapposite.<sup>103</sup> Rule 62 of the Federal Rules of Civil Procedure addresses a district court’s ability to stay the execution of a judgment that is directly appealable to a Court of Appeals. As Comcast explained in its comments, the Commission does not intend a mandatory order of carriage by an ALJ to be directly appealable to a Court of Appeals, and under certain circumstances its rules have the effect of frustrating the defendant’s ability to appeal such an order to the Court of Appeals.<sup>104</sup> Further, a mandatory carriage order by the

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<sup>100</sup> 47 U.S.C. § 155(c)(3)-(4); *see* Comcast Comments at 49.

<sup>101</sup> *See* Bloomberg Comments at 8-10; Joint Commenters Comments at 28-29.

<sup>102</sup> *Compare* Bloomberg Comments at 8, *with Turner I*, 512 U.S. at 636 (holding that cable operators exercise editorial discretion to pick and choose who they carry “and they are entitled to the protection of the speech and press provisions of the First Amendment”); *see also Hurley*, 515 U.S. at 570 (“Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others.”).

<sup>103</sup> *See* Bloomberg Comments at 9.

<sup>104</sup> *See* Comcast Comments at 47-48.

Media Bureau is not directly appealable to a Court of Appeals.<sup>105</sup> Therefore, rules bearing on cases where litigants can seek judicial review immediately and directly do not apply here.

If, despite the legal barriers against doing so, the Commission decides to retain its existing rule or to adopt the proposed rule, it should clearly define the “deletion” of existing programming to include any requirement that an MVPD distribute a programming network to fewer viewers.<sup>106</sup> Any such deletion restrains an MVPD’s speech, curtails consumer options, and disrupts an MVPD’s relationships with those viewers, and thus has serious and permanent effects that should be stayed pending a final determination.<sup>107</sup>

#### **D. Retaliation**

As Comcast explained in its comments, and as several parties also observed,<sup>108</sup> there is no evidence of retaliation by MVPDs against programmers that file (or threaten to file) complaints. As a matter of common sense, it is implausible in the extreme that an MVPD would “retaliate” against a complainant during a program carriage complaint proceeding or after its resolution, when the MVPD’s conduct with respect to the programmer is subject to heightened scrutiny. And, indeed, the supporters of the *Notice*’s proposal confirm that there is no basis in fact for its adoption by failing to cite a single concrete instance of retaliation. Instead, they offer illogical speculation about what “could” happen, express programmers’ “fears” and “concerns” without establishing any factual basis for such sentiments, and parrot back the preliminary (and equally

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<sup>105</sup> See 47 U.S.C. § 155(c)(7).

<sup>106</sup> As Comcast explained in its comments, the current rule preventing deletion based on staff-level decisions is meant to protect consumers. See Comcast Comments at 51 & n.137. Defining “deletion” to include any requirement to distribute a programming network to fewer viewers would likewise protect consumers by preventing loss of programming.

<sup>107</sup> See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

<sup>108</sup> See NCTA Comments at 18; TWC Comments at 10; Cablevision Comments at 11-12.

unsupported) discussion of retaliation in the *Notice*.<sup>109</sup> This absence of evidence is striking given that the *Notice* expressly asked for comment on “the extent to which retaliation has occurred in the past” and “examples of actual retaliation or threats of retaliation” to “assist in developing a record” to address claimed retaliation.<sup>110</sup> Now that the record is clear and devoid of any evidence, just as the record on this issue was clear in the prior rulemaking proceeding, the Commission has only one legally sound option under the APA – to abandon its proposal.<sup>111</sup>

Even if there were any credible evidence that retaliation has occurred or is likely to occur, the Commission does not have the clear authority under Section 616 to adopt a substantive anti-retaliation rule. Comcast and other commenters raised serious questions about the statutory authority to impose any retaliation rule under Section 616, and warned against its potential to chill speech and intrude on MVPDs’ First Amendment rights.<sup>112</sup> Many commenters point out that the most likely result of adoption of an anti-retaliation rules would be simply to afford programmers additional (and non-market-based) negotiation leverage – the end result of which

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<sup>109</sup> For example, Crown Media simply refers back to the *Notice* in asserting, without support, that “potential retaliation” is a “fundamental concern” of programmers. Crown Media Comments at 6. Bloomberg asserts without further support or detail that “some cable operators have indicated they will not negotiate with programmers that file complaints,” and then cites the discussion in the *Notice*. Bloomberg Comments at 15-16. The Joint Commenters assert, contrary to all evidence, that “networks will not enforce their rights under the statute without some protection against retaliation” and that “it is this very fear that has prevented some independent networks from filing program carriage complaints.” Joint Commenters Comments at 14. Needless to say, these assertions are hard to square with the fact that three of these very four commenters have in fact filed program carriage complaints in recent years (whatever the merits of those complaints). HDNet similarly asserts without support that “[t]he possibility of retaliation for filing a legitimate program carriage complaint has been one of the major impediments to independent programmers enforcing their rights under Section 616.” HDNet Comments at 9.

<sup>110</sup> *2011 Program Carriage Order & Notice* ¶ 62.

<sup>111</sup> Indeed, the absence of evidence also further undermines the Commission’s decision to adopt a standstill rule in the *2011 Program Carriage Order & Notice*. *See id.* ¶ 25 (“The record reflects that, absent a standstill, an MVPD will have the ability to retaliate against a programming vendor that files a legitimate complaint . . .”).

<sup>112</sup> *See* NCTA Comments at 21 (contesting the Commission’s authority under Section 616 to adopt this proposal).

would be to drive up programming costs and harm consumers.<sup>113</sup> These problems would be compounded if the Commission were to adopt a rule that, as some commenters propose, shifts the burden of disproving retaliation to the defendant or presumes that any so-called “adverse carriage action” against any programmer affiliated with the complainant is retaliatory in nature.<sup>114</sup>

In any event, even if there were evidence, and even if the Commission had clear statutory authority, the various proposals would invite all manner of unwarranted intrusion into and overbroad interference with the decision-making of MVPDs. The Joint Commenters, for example, suggest that “[r]etaliation can take many forms,” and provide as an example an MVPD “refusing to negotiate with the [complainant] network at issue once its carriage agreement expires.”<sup>115</sup> As implausible as that example is, it only reinforces why no additional “retaliation” protections are needed, since, if the programmer believed there to be anything improper about an MVPD’s refusal to negotiate renewal, then the network presumably would have a fresh basis to assert a claim under Section 616 at that juncture. The Commission would be wise to avoid this thorn-filled thicket and reserve any inquiry into retaliation on a case-by-case basis, to the extent such a claim would be warranted or cognizable under the facts presented.

Finally, MASN’s claim that Comcast “retaliated” against it by writing a letter to subscribers is nonsense.<sup>116</sup> The letter to which MASN refers – an insert in bills to subscribers explaining the retail price increase for cable service – obviously was not “retaliation” against MASN or anyone else. After MASN and Comcast had settled their program carriage dispute (or

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<sup>113</sup> See TWC Comments at 10-11; DirecTV Comments at 20; Cablevision Comments at 12.

<sup>114</sup> See Bloomberg Comments at 17; Crown Media Comments at 6-7; Joint Commenters Comments at 13-14.

<sup>115</sup> Joint Commenters Comments at 14.

<sup>116</sup> See MASN Comments at 22.

so Comcast thought), Comcast determined that it would be prudent to explain to its subscribers why their rates were increasing due to the substantial new wholesale cost that Comcast had incurred by adding MASN. This was and is a non-issue: MASN's second carriage complaint, which formulated various theories of misconduct, devoted only two sentences to this issue in 42 pages of complaint and 52 pages of reply, and the *Hearing Designation Order*, which wrongly gave credence to several of those theories, did not even address this issue.<sup>117</sup> For MASN now to call this subscriber letter "retaliation" shows that MASN is grasping at straws to find some support somewhere for the Commission's proposal.<sup>118</sup>

MASN's "evidence" is useful in one respect. Its inventive claims of "retaliation" point to the kinds of exotic theories of alleged wrongdoing that the Commission would be likely to see should it take the unwise and unsupportable step of adding an anti-retaliation rule to the books. Such a rule would only help parties that seek to use litigation as a negotiating tactic and would further involve the Commission in the adjudication of meritless claims and needless oversight of routine marketplace conduct.

#### **E. Good-Faith Negotiation**

The record confirms that the *Notice's* proposal to require an MVPD to negotiate in "good-faith" is the proverbial "solution in search of a problem," is beyond the Commission's authority, and is inappropriate in the program carriage context.<sup>119</sup> Such a requirement would

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<sup>117</sup> See Program Carriage Complaint, *TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, MB Docket No. 08-214, File No. CSR-8001-P ¶ 88 (July 1, 2008).

<sup>118</sup> Even more absurdly, MASN also lumps into its discussion of "retaliation" an unsupported accusation about wholesale price increases for Comcast's affiliated regional sports network Comcast SportsNet-Mid-Atlantic ("CSN-MA"). The notion that the prices charged by CSN-MA to other MVPDs is somehow "retaliation" against MASN (or anyone else) is a non sequitur.

<sup>119</sup> See MSG & Music Choice Comments at 13-14; NCTA Comments at 22-24; TWC Comments at 12-13.

simply further distort the marketplace and unfairly increase programmers' leverage in carriage negotiations without providing any benefits to consumers.

There is no need to adopt a good-faith negotiation rule. Not a single commenter set forth any facts or evidence that MVPDs have negotiated in bad faith; in fact, the only actual evidence in the record is evidence that MVPDs have been praised for their negotiating tactics.<sup>120</sup> To date, the only examples of conduct that arguably could be construed as "bad faith" have come not from MVPDs but from programming vendors' filing of program carriage complaints years after entering into market-based contracts that included the terms they sought to amend through the complaint process. Claims that MVPDs have negotiated in bad faith are based entirely on unsubstantiated allegations by parties that successfully have negotiated carriage agreements<sup>121</sup> – Crown Media's "Hallmark Channel currently has 87 million subscribers,"<sup>122</sup> Current TV "reaches approximately 60 million U.S. households," Game Show Network "reaches more than 70 million subscribers," NFL Network "reaches over 70 million U.S. homes," and Tennis Channel "reaches approximately 26 million subscribers nationwide";<sup>123</sup> and MASN "has successfully negotiated carriage deals with 29 MVPDs throughout its seven-state footprint."<sup>124</sup>

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<sup>120</sup> See Comcast Comments at 69 n.182 (citing letters from Ovation, Outdoor Channel, America Channel, and HDNet praising Comcast).

<sup>121</sup> See Crown Media Comments at 4 (claiming that MVPDs have "fail[ed] to make carriage offers or respond to an independent programmer's offers until just before an existing agreement is set to expire," and "ma[de] . . . knowingly inadequate offers"); Joint Commenters Comments at 30 (claiming that MVPDs have "refus[ed] to renegotiate carriage terms," and failed "to offer a meaningful counterproposal to a network's request for carriage"); MASN Comments at 15, 17 (claiming that MVPDs have "refus[ed] to engage in genuine carriage negotiations," have "refus[ed] to engage in any back-and-forth with an unaffiliated programming vendor," failed to "put forward at least some bona fide proposal that gives an unaffiliated vendor the opportunity to engage in dialogue," and "fail[ed] to provide contemporaneous and documented reasons for denying carriage").

<sup>122</sup> Crown Media Comments at 2.

<sup>123</sup> Joint Commenters Comments at 8-9.

<sup>124</sup> MASN Comments at 1.

The Commission should be skeptical of claims of bad-faith negotiations from parties that have reached agreements through arms-length negotiations; such claims are blatant attempts to use regulation to distort the marketplace and artificially increase those parties' leverage in negotiations. But, even assuming these allegations were true, they cannot automatically be considered bad-faith negotiation tactics.

Certain of the allegations commenters cite as examples of bad-faith negotiating tactics appear to be precisely the "legitimate, aggressive negotiations" Congress and the Commission sought to protect, while others likely are simply a result of demands and constraints on an MVPD's employees who have to negotiate numerous carriage contracts every year. In fact, such examples are better viewed as evidence that the marketplace is vigorously competitive and that hundreds of programming networks are not only competing for channel space but also competing for the time and attention of the limited number of MVPD employees who negotiate carriage contracts.<sup>125</sup> Although the universe of MVPDs with which a programming network must negotiate is relatively small, the universe of programming networks that seek carriage from an MVPD is not. A good-faith requirement for so-called "independent programmers" would simply move those programmers to the front of the negotiation line in front of other network owners whose programming may be far more valuable to an MVPD and its customers. "Independent programmers" should not have any preferential right to an MVPD's time and resources.<sup>126</sup>

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<sup>125</sup> As Comcast explained in its comments, program carriage negotiations are complex, entail vigorous (and occasionally contentious) negotiations regarding numerous terms and conditions, and, in the normal course, can take a year or more. *See* Comcast Comments at 69. This is how the marketplace works (and works well) free of government interference.

<sup>126</sup> *See* NCTA Comments at 23-24. NCTA correctly points out that the current program carriage rules already "effectively grant unaffiliated networks *with content and formats similar to those owned by MVPDs* preferential treatment vis-a-vis *all other* unaffiliated networks," and that "[s]uch preferential treatment is unfair to other networks" and "distorts the marketplace by artificially encouraging programmers to select content and formats that match those of networks that are owned by cable operators." *Id.* at 24 (emphasis in original).

More importantly, as a legal matter, these allegations cannot serve as examples of bad-faith negotiating tactics because there is no obligation to negotiate in the first place and no obligation to reach an agreement for carriage. Section 616 does not grant any programmers a right to be carried,<sup>127</sup> and no commenter supporting a good-faith requirement provides any explanation or cites any authority to the contrary. Thus, imposing a good-faith negotiation requirement that in effect forces MVPDs to negotiate with programmers or to negotiate in a particular manner would be beyond the Commission's authority.<sup>128</sup> Doing so would conflict directly with the Communications Act and the Commission's *1993 Program Carriage Order* that recognized that, consistent with the 1992 Cable Act, "regulations must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations."<sup>129</sup>

If any factual evidence that "bad-faith" conduct occurred and that it was because a programmer was unaffiliated came to light, then that evidence likely would be relevant to whether an MVPD unlawfully discriminated against a programmer. HDNet concedes that "[b]ad

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<sup>127</sup> See 47 U.S.C. § 536; NCTA Comments at 22-23 ("The statute and the rules prohibit discrimination on the basis of affiliation, but they do not preclude vertically integrated MVPDs from declining to carry unaffiliated programming networks for *any* other reason. Nor do they embody any public policy that all such unaffiliated programming be carried." (emphasis in original)); Cablevision Comments at 11 ("MVPDs have no requirement to carry independent programmers . . . . Sometimes the answer is just 'no.'"); TWC Comments at 12 ("Section 616 and the Commission's program carriage rules do not include a general requirement to carry unaffiliated programming, nor could they.").

<sup>128</sup> Section 616 does not provide a general grant of authority to adopt any requirements that will facilitate carriage negotiations nor did it in any way grant programmers a right to carriage, as Congress did in its must-carry rules. As Comcast explained in its comments, "Congress knows how to provide the Commission with the authority to require good-faith negotiation," and it only has done so where there is an express statutory requirement to negotiate: 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. See Comcast Comments at 70.

<sup>129</sup> *In re 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*, Second Report & Order, 9 FCC Rcd. 2642 ¶ 14 (1993) ("*1993 Program Carriage Order*").

faith negotiation is often just another form of discrimination based on affiliation.”<sup>130</sup> As the *1993 Program Carriage Order* recognized, “ultimatums, intimidation, conduct that amounts to the exertion of pressure *beyond good faith negotiations*, or behavior that is tantamount to an unreasonable refusal to deal . . . should be considered examples of behavior that violates the prohibitions set forth in Section 616.”<sup>131</sup>

#### **F. Scope of Affiliation Provision**

There is no basis to expand the scope of “affiliation” or “attributable interest” in any of the various ways proposed in the *Notice*.<sup>132</sup> None of the proponents of expanding regulation in this manner provide any evidence of the harms it purportedly is intended to address, or seriously attempt to identify any authority for doing so. Instead, in response to the *Notice*, these commenters rely on incorrect assertions about changes to the marketplace that they claim support a radical amendment to a nearly twenty-year old affiliation standard.<sup>133</sup> As Comcast demonstrated, the marketplace has moved in the opposite direction, as competition among MVPDs has intensified,<sup>134</sup> with DBS and telco providers gaining market share by leaps and bounds in recent years and now ranking among the top ten largest MVPDs.<sup>135</sup>

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<sup>130</sup> HDNet Comments at 13.

<sup>131</sup> *1993 Program Carriage Order* ¶ 17 (emphasis added).

<sup>132</sup> See *2011 Program Carriage Order & Notice* ¶¶ 72-78.

<sup>133</sup> See HDNet Comments at 13 (“Limiting the prohibition on discrimination in favor of vertically-integrated MVPDs ignores the realities of the modern market. Not only are MVPDs increasingly concentrated, but also independent programmers have waned, leaving most programming in the hands of a few large content providers.”); MAP & PK Comments at 12 (arguing, as support for redefining the scope of the discrimination provision, that “[c]oncentration of resources and market share increases MVPDs’ ability to leverage their position as gatekeepers to prevent competition between video programming vendors”).

<sup>134</sup> See *supra* Section II.C. At the same time, ownership interests are no more complex now than they were in 1993. See Comcast Comments at 58 & n.156.

<sup>135</sup> See Comcast Comment at 8-9 & nn.16-17 (detailing the growth of DBS providers’ and AT&T’s and Verizon’s MVPD services). Contrary to Verizon’s suggestion, see Verizon Comments at 1-2, there is no statutory

Programmers' fears and concerns about MVPDs' alleged "reciprocal carriage" arrangements are unsubstantiated and unfounded.<sup>136</sup> Numerous commenters pointed out that there is no basis to assume that MVPDs that agree to compensate each other for carriage of each others' affiliated programming networks are discriminating against unaffiliated programming networks.<sup>137</sup> (And, as Comcast noted in its initial comments, there would be nothing anti-competitive or inappropriate about a mutually beneficial exchange of value between an MVPD and a programming network affiliated with another MVPD.)<sup>138</sup> Nor is there any evidence of anti-competitive collusion between MVPDs to favor each others' programming, and, as the

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or policy basis for applying Section 616 differently to some MVPDs than to others, including so-called "new entrants."

<sup>136</sup> For example, Joint Commenters argue that "it is common for vertically-integrated MVPDs to enter into carriage arrangements with other MVPDs that mutually benefit their affiliated program entities," without any support for this statement except a 2005 study on reciprocal carriage, which relied on 1999 data and was published prior to the Commission's decision on remand of the cable ownership. See Joint Commenters Comments at 12; *supra* note 6. Crown Media similarly argues that MVPDs "can have an incentive to advantage the affiliated services of other vertically-integrated MVPDs . . . in exchange for favorable treatment when the first MVPD seeks to obtain carriage of its own affiliated services by the second MVPD." Crown Media Comments at 8 (citation omitted). As support for this, Crown Media cites back to its own comments from 2007, which similarly expressed this speculative concern without any evidence of its occurrence in the marketplace. See Comments of Crown Media, MB Docket No. 07-42, at 8 n.16 (Oct. 12, 2007). Bloomberg too suggests that "[c]able operators are inclined to favor each other's programming at the expense of independent programming" without any evidence to support this assertion. See Bloomberg Comments at 19.

<sup>137</sup> See Charter Comments at 4 ("Despite the constant stream of negotiations and discussion between program suppliers and MVPDs, there is no problem in the programming marketplace that the proposed expansion of 'affiliates' under the program carriage rules would address."); Comcast Comments at 55 ("There is absolutely no evidence that MVPDs discriminate against unaffiliated programming networks in favor of other MVPDs' affiliated programming networks . . ."); DirecTV Comments at 7 ("[T]he notion that MVPDs might collude in favor of mutual carriage . . . is exactly the factual scenario that the Commission rejected explicitly in 1993 and 2008 . . . . DIRECTV is aware of no evidence showing either that the Commission misunderstood the facts previously or that the facts have changed now."); TWC Comments at 8 ("[S]uch conjecture is completely unfounded and unsupported by any evidence.").

<sup>138</sup> Comcast Comments at 56.

Commission noted,<sup>139</sup> the D.C. Circuit has made clear that collusion cannot simply be assumed.<sup>140</sup>

Moreover, as many commenters emphasized, expanding the scope of the discrimination provision to pertain to a programming vendor's lack of affiliation with *another* MVPD would expand the scope of the rules beyond their purpose, exceed the Commission's authority, ignore the fact that the marketplace is highly competitive, and overly burden MVPDs' First Amendment rights.<sup>141</sup> Programmers' vague assertions that the statutory language is broad enough to support a far more expansive reading are unconvincing and insufficient to support a drastic change to the Commission's 18-year-old interpretation.<sup>142</sup>

Strikingly, the Joint Commenters assert that “[n]etworks affiliated with MVPDs enjoy special benefits by virtue of their affiliation.”<sup>143</sup> This is ironic, considering that three of the Joint

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<sup>139</sup> 2011 Program Carriage Order & Notice ¶ 74.

<sup>140</sup> See Cox Comments at 4 (citing *Time Warner II*, 240 F.3d at 1132); Comcast Comments at 55 (noting that the D.C. Circuit has struck down the Commission order that inferred collusion among vertically integrated MVPDs); DirecTV Comments at 6 (noting that, on remand, the Commission conceded that it lacked evidence to support the conclusion that cable operators are likely to behave in a coordinated fashion); NCTA Comments at 8; TWC Comments at 8.

<sup>141</sup> See Cablevision Comments at 7-8 (explaining that the universe of potential complainants from the revised definition would be expansive in ways unintended by Congress); Cox Comments at 5 (arguing that today's fiercely competitive marketplace forces MVPDs to select programming based on “powerful incentives to contain programming costs” and “develop the most attractive possible channel lineup for consumers”); Comcast Comments at 55 (noting that the expanded definition would be arbitrary and capricious and would burden far more speech than necessary); DirecTV Comments at 3-4 (arguing that the Commission lacks authority to expand the anti-discrimination provision “as no evidence exists that could justify abandoning repeated legal determinations . . . and factual determinations”); MSG & Music Choice Comments at 5-6 (arguing that the expansion of the anti-discrimination provision is barred by the language and legislative history of Section 616 and would violate the Communications Act and Congress's intent to rely on marketplace forces).

<sup>142</sup> Compare Crown Media Comments at 8-9 (arguing that a broad interpretation is reasonable because the statute directs the Commission to adopt regulations to prevent an MVPD from discriminating “on the basis of affiliation or nonaffiliation of vendors” (emphasis in original)), and MAP & PK Comments at 11 (citing the same language for support), and Bloomberg Comments at 17-18 (citing same), with DirecTV Comments at 4 (“The legislative history is unequivocal that the nondiscrimination provision ‘was crafted to ensure than a [MVPD] does not discriminate against an unaffiliated video programming vendor *in which it* does not hold a financial interest” (emphasis in original) (quoting H. Rep. No. 102-628, at 110, 111)), and Charter Comments at 7-8.

<sup>143</sup> Joint Commenters Comments at 12.

Commenters are in fact affiliated with MVPDs.<sup>144</sup> Yet a part-owner of three of those networks, DirecTV, casts serious doubt on whether there is any cross-MVPD carriage benefit to being affiliated with another MVPD.<sup>145</sup> This striking disconnect highlights that the Section 616 inquiry is properly restricted to an MVPD's own affiliated networks – as is currently determined under an already stretched attribution standard<sup>146</sup> – and not how MVPDs may be “affiliated” under some theory or another with networks they do not own.

Nor is it germane to Section 616 to examine licensing or ownership relationships with upstream programming suppliers, and very few commenters even address, let alone support, such an expansion.<sup>147</sup> Section 616 concerns carriage of networks, not inquiries into how networks acquire programming. As Comcast and other commenters demonstrated, nothing in the legislative history of Section 616 indicates that these upstream relationships have anything to do with the concerns underlying the statute, and the clearest legislative history demonstrates that Congress intended such upstream relationships not to be the basis of any liability under Section 616.<sup>148</sup> Notably, commenters advocating for an expanded discrimination provision do

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<sup>144</sup> Game Show Network is owned in part by DirecTV, Tennis Channel is owned in part by DirecTV and Dish Network, and Current TV is owned in part by DirecTV and Comcast.

<sup>145</sup> *See* DirecTV Comments at 8-9.

<sup>146</sup> *See* MSG & Music Choice Comments at 3, 12-13 (arguing that the Commission's attribution scheme is overbroad and fails to reflect the actual relationships between affected parties – e.g., the rules “gratuitously ensnare” MSG into program carriage disputes despite having been spun-off from Cablevision in 2010).

<sup>147</sup> HDNet favors a prohibition on all discrimination that violates the statute based on any form of affiliation or non-affiliation. *See* HDNet Comments at 11. No other programmers specifically endorse expanding the scope of discrimination to include upstream relationships.

<sup>148</sup> Comcast Comments at 57-58; Cox Comments at 6; NCTA Comments at 9-10.

not cite any legislative history to the contrary, even though the *Notice* implicitly invited comment on the relevant legislative history.<sup>149</sup>

### **G. Burden of Proof**

Certain commenters urge the Commission to adopt a new rule that would shift the burdens of production *and* persuasion to a defendant MVPD once a complainant establishes a prima facie case. Such a rule “would essentially create a presumption in favor of compelled speech and would force MVPDs to rebut that presumption.”<sup>150</sup> As Comcast stressed in its initial comments, such a proposal would be contrary to Section 616 and the APA, especially in light of the Commission’s new minimal standard for establishing a prima facie case in which the Commission looks solely at the allegations and evidence submitted by the complainant and accepts such as truthful and valid.<sup>151</sup> Moreover, in a vibrant and competitive marketplace, there is no reason to presume that MVPDs are engaging in anticompetitive behavior, and any such presumption in favor of compelled speech would be “anathema to the First Amendment.”<sup>152</sup>

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<sup>149</sup> 2011 *Program Carriage Order & Notice* ¶ 78 & n.272. Contrary to the *Notice*’s implication, *see id.*, the use of the term “video programming vendor” in the House Bill that the conference committee accepted over the Senate bill, which used the term “video programmer,” does not undermine the relevance of the Senate explanation of what “video programmer” means and does not mean. As the Conference Committee stated, “The provisions of the House amendment are virtually identical to those of the Senate bill,” and the Conference Committee noted two differences between House and Senate bills that have nothing to do with giving a broader meaning to “video programming vendor.” H. Conf. Rep. No. 102-862, at 82 (1992); *see also id.* at 53 (“The term ‘video programmer’ . . . applies to those video programmers who enter into arrangements with cable operators for *carriage* of a programming service.” (emphasis added)).

<sup>150</sup> TWC Comments at 11-12.

<sup>151</sup> *See* Comcast Comments at 60; *see also* TWC Comments at 12 (“Such burden-shifting is particularly inappropriate given the Commission’s efforts to relax the pleading standard complainants must satisfy in particular circumstances.”). The Joint Commenters assert that “[a] program carriage complainant meeting this threshold has thus already surmounted an important hurdle regarding its credibility and the weight of its allegations.” Joint Commenters Comments at 11. As Comcast explained in its comments, the Commission need only look at the *WealthTV* case to recognize the fallacy of that claim. *See* Comcast Comments at 14, 61-62.

<sup>152</sup> TWC Comments at 12.

The APA is explicit that, “[e]xcept as otherwise provided by the statute, the proponent of a rule or order has the burden of proof.”<sup>153</sup> Section 616 provides no authority to shift the burden of persuasion to defendants, so the proposal in the *Notice* would violate the APA. Revealingly, not a single commenter supporting this proposal even mentions the APA or addresses the lack of statutory authority. Instead, they argue that, because the program access and program carriage provisions of the Communications Act are both intended to “address the potential harmful effects of vertical integration,”<sup>154</sup> the Commission can and should adopt the same “burden-shifting” framework for program *carriage* cases that it uses for program *access* cases.<sup>155</sup> Such simplistic logic fails to account for the significant differences between program access and program carriage.

There are many reasons in law and fact for the differing burdens of proof in program access and program carriage. In particular,

- In program access, defendants are obligated to sell their programming to unaffiliated MVPDs; in program carriage, there is no obligation to carry unaffiliated programming networks.
- In program access, the price, terms, and conditions by which programming is sold to competing MVPDs may not be known to or knowable by the complainant MVPD; in program carriage, differences in how networks are carried by the defendant as well as other MVPDs are readily ascertainable.
- In program access, there are relatively clearly-defined statutory and detailed regulatory affirmative defenses to justify treating MVPDs differently; in program carriage, the Commission consciously (and wisely) decided that it should not adopt per se conduct standards.

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<sup>153</sup> 5 U.S.C. § 556(d).

<sup>154</sup> Crown Media Comments at 10; *see* Joint Commenters Comments at 11 (“As in the program access context, the program carriage rules are intended to curb the ability of vertically-integrated MVPDs to use one arm of their businesses to bestow benefits on the other.”).

<sup>155</sup> *See* Bloomberg Comments at 20; Crown Media Comments at 9; Joint Commenters Comments at 11 (“There is no reason in law or fact for these similar adjudications to be characterized by differing burdens of proof.”); HDNet Comments at 6.

- In program access, the adjudicator will consider the defendant’s reasons and supporting evidence contained in its Answer before determining whether a prima facie showing has been made; in program carriage, the Commission’s new rules instruct the adjudicator to base its finding of a prima facie showing solely on the allegations and any evidence contained in a complaint.<sup>156</sup>

In light of these inherent differences, even assuming that the program access burden-shifting framework actually shifts *both* the burden of production and the burden of persuasion to a defendant, the Commission should pay no heed to illogical arguments that it makes sense to “harmonize” the program access and program carriage burden of persuasion standards.<sup>157</sup> It bears emphasis that the burden-shifting approach in program access was not subjected to judicial review when it was adopted, and, when a form of burden-shifting was adopted in a later program access rulemaking, the D.C. Circuit upheld the action only because it construed the order as shifting the burden of production but *not* the burden of persuasion.<sup>158</sup>

Instead, once a program carriage case has moved beyond the prima facie stage, is designated for hearing, and discovery is completed, the Commission might consider allowing the *adjudicator* to follow the framework used to allocate the burden of proof in the *McDonnell Douglas Corp. v. Green* line of employment discrimination cases.<sup>159</sup> As the Commission notes, the legislative history of Section 616 refers to such cases as relevant guidance, noting that “an extensive body of law exists addressing discrimination in normal business practices, and the

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<sup>156</sup> See Comcast Comments at 61.

<sup>157</sup> See Crown Media Comments at 10; *see also* Joint Commenters Comments at 11; MASN Comments at 11 (“Given the mutually reinforcing goals underlying the two sets of rules . . . [i]t would be irrational now to refuse to apply a consistent burden of proof in both contexts.”).

<sup>158</sup> See *Cablevision v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (internal citations omitted) (stating that agencies only “may adopt evidentiary presumptions provided that the presumptions (1) shift the burden of production and not the burden of persuasion, and (2) are rational” (citing *Garvey v. Nat’l Transp. Safety Bd.*, 190 F.3d 571, 579-80 (D.C. Cir. 1999))).

<sup>159</sup> 411 U.S. 792 (1973) (“*McDonnell Douglas*”).

Committee intends the Commission to be guided by these precedents.”<sup>160</sup> Courts have relied on *McDonnell Douglas* to establish the burden of proof in claims of discrimination arising under statutes that, like Section 616, require a plaintiff to prove discrimination “on the basis of” or “because of” a particular factor.<sup>161</sup>

Absent any direct evidence of discriminatory intent, *McDonnell Douglas* prescribes a three-staged approach to allocate the burdens of production and persuasion. Under this framework, the plaintiff must first produce evidence that creates an inference of discrimination; the burden of *production* then shifts to the defendant, who must provide a legitimate, nondiscriminatory reason for the action; if a defendant does so, then the burden of production shifts *back to* the plaintiff, who must produce evidence that the defendant’s articulated reasons were merely pretextual.<sup>162</sup> However, the “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff.”<sup>163</sup>

As Congress intended, the Commission should rely on this established precedent during the adjudication stage of a program carriage complaint. Because the *Order* lowered the prima facie threshold such that it will not even consider a defendant MVPD’s answer and supporting evidence, it is all the more important that the burden of persuasion always remain with the

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<sup>160</sup> 2011 Program Carriage Order & Notice ¶ 81 n.280 (quoting H. Rep. No. 102-628, at 110 (1992)).

<sup>161</sup> See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (Age Discrimination in Employment Act); *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 927 (8th Cir. 1993) (Fair Housing Act); *Price v. S-B Power Tool*, 75 F.3d 362, 364 (8th Cir. 1996) (Americans with Disabilities Act); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (Family and Medical Leave Act and Americans with Disabilities Act); *Gross v. Small Bus. Admin.*, 669 F. Supp. 50, 52 (N.D.N.Y. 1987) (Equal Credit Opportunity Act).

<sup>162</sup> *Reeves*, 530 U.S. at 142; *McDonnell Douglas*, 411 U.S. at 802, 804; *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

<sup>163</sup> *Burdine*, 450 U.S. at 253.

complainant during the adjudication, even if the burden of production may at some point temporarily shift to the defendant.<sup>164</sup>

## H. Statute of Limitations

As Comcast discussed in its initial comments, the *Notice* correctly identified the problem with the Media Bureau’s interpretation of the third prong of the statute of limitations – it allows a programmer to manufacture a triggering event virtually at any point, including when there is already a longstanding contract that governs the carriage arrangement between the programmer and the MVPD. Very few commenters besides Comcast address the *Notice*’s statute of limitations proposal,<sup>165</sup> and those that did nearly unanimously urge the Commission to amend its statute of limitations rule to “make clear that . . . there is a fixed point at which an MVPD’s action – the refusal to carry a programming vendor on nondiscriminatory terms and conditions – allegedly occurred.”<sup>166</sup> The notable exception is MASN, which proposes that the relevant triggering events should be when:

- (1) a vertically integrated MVPD has clearly communicated to an unaffiliated program vendor the terms on which it is willing to carry that vendor’s programming; and
- (2) it is reasonably apparent that the MVPD is carrying its similarly-situated affiliated programming on terms that are more favorable. Such a rule would comport with the federal “discovery” rule, which recognizes that a claim generally does not accrue until a reasonable plaintiff would have discovered it.<sup>167</sup>

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<sup>164</sup> Of course, in administering a McDonnell-Douglas-like approach, the Commission would have to do so in a way that was fully consistent with the First Amendment, which, as explained above, imposes severe restraints on the Commission’s ability to infer discrimination and issue mandatory carriage orders based on (frequently subjective) assessments or comparisons of programming content.

<sup>165</sup> See NCTA Comments at 26-28; MASN Comments at 21. Other commenters generally supported the Commission’s efforts to clarify when a statute of limitations begins to run, but did not support a particular proposal. See TWC Comments at 13 (“Finally, although TWC opposes further regulation of program carriage arrangements, in the event that the Commission adopts any new rules, TWC supports the establishment of an appropriate limitations period for complaints.”).

<sup>166</sup> NCTA Comments at 27; see Comcast Comments at 74-79; TWC Comments at 13.

<sup>167</sup> MASN Comments at 21.

Although there is arguably some merit to this proposal, it too could be subject to misinterpretation and misuse in the same way as the existing rule. As applied in a case involving a contract between the parties, MASN's proposed factors *ought* to be met when *a contract is signed*; in that regard, MASN's proposed rule would have precluded its own stale 2008 claim, just as the existing rule should have done.<sup>168</sup> But it does not take much inventiveness to see how MASN's proposal could be used to manufacture a claim that is "discovered" years into a contractual relationship.

For example, if a network X is under a seven-year carriage contract, and three years into that term an MVPD provides superior carriage to affiliated network Y (perhaps because network Y was up for renewal, obtained valuable programming rights, and thereby demonstrated a greater ability to attract and retain subscribers), under MASN's rule, network X could assert that it has "discovered" unlawful discrimination under the theory that network Y is "similarly situated" to network X. Network X then could bring a claim asking the Commission to force the MVPD to improve carriage of network X, notwithstanding that the MVPD is honoring the governing contract to which network X specifically and voluntarily agreed. In short, MASN's rule would allow would-be complainants to search constantly for and potentially "discover" new triggering events at any point in a contract term. This proposal raises more problems than it solves.

As to MASN's claim that a denial of carriage may not be apparent in a "formal denial," the existing rules already provide a remedy for clearing up any doubt the programmer seeking

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<sup>168</sup> The gravamen of MASN's July 2008 complaint was that it was not being carried in certain outer-market systems in Pennsylvania and Virginia where Comcast was carrying its affiliated network CSN-MA. The fact that Comcast was not obligated to carry MASN in those systems was apparent when the contract was executed in August 2006 and was crystal clear by April 2007 – more than a year before MASN brought its complaint. See Proposed Findings of Fact and Conclusions of Law of Comcast Corporation, *TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, MB Docket No. 08-214, File No. CSR-80001-P ¶¶ 82-83 (June 26, 2009).

carriage for the first time might have about where it stands with a given MVPD.<sup>169</sup> Under Section 76.1302(b) of the Commission’s rules, a complainant can send a timely pre-filing notice letter to the MVPD, wait ten days for a response, and still have the better part of a year to file a complaint if the response confirms that a carriage arrangement is not likely to occur. There is little doubt that this process will make clear the MVPD’s position and put both parties in a position to assess their respective negotiation (and litigation) positions. Of course, such a letter should not be frivolous, and MVPDs are under no obligation to carry a network, even one that is arguably “similarly situated” to an affiliated network, especially if the network is demanding terms that do not make business sense.<sup>170</sup>

“A programming vendor should not . . . be permitted to continue to toll the statute of limitations by repeatedly asking for carriage on particular terms or by asking for modifications of the terms of existing contracts.”<sup>171</sup> The codification of a rule allowing claims to arise at virtually any point of the programmer’s choosing would have several negative unintended consequences. As Comcast described in its comments, if MVPDs face continuing potential liability, years into a contract, based on a contractual right to improve a network’s carriage at the MVPD’s discretion, then MVPDs such as Comcast may well decide not to include such terms in their contracts. The likely result of omitting such carriage discretion from contracts would be that programmers will have fewer opportunities to gain increased carriage prior to renewal of contracts, MVPDs will be less nimble in responding to marketplace developments and customer demand, and programmers and MVPDs will face more burdensome and frequent contract negotiations. To be sure, the

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<sup>169</sup> MASN Comments at 20.

<sup>170</sup> See *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd. 18099 (2010).

<sup>171</sup> NCTA Comments at 27.

current misinterpretation of the rule already has resulted in significant burdens on MVPDs. Several complainants have been allowed to pursue their complaints through costly evidentiary hearings when those complaints should have been barred as untimely as a legal matter.<sup>172</sup>

For these reasons, Comcast urges the Commission to reject MASN's proposal and the proposal set forth in the *Notice* and, instead, simply clarify that the existing rule will be properly construed and strictly applied so that the third prong will no longer be interpreted as the exception that swallows the limitations periods under the first two prongs. More specifically, the Commission should clarify that, where there is an existing contract between the parties, the first prong of the statute of limitations controls, and a programmer cannot manufacture a claim based on conduct that complies with a contract that is more than a year old – all the more so if the conduct in question is specifically contemplated by the contract. The third prong of the statute of limitations should be limited to instances outside of an existing contract where an MVPD refuses to deal with or carry the complainant programmer for reasons that violate Section 616.<sup>173</sup> Of course, this is the plain meaning and effect of the original third prong of the rule, and the Commission's amendment to that provision for unrelated reasons was not intended to alter this meaning and effect.<sup>174</sup> This clarification would have the benefit of encouraging parties to assert rights in a timely manner, providing certainty to MVPDs that they will not be subject to stale complaints concerning contracts that are more than one year old.

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<sup>172</sup> For example, the NFL Network's complaint against Comcast and MASN's complaint against Comcast were filed more than one year after each respective programmer entered into its carriage agreement with Comcast, but were nonetheless allowed to go forward.

<sup>173</sup> The proposal to strike the third prong of the rule while keeping the first two prongs would also solve this issue. *See* NCTA Comments at 27. As NCTA recognized: "[I]t is most important that the Commission make clear that, for purposes of the statute of limitations, there is a fixed point at which an MVPD's action – the refusal to carry a programming vendor on nondiscriminatory terms and conditions – allegedly occurred." *Id.* at 27-28.

<sup>174</sup> *See* Comcast Comments at 78.

## I. Submissions of Final Offers

Commenters express a diverse array of views about the *Notice*'s proposal to "adopt a rule providing that the adjudicator will have the discretion to order each party to submit their 'final offer' for the rates, terms, and conditions for the video programming at issue."<sup>175</sup> Although some commenters provide constructive feedback regarding how the *Notice*'s proposal could be utilized to expedite resolution of the remedy phase of a program carriage complaint proceeding and to facilitate settlement once a program carriage violation is found,<sup>176</sup> other parties use this issue as a platform to call for regulations that would tilt the program carriage adjudicatory process further in programmers' favor and that would require mandatory arbitration the Commission cannot mandate.<sup>177</sup> The Commission should reject these invitations to exceed its statutory authority and to increase programmers' incentives to use program carriage complaint proceedings to obtain better carriage terms than they can get in the marketplace.

Bloomberg and Media Access Project/Public Knowledge appear to construe the *Notice*'s proposal as a proposal to mandate baseball-style arbitration similar to the arbitration the Commission has imposed as conditions for approving merger transactions.<sup>178</sup> As Comcast and others have explained previously, the Commission does not have authority to impose mandatory arbitration and doing so would impose additional costs and delays.<sup>179</sup> Even NFL Network,

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<sup>175</sup> 2011 Program Carriage Order & Notice ¶ 54.

<sup>176</sup> See Joint Commenters Comments at 32-34; MASN Comments at 30-31; Comcast Comments at 79-81.

<sup>177</sup> See Bloomberg Comments at 7; MAP & PK Comments at 22-23.

<sup>178</sup> See Bloomberg Comments at 7 ("Bloomberg . . . encourages the Commission to require the use of baseball-style arbitration in program carriage proceedings."); MAP & PK Comments at 22-23 ("The application of 'baseball-style' mandatory arbitration best serves the public interest by efficiently and equitably promoting competition and diversity in video programming.").

<sup>179</sup> See Comcast Corp. Reply Comments, MB Docket No. 07-42, at 36-37 (Oct. 12, 2007); NCTA Comments, MB Docket No. 07-42, at 16-17 (Sept. 11, 2007); Time Warner Cable Comments, MB Docket No. 07-42, at 34-35 (Sept. 11, 2007).

which supported mandatory arbitration in its 2007 Comments, now, with its cohorts, acknowledges that any arbitration must be *voluntary*.<sup>180</sup> That is not to say that the Commission cannot authorize the adjudicator (whether it be the Media Bureau or an ALJ) to request that parties submit proposed final offers as part of a remedy phase once the adjudicator has determined that a program carriage violation has occurred and the appropriate remedy is carriage. Of course, requiring an MVPD to submit a final offer in no way should be considered a waiver of any right to appeal (i) the underlying determination of a program carriage violation, *or* (ii) whether a carriage order is consistent with Section 616, the APA, or the First Amendment.

Comcast tentatively supported a rule that would allow an adjudicator to request the submission of final offers in specific circumstances, *i.e., if and only if*, (1) the adjudicator has determined that a program carriage violation occurred, (2) the adjudicator has determined that carriage is the appropriate remedy, and (3) the adjudicator is required to choose one of the offers submitted.<sup>181</sup> Other commenters – notably, those commenters who, like Comcast, have experience with “baseball-style” arbitration – also supported such a rule.<sup>182</sup> Commenters’ proposals to go beyond such a requirement to fashion a remedy, even if limited to “extraordinary circumstances,”<sup>183</sup> would undermine the benefits of having a “final offer” rule in the first place and “sacrifice the predictability created by a rule requiring an adjudicator to pick one of the offers.”<sup>184</sup>

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<sup>180</sup> Compare NFL Enterprises Comments, MB Docket No. 07-42, at 7-8 (Sept. 11, 2007), with Joint Commenters Comments at 32-33.

<sup>181</sup> See Comcast Comments at 79-81.

<sup>182</sup> See Joint Commenters Comments at 32-33; MASN Comments at 30-31.

<sup>183</sup> Joint Commenters Comments at 15.

<sup>184</sup> MASN Comments at 31.

Finally, Bloomberg argues that an adjudicator should have “significant latitude to require the submission of offers at any time in the complaint process, *including any time* after the prefiling notice is submitted.”<sup>185</sup> Bloomberg seeks to stack the deck against an MVPD defendant by forcing the MVPD to either (1) submit an offer even where no offer is warranted – for example, if an MVPD does not want to force its customers to pay for a programmer it does not want to carry or does not want to move to another tier – and risk the adjudicator taking a perceived path of least resistance by accepting the MVPD’s offer, or (2) refuse to submit an offer and risk appearing to the adjudicator as the “problem.” The Commission should not countenance such manipulation of its complaint adjudication processes. Because MVPDs have no statutory obligation to carry a programmer in the first place, they should not be compelled to submit an offer for carriage just in case the adjudicator determines a program carriage violation has occurred. If the parties want to voluntarily submit offers for consideration in the adjudication, they are free to do so already. Any submission of final offers for carriage should only be required once an adjudicator has determined that a program carriage violation has occurred and needs to be remedied and after the parties agree to participate in a “final offer” remedy phase.

#### **IV. OTHER ISSUES.**

##### **A. “True Up”**

In response to the *Notice*’s request for comment on whether the Commission should, after adjudicating that no program carriage violation occurred, require a network that was wrongfully awarded a temporary standstill to refund any license fees an MVPD paid it during the

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<sup>185</sup> Bloomberg Comments at 7 (emphasis added).

standstill,<sup>186</sup> the Joint Commenters argue that this “true-up” would unjustly enrich and reward the MVPD.<sup>187</sup> The Commission should reject this illogical argument.

The idea that an MVPD is in any way “rewarded” for forced carriage utterly misconstrues which party would truly be harmed by an improvidently granted standstill.<sup>188</sup> There is no marginal cost to a network to provide its programming to an MVPD in the event a standstill is required; to the contrary, the network receives increased advertising revenue as a result of expanded distribution. In contrast, where a standstill forces carriage that is not ultimately required, an MVPD has suffered serious First Amendment injury, on top of its economic injury from paying more money than was required to the network as well as potentially having to forego carriage of other programming.<sup>189</sup> Repayment of license fees would be the least the network should do, as it is the proper return of a benefit the network never had the right to receive; yet, no monetary amount can repay the First Amendment injury of being compelled to speak.

Crown Media argues that requiring an unsuccessful complainant to repay carriage fees it received during the standstill would “penalize programmers for filing in good faith.”<sup>190</sup> Yet this turns the truth on its head: it is the MVPD that, by being forced to carry programming, is paying for programming it has not chosen to carry. And it is the MVPD that is being forced to speak in a manner it otherwise would not. There is no “benefit” to the MVPD during this period, as

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<sup>186</sup> *2011 Program Carriage Order & Notice* ¶ 28.

<sup>187</sup> *See* Joint Commenters Comments at 15 (“The MVPD should not be rewarded with months of free programming every time a program carriage complaint is unsuccessful.”).

<sup>188</sup> *See also* Crown Media Comments at 6 (arguing that a “true up” would harm unsuccessful complainants”).

<sup>189</sup> *See* Letter from David P. Murray, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 25, 2011).

<sup>190</sup> *See* Crown Media Comments at 6.

Crown Media suggests.<sup>191</sup> Joint Commenters' argument that a potential true-up will dissuade programmers from filing meritorious complaints or seeking restoration of service levels is also illogical. A standstill will encourage more non-meritorious complaints, even if a "true up" were required. The opportunity of a standstill provides a network with an incentive to bring a meritless complaint simply to earn additional advertising revenue while the standstill is in place. Although a "true up" may require it to repay license fees that, absent the standstill, it would have never received, the increased advertising revenues received over how ever many months the complaint is pending will simply be pocketed by the programmer.

#### **B. Scope of Issues To Be Litigated Before an ALJ**

As part of their discussion of discovery issues, the Joint Commenters argue that "the Commission's procedures should facilitate the early resolution of issues by the Media Bureau, which should narrow the scope of issues for which a hearing is required."<sup>192</sup> Joint Commenters effectively urge the Media Bureau to prejudge as many factual and legal issues in a Hearing Designation Order so as to limit the issues an ALJ needs or is authorized to make.<sup>193</sup> Although this proposal may seem to promote some efficiency, the Commission's actual experiences counsel against adopting such a proposal, either formally or in practice. Of particular note, had the ALJ been limited in his ability to review the purported factual findings in the order designating for hearing the *WealthTV* cases, he may have never had the opportunity to assess all of the evidence that formed the basis of his decision – which a unanimous Commission approved – that *WealthTV*'s claims were without merit. If the parties are precluded from presenting all

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<sup>191</sup> *Id.*

<sup>192</sup> Joint Commenters Comments at 18.

<sup>193</sup> *See id.* at 18-19.

relevant evidence to the trier of fact, whatever expedience is gained on the front end could cause further delays on appeal, when any party taking exception to an initial decision may argue that the decision was not based on substantial evidence in the record.

Joint Commenters' proposal is especially inappropriate in light of the Commission's decision "that the Media Bureau's determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only."<sup>194</sup> Given that the issue before the Bureau in determining a *prima facie* case of discrimination often will include whether the complainant's network is "similarly situated" to the defendant's affiliated network, and based on experience that issue is highly fact-intensive, justice would be served best by referring that issue along with any other contested issues of law or fact for a full evidentiary hearing before the ALJ, where the complainant's proof may be fully put to the test.

## V. CONCLUSION

The record confirms that the video marketplace is more competitive than ever and that there are no factual or legal bases for adopting the expansive regulatory proposals in the *Notice*. The record also leaves little doubt that adoption of the *Notice*'s proposals would infringe on MVPDs' First Amendment rights in ways that cannot be justified. Accordingly, as the majority of commenters urged, the Commission should refrain from adopting any proposals that would

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<sup>194</sup> 2011 Program Carriage Order & Notice ¶ 17.

unwisely increase regulation and only consider clarifying its existing rules to bring more certainty to program carriage proceedings.

Respectfully submitted,

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January 11, 2012