

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF TIME WARNER CABLE INC.**

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Time Warner Cable Inc. (“TWC”) hereby submits the following reply comments in response to the Notice of Proposed Rulemaking issued in the above-captioned docket and the opening comments submitted on November 28, 2011.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

The opening comments confirm that the expansion of the program carriage regime contemplated by the NPRM would be untenable from a legal, practical, and policy perspective. While programming vendors support adoption of most of the NPRM’s proposals, they, like the NPRM, conspicuously ignore the significant First Amendment implications of the proposed rules. Yet as TWC explained in its opening comments, the First Amendment must guide the outcome of this proceeding, given the proposed encroachment on the editorial discretion of multichannel video programming distributors (“MVPDs”). Indeed, setting aside the constitutional infirmities of the existing regime, the opening comments in response to the NPRM confirm that any further regulation of MVPDs’ carriage decisions would not only violate the First Amendment but also exceed the scope of the Commission’s statutory authority and violate the Administrative Procedure Act (“APA”).

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<sup>1</sup> *Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Rcd 11494 (2011) (“NPRM” or “Second Report and Order”).

The opening comments also highlight a host of additional problems that would arise from specific proposals to broaden the reach of the Commission’s program carriage rules, all of which militate strongly against their adoption. For example, despite explicit requests for evidence that would support the Commission’s contemplated expansion of the non-discrimination rule and its “collusion hypothesis,” programming vendors supporting the proposal have proffered no such evidence. To the contrary, the record now more than ever confirms that robust competition among MVPDs precludes any colorable claim of a constitutionally sufficient governmental interest in regulating MVPDs’ programming decisions, whether made on the basis of affiliation or otherwise. In any event, the statutory text and legislative history make clear that Congress intended only to target the potential for MVPDs to favor their *own* programming affiliates, and the Commission therefore is without authority to prohibit purported “discrimination” based on a programming vendor’s affiliation with some other distributor.

Likewise, the opening comments demonstrate that the so-called “anti-retaliation” rule proposal exceeds the scope of the Commission’s authority and would only incent vendors of undesirable programming to file baseless complaints as a means of securing carriage. MASN, in particular, advances a number of sweeping proposals that are transparently aimed at giving it sufficient bargaining leverage to demand carriage on any terms of its choosing. MASN’s proposals include proscribing and penalizing any “adverse” post-complaint conduct—whether related to carriage or not—by an MVPD, including pricing and customer communications that a programming vendor might deem disadvantageous. While MASN attempts to justify this and other proposals by pointing to its failed complaint against TWC, its specious claims only undermine its effort to skew the bargaining process even further in its favor.

MASN and other programmers also propose a burden-shifting mechanism for discrimination complaints that effectively would presume that a program carriage violation has occurred in the event a complainant meets the minimal burdens imposed by the Commission's new *prima facie* pleading standard. But nothing in Section 616 would support such an adverse presumption. To the contrary, even apart from the constitutional limitations on the Commission's ability to compel carriage of particular programming and to displace an MVPD's preferred programming, the statute authorizes interference with such editorial judgments only where the Commission finds that the MVPD discriminated "on the basis of affiliation or nonaffiliation."<sup>2</sup> Moreover, additional unwarranted regulation of MVPDs' editorial decision making would cause consumer harm. Instead of obtaining the benefit of programming decisions made by cable operators trying to provide customers the programming they want (as Congress intended outside of decisions based on affiliation), consumers often would be put in the position of obtaining and paying for programming they have no interest in receiving, because the expanded new rules would result in findings of violations where no consideration of affiliation was involved.

Binding precedent further dictates that the burden of proof remain with complainants unless Congress provided a clear indication of an intent to shift the burden. And because shifting the burden to defendants in program carriage cases would upset the statutory scheme and thereby subject MVPDs to far more expansive liability than Congress intended, doing so also would violate the APA. TWC therefore urges the Commission to reject these and other proposals, including the proposed adoption of a good faith negotiation requirement or additional, party-led discovery procedures. To the extent that the Commission takes further action in this proceeding,

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<sup>2</sup> 47 U.S.C. § 536(a)(3).

such action should be limited to restoring appropriate deference to MVPDs' editorial discretion by jettisoning a regime that unjustifiably intrudes on core First Amendment rights.

## DISCUSSION

### I. THE OPENING COMMENTS CONFIRM THAT THE PROPOSED EXPANSION OF THE PROGRAM CARRIAGE RULES WOULD BE UNCONSTITUTIONAL

As TWC explained in its opening comments, the existing program carriage rules already impose a significant and unwarranted burden on MVPDs' constitutionally protected speech.

Numerous commenters agree that the various expansions of those rules proposed in the NPRM would do considerably more damage to MVPDs' First Amendment rights. For example, Comcast points out that the NPRM "proposes a host of new rules and a much more active role for the Commission, a role that inevitably would intrude on MVPDs' editorial discretion and First Amendment rights and place the Commission squarely (and intrusively) in the middle of relationships between programming networks and MVPDs."<sup>3</sup> Such an intrusion, as Comcast notes, would be "inconsistent with [c]ongressional intent and an affront to the Constitution."<sup>4</sup>

Likewise, NCTA, which counts independent programmers such as A&E, BET, and TV Guide Network among its members,<sup>5</sup> explains that the NPRM's proposals "would compound the First Amendment concerns raised by the [existing] rules," and that "[m]andatory carriage of programming that a cable operator or other MVPD would not choose to carry is an extraordinary

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<sup>3</sup> Comments of Comcast Corporation, MB Docket No. 11-131, at 3 (filed Nov. 28, 2011) ("Comcast Comments").

<sup>4</sup> *Id.* at 7.

<sup>5</sup> See National Cable and Telecommunications Association, *NCTA Member Companies*, <http://www.ncta.com/About/About/NCTAMemberCompanies.aspx>. As discussed *infra*, Section II.A, any programming service that is not owned by TWC is "independent" from TWC's perspective.

remedy that seriously impacts First Amendment rights.”<sup>6</sup> Cablevision, among others, agrees with TWC that the program carriage regime is inherently “content-based,” and should be evaluated under strict scrutiny.<sup>7</sup> Several commenters also share TWC’s view that any expansion of the program carriage rules is particularly inappropriate now that the concerns about cable operators’ supposed “bottleneck” control have been resolved by the emergence of robust competition, thus negating any plausible constitutional justification for rules imposing mandatory carriage obligations on MVPDs.<sup>8</sup>

Meanwhile, the programmers and other entities supporting the NPRM’s proposals—and in most instances proposing even deeper intrusions into the editorial discretion of MVPDs—fail to grapple at all with the serious First Amendment concerns at issue here. MASN, Bloomberg, and HDNet all support proposals that would effectively substitute the Commission’s editorial judgment for that of MVPDs,<sup>9</sup> and yet they all fail even to mention the First Amendment in their comments, much less explain why the rules they propose would pass constitutional muster. Indeed, the *only* proponents of expanding the program carriage regime that raise the First

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<sup>6</sup> Comments of the National Cable & Telecommunications Association, MB Docket No. 11-131, at 4-5 (filed Nov. 28, 2011) (“NCTA Comments”).

<sup>7</sup> Comments of Cablevision Systems Corporation, MB Docket Nos. 11-131, 07-42, at 17 (filed Nov. 28, 2011) (“Cablevision Comments”); *see also* Comcast Comments at 22 (stating that the proposed rules “necessarily entail government judgments focused on the *content* of the programming, which triggers strict scrutiny”) (emphasis in original).

<sup>8</sup> *See, e.g.*, Comcast Comments at 1 (“In today’s vibrantly competitive and diverse video programming marketplace, Congress’s goals of promoting competition and diversity have been achieved.”); Cablevision Comments at 4 (“Despite the fact that the competitive landscape has changed dramatically since 1992, the Commission is considering proposals in the NPRM that would add to, not streamline, [the program carriage rules].”).

<sup>9</sup> *See generally* Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, MB Docket No. 11-131 (filed Nov. 28, 2011) (“MASN Comments”); Comments of Bloomberg L.P., MB Docket Nos. 11-131, 07-42 (filed Nov. 28, 2011) (“Bloomberg Comments”); Comments of HDNet Entertainment LLC, MB Docket Nos. 11-131, 07-42 (filed Nov. 29, 2011) (“HDNet Comments”).

Amendment were Media Access Project and Public Knowledge, which filed jointly. And even then, they mention the First Amendment only in passing, without attempting to justify or even acknowledge the significant burden that the proposed expansion of the program carriage rules would have on MVPD speech.<sup>10</sup>

The Supreme Court held nearly two decades ago that “[c]able programmers and cable operators engage in and transmit speech” and are thus “entitled to the protection of the speech and press provisions of the First Amendment.”<sup>11</sup> As a result, the vital First Amendment interests of MVPDs at stake here must inform the Commission’s consideration of every proposal advanced in the record. These interests cannot be ignored (as the programming provider commenters do) or treated as a mere afterthought (as the NPRM does). Rather, the First Amendment must be a primary consideration in this proceeding.

## **II. THE PROPOSED RULES SUFFER FROM ADDITIONAL LEGAL, PRACTICAL, AND POLICY DEFECTS**

The opening comments provide no basis for the sweeping expansion of the program carriage regime that the NPRM proposes to adopt. To the contrary, the record in this proceeding, together with “the litigation record of the past four years, ... demonstrates that the type of ‘improvements’ proposed in the [NPRM] likely will only promote further regulatory gamesmanship and meritless litigation.”<sup>12</sup> TWC has experienced such gamesmanship firsthand in defending against MASN’s baseless complaint. Indeed, any further expansion of the Commission’s rules—whether by broadening the non-discrimination rule to sweep in

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<sup>10</sup> See Comments of Media Access Project and Public Knowledge, MB Docket No. 11-131, at 22 (filed Nov. 28, 2011) (“MAP/PK Comments”).

<sup>11</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

<sup>12</sup> Comcast Comments at 4; see also Comments of MSG Holdings, L.P. and Music Choice, MB Docket Nos. 11-131, 07-42, at 3 (filed Nov. 28, 2011).

programming vendors that are vertically integrated with *other* MVPDs; by adopting a so-called “anti-retaliation” rule, burden-shifting framework, or good faith negotiation requirement; or by expanding discovery procedures in complaint proceedings—would not advance any of the goals asserted in the NPRM but instead would invite additional abuse of the regime by programming vendors and, as a result, harm the very interests the NPRM proposes to protect. TWC therefore urges the Commission to avoid “engrafting new and knotty regulatory branches onto the program carriage statute,” and instead identify ways to “prun[e] back unnecessary regulation and allow[] the marketplace to function.”<sup>13</sup>

**A. The Opening Comments Provide No Basis for Broadening the Non-Discrimination Rule.**

The proposed expansion of the non-discrimination rule lacks any empirical or legal basis. Although some commenters urge the Commission to “recognize” MVPDs’ supposed practice of “favoring each other’s affiliates,” they proffer no evidence whatsoever to demonstrate that an MVPD has ever materially favored the affiliate of *another* MVPD solely on the basis of that affiliation.<sup>14</sup> Nor have the proponents of new rules demonstrated that Congress intended “affiliation” to have such a broad and unconventional meaning. To the contrary, the legislative history makes clear that, when Congress considered the possibility of discrimination by vertically integrated distributors, it focused only on the then-existing concern that “vertical

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<sup>13</sup> Comcast Comments at 2.

<sup>14</sup> Comments of Current TV LLC; Game Show Network, LLC; NFL Enterprises LLC; and the Tennis Channel, Inc., MB Docket No. 11-131, at 12 (filed Nov. 28, 2011) (“Joint Programmer Commenters Comments”); *see also* Bloomberg Comments at 17; HDNet Comments at 12-13.

integration gives cable operators the incentive and ability to favor *their* affiliated programming services.”<sup>15</sup>

As TWC and others explained in their opening comments, the Commission may not assume that vertically integrated MVPDs would discriminate in favor of a programming vendor affiliated with a different MVPD,<sup>16</sup> as the courts already have “rebuked the Commission once for adopting restrictions based on a theory of MVPD collusion while failing to provide any evidence of such collusion.”<sup>17</sup> Nor have the comments of programming vendors provided any evidence that would support this “collusion hypothesis,” despite the NPRM’s explicit request for “real-world examples.”<sup>18</sup> Moreover, the First Amendment interests discussed above, together with the dramatic increase in competition since the enactment of the 1992 Cable Act, compel a narrow construction of the statute, not the type of expansive interpretation the programming providers seek.

For the same reasons, TWC agrees with other MVPDs that expanding the attribution rules to encompass arms-length contractual relationships between MVPDs and programming

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<sup>15</sup> S. REP. NO. 102-92, at 25 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 (emphasis supplied).

<sup>16</sup> *See, e.g.*, Comments of Time Warner Cable Inc., MB Docket No. 11-131, at 7-10 (filed Nov. 28, 2011) (“TWC Comments”); Comcast Comments at 5 (echoing TWC’s concern that the Commission’s proposed expansion of the discrimination rule “lacks any factual or legal basis and would expand the number of program carriage complaints and likely harm the very independent programming networks that the [NPRM] claims it seeks to protect”).

<sup>17</sup> Comments of DirecTV, Inc., MB Docket No. 11-131, at 10 (filed Nov. 28, 2011) (“DirecTV Comments”) (citing *Time Warner Entm’t Co. LP v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001)).

<sup>18</sup> NPRM ¶ 74 (citing cases demonstrating that the Commission is required to have evidence to support any conclusion that MVPDs would engage in coordinated activity).

vendors that control multiple programming networks would run counter to congressional intent.<sup>19</sup> Congress made clear that Section 616 was intended to prevent discrimination in carriage negotiations based on an MVPD's ownership interest in competing programming.<sup>20</sup> MVPDs that otherwise have no financial stake in a programming vendor do not gain one merely by agreeing to carry multiple networks controlled by that vendor. Rather, it is commonplace for negotiations with a vendor of multiple programming services to include agreements to carry such vendor's more popular services as well as niche networks. The Commission also should reject HDNet's proposal, which takes such liberties with the statute that it would apply the program carriage rules even to "MVPDs that own no programming."<sup>21</sup> Such a reading cannot possibly be squared with the statute or the policies underlying it, and typifies the overreaching of parties that propose new program carriage mandates.

**B. The "Anti-Retaliation" Rule Proposed by Programmers Would Be Plainly Unlawful and Profoundly Unwise.**

Programmers also propose an overly expansive rule that ostensibly would bar "retaliation" but in fact would unjustifiably reward programmers for filing program carriage complaints, no matter how meritless, and regardless of how attenuated any subsequent "adverse action" by the MVPD may be.<sup>22</sup> Even apart from the First Amendment violation that would result if the Commission granted preferential treatment to a programmer's speech based on its

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<sup>19</sup> See, e.g., DirecTV Comments at 21; Comments of Cox Communications, Inc., MB Docket No. 11-131, at 6 (filed Nov. 28, 2011); Comcast Comments at 5.

<sup>20</sup> H.R. REP. NO. 102-68, at 110 (1992) ("*House Report*") ("This provision was crafted to ensure that a multichannel video programming operator does not discriminate against an unaffiliated video programming vendor in which *it* does not hold a financial interest.") (emphasis supplied).

<sup>21</sup> HDNet Comments at 4.

<sup>22</sup> See *id.* at 10; MASN Comments at 23; Joint Programmer Commenters Comments at 13; Comments of Crown Media Holdings, Inc., MB Docket No. 11-131, at 6 (filed Nov. 28, 2011); Bloomberg Comments at 15.

filing of an unrelated complaint, the broad anti-retaliation rules these commenters propose exceed the Commission’s authority under Section 616.

The Commission has recognized that Section 616 authorizes the Commission to restrict MVPDs’ editorial discretion *only* insofar as the MVPD seeks to make carriage decisions “on the basis of video programmers’ affiliation or nonaffiliation” (or based on another prohibited category); otherwise, an MVPD “is free to exercise its discretion to carry or not carry any cable network it chooses.”<sup>23</sup> Programmers such as MASN nevertheless argue that the Commission should not only ensure that independent programmers gain carriage on the terms they demand, but also proscribe any post-complaint conduct by the MVPD that the programmer deems “adverse,” including such matters as making public remarks identifying the reason for a rate increase.<sup>24</sup> MASN likewise suggests that Comcast should have been barred from raising the rate for its own regional sports network (“RSN”) in the wake of the parties’ carriage dispute.<sup>25</sup> In a further effort to bootstrap the filing of a complaint into a means of regulating unrelated conduct by MVPDs, MASN proposes that any adverse action—not necessarily related to carriage at all—“taken within two years of the resolution of a complaint constitutes *prima facie* evidence of retaliation.”<sup>26</sup>

Even apart from the obvious constitutional problems posed by further curtailing an MVPD’s freedom of speech—not only by usurping its editorial discretion with respect to

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<sup>23</sup> Brief for Respondents, *TCR Sports Broad. Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC*, No. 11-1151, at 29 (4th Cir. filed May 26, 2011) (“*FCC MASN Brief*”) (internal citations and quotation marks omitted). *See also id.* at 27-28 (rejecting MASN’s argument that “the statute and the FCC’s rules impose a ‘federal equal treatment obligation’ on vertically integrated cable operators”).

<sup>24</sup> MASN Comments at 22-23 (characterizing Comcast’s explanation of its retail rate increase as unlawfully retaliatory).

<sup>25</sup> *See id.*

<sup>26</sup> *Id.* at 23.

programming, but also by dictating what may be said to customers—MASN’s far-ranging conception of the Commission’s power to police MVPD practices extends far beyond its actual authority under Section 616. In fact, these “anti-retaliation” proposals would create a roving mandate for the Commission to second-guess not only an MVPD’s carriage decisions, but ratemaking, customer communications, and all manner of policy judgments. Section 616 *at most* authorizes the Commission to regulate “program carriage agreements and related practices *between* ... [MVPDs] and video programming vendors.”<sup>27</sup> Thus, notwithstanding the wish list submitted by programmers, the statute does *not* authorize the Commission to regulate an MVPD’s retail ratemaking or unrelated wholesale practices (such as the rate charged for an MVPD’s own affiliated programming service). Nor would it be permissible to deem any post-complaint conduct that a programmer finds objectionable to be a form of “retaliation.”

The notion that such requirements “would not impose an[] onerous burden on MVPDs,” as MASN claims, is nonsense.<sup>28</sup> A rule that effectively subjects any “adverse” action to a presumption of illegality within some period following a complaint proceeding—such as the two-year period suggested by the NPRM<sup>29</sup>—would enmesh the Commission in potentially any aspect of the MVPD’s business. MASN’s blithe assertion that an MVPD with a “legitimate” reason for the conduct in question “should have little trouble demonstrating that reason” is at best naïve, and at worst intentionally misleading.<sup>30</sup> As reflected in MASN’s multiyear pursuit of a baseless program carriage complaint against TWC—in which TWC repeatedly demonstrated its neutral business reasons for refusing to carry Baltimore Orioles and Washington Nationals

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<sup>27</sup> 47 U.S.C. § 536(a) (emphasis supplied).

<sup>28</sup> MASN Comments at 23.

<sup>29</sup> *See* NPRM ¶ 66.

<sup>30</sup> MASN Comments at 23.

baseball games in distant North Carolina communities that have no interest in viewing that programming (even apart from the inflated charges MASN sought to impose)—even meritless allegations tend to result in time-consuming and extremely burdensome litigation.

Likewise, MASN ignores the significant costs that its regulatory proposals would have on consumers. Indeed, in the event that TWC had caved to MASN’s demands, TWC’s customers in North Carolina would have been forced to pay for and receive expensive, non-local sports programming that they have no interest in viewing. Thus, to the extent that an MVPD were required to carry programming based on any factor other than its considered editorial judgment—including in particular regulatory processes that substitute other parties’ judgment for the MVPD’s—consumer harm inevitably would result.

MASN’s further assertion that the Commission’s rules adequately deter programming vendors from filing meritless complaints is equally unavailing.<sup>31</sup> As described above, MASN’s continued litigation against TWC demonstrates the ease with which programming vendors can twist the Commission’s existing rules in a misguided effort to make out a viable claim. The changes proposed by the NPRM and supported by some programming vendors plainly would be a recipe for *encouraging* baseless complaints, as any programming vendor would realize that securing broad “anti-retaliation” protections for a period of years would make filing such a complaint an obvious and easy way to gain negotiating leverage and to secure preferential treatment.

In short, not only do programmers seek to establish the type of expansive “equal treatment” mandate that this Commission has recognized to be inconsistent with the Act,<sup>32</sup> but some attempt to go one step further, and would require *preferential* treatment of any party that

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<sup>31</sup> See *id.* at 24.

<sup>32</sup> *FCC MASN Brief* at 27-28.

files a complaint. There plainly is no lawful basis or sound policy rationale for the Commission to establish such rules.

**C. The Commission Should Reject Programming Providers’ Burden-Shifting Proposals.**

**1. *Programmers’ Burden-Shifting Proposals Ignore Congressional Intent and the Constitutional Interests at Stake.***

Just as the proposed anti-retaliation rule would confer preferences on programmers that Congress did not intend and the Constitution forbids, programmers’ proposals to alter the burden of proof applicable in program carriage cases suffer from the same defects. Programmers propose a radical departure from the standard traditionally used in program carriage proceedings that would shift the burden of proof to the defendant after the complainant has made out a bare *prima facie* case,<sup>33</sup> thus creating “a *presumption* that the MVPD discriminated on the basis of affiliation.”<sup>34</sup> But even if such an approach were permissible under Section 616 and the APA (and it is not), it could not pass constitutional muster because of its impact on MVPDs’ protected speech.

Congress’s proscription of certain discriminatory conduct “*on the basis of* affiliation or nonaffiliation” plainly establishes an MVPD’s intent as the central element in any program carriage discrimination claim.<sup>35</sup> The Commission thus has held that an MVPD cannot be found to have discriminated on the basis of affiliation—and thus cannot violate Section 616(a)(3)—

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<sup>33</sup> See, e.g., Joint Programmer Commenters Comments at 10-11; MASN Comments at 10; Bloomberg Comments at 20.

<sup>34</sup> NCTA Comments at 25 (emphasis in original).

<sup>35</sup> 47 U.S.C. § 536(a)(3) (emphasis supplied); cf. Second Report and Order ¶ 13 (acknowledging that an MVPD’s reasons for any carriage decision it makes is an “element of a *prima facie* case”).

unless it intentionally denied carriage for that specific reason.<sup>36</sup> The burden-shifting proposal supported by programming vendors, however, would be completely at odds with this statutory framework, in large part as a result of the malleable *prima facie* standard adopted by the Commission in the Second Report and Order. Indeed, a complainant can make out a *prima facie* case without offering any evidence that a defendant MVPD based the carriage decision at issue on the vendor's lack of affiliation with the defendant.<sup>37</sup> Moreover, the Media Bureau's *prima facie* determination "completely ignore[s]" a defendant MVPD's answer and supporting evidence of nondiscrimination.<sup>38</sup> Layering a burden-shifting mechanism on top of this liberal *prima facie* standard would ensure that a defendant would bear the burden of proof even before being afforded an opportunity to challenge the allegations made in a complaint.<sup>39</sup> Such a mechanism therefore would assume a rule violation at the outset of any proceedings on the merits, and in turn would allow an MVPD to be held liable for a program carriage violation

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<sup>36</sup> *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099 ¶ 12 (2010) ("*MASN Order*") ("The plain language of Section 616(a)(3) permits a finding of program carriage discrimination only in cases where such discrimination is carried out on the basis of an unaffiliated programming vendor's affiliation or nonaffiliation.") (internal quotation marks omitted), *appeal pending sub nom. TCR Sports Broad. Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC*, No. 11-1151 (4th Cir.). *See also* NCTA Comments at 6 (explaining that Section 616 "only prohibit[s] MVPDs from refusing to carry [programming networks] *because they are unaffiliated*") (emphasis in original).

<sup>37</sup> *See* Second Report and Order ¶ 14 (establishing *prima facie* standard permitting complainants to demonstrate merely that the unaffiliated programming at issue "is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD" and that "the defendant MVPD has treated the video programming provided by the complainant programming vendor differently" than its affiliated programming).

<sup>38</sup> Comcast Comments at 62; *see also* Second Report and Order ¶ 17 (providing 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>39</sup> *See* Second Report and Order ¶ 17 (explaining that only after the Media Bureau makes its *prima facie* determination would it consider an MVPD's "legitimate and non-discriminatory business reasons in its answer").

notwithstanding the complainant’s inability to carry the ultimate burden of proof that Congress intended it to bear.<sup>40</sup>

Commenters favoring such a burden-shifting proposal provide no support for the proposition that Congress intended a defendant MVPD to bear the burden of proving that it did not violate Section 616. The Supreme Court has held that “[a]bsent some reason to believe that Congress intended otherwise, ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.”<sup>41</sup> Indeed, it is a well-settled tenet of American jurisprudence that the burden of proof falls on the complaining party,<sup>42</sup> a fact recently recognized by the Commission’s Chief Administrative Law Judge.<sup>43</sup> And as Comcast points out, “Section 616 provides no basis to shift the burden of production or persuasion to the defendants.”<sup>44</sup> Accordingly, the Commission is bound by the plain language of the APA, which dictates that

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<sup>40</sup> NPRM ¶ 67 (explaining that “a finding of a *prima facie* [case] does not ... mean that the defendant has violated the Commission’s rules” but, rather, “that the complainant has alleged sufficient facts that, if left un rebutted, *may* establish a violation”); *see also* Comcast Comments at 62.

<sup>41</sup> *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005).

<sup>42</sup> *See, e.g., Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2351 (2009) (“Where the statutory text is silent ... the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.”) (internal citations and quotation marks omitted); *Schaffer*, 546 U.S. at 57 (citing cases in which the Court has “assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims”).

<sup>43</sup> *See Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, FCC 11D-01, at ¶ 100 (rel. Dec. 20, 2011) (“*Tennis Channel Initial Decision*”) (explaining that “placing the burden of proof on Tennis Channel is consistent ... with the historic practice of requiring that the party seeking relief by Commission order bear the burden of proving by preponderance of the evidence that violations occurred”).

<sup>44</sup> Comcast Comments at 60.

“[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”<sup>45</sup>

The burden-shifting proposal advanced by programmers also is inconsistent with the First Amendment. As NCTA explains, “[i]nsofar as the rules regulate programming decisions and, in some cases, force cable operators and other MVPDs to carry programming against their own wishes and editorial discretion, [they] ... raise serious constitutional problems.”<sup>46</sup> In particular, because the allocation of the burden of proof distributes “the risk of error,” placing the burden on the defendant MVPD inevitably raises the risk that it would erroneously be found liable. In fact, the mere threat of liability likely would, as Comcast explains, “have a deep chilling effect on an MVPD’s exercise of its editorial discretion.”<sup>47</sup> The Constitution thus compels that the burden of proof remain with the program carriage complainants to avoid such “false positive” findings of liability.

Moreover, MASN has it exactly backwards in claiming that the burden must shift to defendants so that complainants will not have to “prove a negative.”<sup>48</sup> Program carriage complainants must prove a positive allegation—that a carriage decision resulted from unlawful discrimination (*i.e.* “on the basis of affiliation or nonaffiliation” of the vendor).<sup>49</sup> But if the burden of proof shifts to the defendant, the *MVPD* would be required to prove a negative—that it

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<sup>45</sup> 5 U.S.C. § 556(d); *see also* *Director, Office of Workers’ Comp. Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 281 (1994) (holding that agencies are prohibited from shifting the burden of proof to defendants under the APA); *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (explaining that the APA forbids the Commission from shifting the burden of persuasion); *Tennis Channel Initial Decision* ¶ 100 n.313 (citing *Shaffer, Greenwich Collieries*, and 5 U.S.C. § 556(d)).

<sup>46</sup> NCTA Comments at 26.

<sup>47</sup> Comcast Comments at 63.

<sup>48</sup> MASN Comments at 12-13 (internal citations and quotation marks omitted).

<sup>49</sup> 47 U.S.C. § 536(a)(3).

did *not* discriminate on the basis of affiliation or nonaffiliation. MASN’s reference to proving a negative accordingly supports rejection of its burden-shifting proposal, not its adoption. If anyone should bear such a burden, it should not be the party whose constitutionally protected speech rights hang in the balance.

Accordingly, to the extent a *prima facie* showing is accorded any significance in program carriage complaint proceedings, it should be limited to determining whether a dispute should be referred to a finder of fact. Such treatment is most appropriate in light of the fact that, at the *prima facie* stage of the case, no determination on the merits has been made and that the ultimate fact finder “may reach an opposite conclusion after conducting further proceedings and developing a more complete evidentiary record.”<sup>50</sup> But in no event should a complainant’s satisfaction of the *prima facie* pleading standard justify requiring the defendant to bear the burden of proof.

**2. *Burden-Shifting Schemes Applicable in Other Contexts Demonstrate That the Burden of Proof Should Remain with Program Carriage Complainants.***

MASN and other commenters argue that the burden-shifting standard used in the program access context compels adoption of the same approach in the program carriage cases.<sup>51</sup> That claim fails on several levels. Most fundamentally, contrary to MASN’s suggestion that the program access and program carriage rules are animated by the same concerns,<sup>52</sup> the rationales for, and First Amendment implications of, the two regimes are quite different. Congress adopted the program access requirements based on the concern that an MVPD might withhold critical

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<sup>50</sup> Second Report and Order ¶ 16. *See also Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222 ¶ 14 (2007) (citing 47 C.F.R. § 76.7(g)).

<sup>51</sup> *See, e.g.*, MASN Comments at 10-11; MAP/PK Comments at 15-16.

<sup>52</sup> *See* MASN Comments at 11.

programming that would prevent a competing distributor from offering a viable service to its customers.<sup>53</sup> In contrast, the focus of the program carriage rules—an MVPD’s refusal to carry an unaffiliated programmer’s content—has nothing to do with promoting competition among video distributors. Instead, the rules at issue here address the video *programming* marketplace.

These critical differences thus explain why First Amendment concerns in the program carriage context are far more significant. Where a programming vendor has chosen to distribute its content to MVPD customers, a requirement to distribute that content to a different MVPD’s customers presents far less of a concern than a governmental mandate that an MVPD carry programming that it has no interest in carrying *at all*. That harm is further exacerbated where such a carriage mandate displaces the MVPD’s preferred programming choice—a concern that cannot arise under the program access rules.

In addition, while the D.C. Circuit recently upheld the Commission’s determination that the emergence of strong competition among MVPDs does not eliminate the need for program access requirements (for example, because withholding must-have programming from a rival MVPD could undermine that competition),<sup>54</sup> such competition among distributors *does* undercut the justification for program carriage requirements. In fact, TWC believes that vigorous competition among MVPDs eliminates any governmental interest in precluding MVPDs from preferring programming based on affiliation or for any other reason. Moreover, if an MVPD in today’s competitive marketplace were to refuse to carry programming that its subscribers want to watch, it would diminish the value of its *own* service, not the services of competing MVPDs. As

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<sup>53</sup> See *Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 13 (2010), *aff’d in part and vacated in part sub nom. Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (“2010 Program Access Order”).

<sup>54</sup> See *Cablevision*, 649 F.3d at 712-713; *2010 Program Access Order* ¶ 25.

the D.C. Circuit acknowledged more than a decade ago (when MVPD competition was far less advanced than today), an MVPD's carriage decisions inevitably are driven by the fact that "[i]f an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch."<sup>55</sup> Competition thus compels MVPDs to make carriage decisions that are in the interest of their customers; but in any event, those decisions, as protected speech, should be left to MVPDs to make without governmental intrusion.

MASN again has it backwards when it asserts that "must-have" RSN programming is a "particularly attractive target[]" for discriminatory carriage denials.<sup>56</sup> By definition, the nature of "must-have" programming—*i.e.*, programming that is so popular with consumers that an MVPD *must have* access to it in order to offer a viable service<sup>57</sup>—confers asymmetrical bargaining leverage on the programming vendor (not the MVPD) and would make it irrational for an MVPD to refuse to carry such programming. To the extent there is any role for regulators in addressing must-have programming, it should be to ensure that MVPDs have access to it,<sup>58</sup> not to construct rules around the nonsensical premise that MVPDs will discriminate against vendors whose programming they "must have," and thereby lose customers to competing MVPDs that do carry that programming.

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<sup>55</sup> *Time Warner Entm't*, 240 F.3d at 1134.

<sup>56</sup> MASN Comments at 4.

<sup>57</sup> *See 2010 Program Access Order* ¶ 34 (noting that "'must-have' programming is necessary for viable competition in the video distribution market").

<sup>58</sup> Accordingly, TWC has urged the Commission in the program access context to modify its rules to focus on the "must-have" characteristics of major sports programming as a general matter, including that programming controlled by the Big Four broadcast networks, rather than singling out vertically integrated programming. *See Reply Comments of Time Warner Cable Inc.*, MB Docket No. 11-128, at 9-12 (filed Sept. 26, 2011).

By the same token, MASN seeks to analogize to “economic discrimination” cases where courts have approved burden-shifting, but it again ignores the critical attributes of this programming-related context. Merely labeling the program carriage decision making at issue as “economic discrimination” cannot mask the undeniable speech implications of the radical rule proposals it advances.<sup>59</sup> Because MASN’s proposed burden-shifting framework in this context would compel MVPDs to defend the reasonableness of their *speech*, MASN’s reliance on cases regarding the reasonableness of common carriers’ *non-expressive* conduct misses the mark.<sup>60</sup> In fact, the legislative history of Section 616 provides that “the term ‘discrimination’ is to be *distinguished* from how that term is used in connection with actions by common carriers subject to title II of the Communications Act.”<sup>61</sup>

Relatedly, programming vendors’ attempts to distinguish the framework applicable in employment discrimination cases also are unavailing. As explained above, the statutory text together with the First Amendment implications of shifting the burden of proof to defendants compel adoption of an approach that maintains the ultimate burden on the complainant *throughout* a program carriage proceeding. In the employment discrimination context, while the burden of production may shift to a defendant once a plaintiff provides sufficient evidence, the ultimate burden of persuasion to demonstrate *intentional* discrimination always remains with the plaintiff.<sup>62</sup>

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<sup>59</sup> MASN Comments at 12.

<sup>60</sup> *See id.*

<sup>61</sup> *House Report* at 110 (emphasis supplied); *see also id.* (directing instead that the Commission should draw from the “extensive body of law ... addressing discrimination in normal business practices”).

<sup>62</sup> *See, e.g., U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (“The factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. In other words, is the employer treating some people less favorably

MASN seeks to distinguish employment discrimination law, arguing that in such cases “there is typically no economic incentive to discriminate.”<sup>63</sup> But the same is true in the robustly competitive marketplace in which MVPDs operate. Particularly with respect to the “must-have” RSN programming MASN claims to distribute, it would be irrational for an MVPD to take action that would steer its customers to a competing distributor. Moreover, even assuming that barring discrimination on the basis of affiliation could pass constitutional muster in today’s competitive marketplace, shifting the burden of proof to defendants in program carriage proceedings would go too far. As noted above, proposals to shift the burden to defendants would lead to many more “false positives” in complaint proceedings—meaning that the Commission would override an MVPD’s editorial discretion in carriage decisions that have nothing to do with a programming vendor’s affiliation. While MASN simply ignores the critical impact of the emergence of MVPD competition since 1992, D.C. Circuit precedent makes clear that the Commission may not do the same.<sup>64</sup>

**3. *MASN’s Baseless Program Carriage Complaint Against TWC Illustrates the Dangers of Shifting the Burden of Proof to Defendant MVPDs.***

MASN’s multi-year pursuit of its meritless complaint against TWC provides a cautionary tale that illustrates the dangers of adopting an open-ended burden-shifting mechanism in program

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than others because of their race, color, religion, sex, or national origin.”) (internal citations and quotation marks omitted); *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 141 (2008) (“The ADEA forbids an employer to ... discriminate against any individual ... because of such individual’s age. ... [W]here, as here, a plaintiff claims age-related disparate treatment (*i.e.*, intentional discrimination because of ... age) the plaintiff must prove that age actually motivated the employer’s decision.”) (internal citations, emphasis, and quotation marks omitted); *Int’l Broth. Of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“Proof of discriminatory motive is critical[.]”).

<sup>63</sup> MASN Comments at 14 (explaining that “employers have a strong incentive to hire the most qualified applicant, regardless of race or gender”).

<sup>64</sup> *Time Warner Entm’t*, 240 F.3d at 1134 (faulting the Commission for ignoring “the true relevance of competition” in assessing cable operators’ market power).

carriage cases. As the Commission is aware, the AAA-appointed arbitrator adopted a burden-shifting approach in that case, leading it and the Media Bureau to “fail[] to afford sufficient deference to TWC’s editorial judgment and to disregard the “legitimate and non-discriminatory reasons for [TWC’s] decision to decline to carry MASN on an [expanded basic] tier in its North Carolina cable systems.”<sup>65</sup> While the Commission ultimately ruled in TWC’s favor, TWC was forced to defend itself in multiple rounds of time-consuming and costly litigation, even though MASN never produced a shred of evidence indicating that TWC denied it carriage in North Carolina on the basis of MASN’s non-affiliation.

Indeed, despite the Commission’s unequivocal recognition that TWC provided ample evidence of its nondiscriminatory business reasons for denying MASN carriage on a particular tier,<sup>66</sup> and despite Congress’s imposition of the burden of proof on MASN, MASN continues to argue in court that the Commission should override TWC’s editorial judgment without any consideration of the clear First Amendment implications of such action. MASN’s campaign to impose a burden-shifting mechanism is nothing more than an effort to displace the statutory framework and MVPDs’ First Amendment protections. While MASN understandably would prefer a regime in which regulators would overturn market-based carriage decisions and thereby enable MASN to extract inflated compensation for programming that may be of little interest to an MVPD’s viewers, neither the Constitution nor the statute permit that result.

Indeed, MASN’s burden-shifting proposal in particular highlights the constitutional infirmities of any burden-shifting mechanism where protected speech interests are at play. Under MASN’s proposed procedure, the Commission would review and evaluate the perceived

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<sup>65</sup> *MASN Order* ¶¶ 12, 10.

<sup>66</sup> *Id.* ¶ 11 (finding that TWC would prevail even under a burden-shifting framework “because it has established legitimate reasons for its carriage decision that are borne out by the record and are not based on the programmer’s affiliation or non-affiliation”).

merits of an MVPD's editorial decision making and override the MVPD's decisions if it found that the MVPD failed to provide sufficient nondiscriminatory support for them. Such an intrusive procedure would be unthinkable in any other context involving protected speech,<sup>67</sup> is contrary to the fundamental principles of the First Amendment, and thus should be flatly rejected here.

**D. The Commission Should Reject Programmers' Calls To Impose Additional Burdens That Would Further Skew the Commission's Rules in Their Favor.**

**1. *The Commission Should Not Impose Bargaining Obligations That Effectively Expand the Scope of MVPDs' Carriage Obligations or Trample on Their Editorial Discretion.***

As a number of commenters including TWC point out, Congress did not impose a general carriage requirement on MVPDs with respect to unaffiliated programming.<sup>68</sup> Rather, as the Commission has recognized, Section 616 prohibits MVPDs from refusing to carry independent programming only to the extent that the MVPD denies carriage on the basis of affiliation or non-affiliation (or based on another prohibited category).<sup>69</sup> Accordingly, TWC agrees that “[i]f an MVPD has no interest in carrying [unaffiliated] networks for any other reason, it should not have to negotiate with them *at all*.”<sup>70</sup>

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<sup>67</sup> See Comcast Comments at 18-20.

<sup>68</sup> See, e.g., TWC Comments at 12-13; Cablevision Comments at 11; NCTA Comments at 6; Comcast Comments at 71.

<sup>69</sup> See *MASN Order* ¶ 12 (“The plain language of Section 616(a)(3) permits a finding of program carriage discrimination only in cases where such discrimination is carried out on the basis of an unaffiliated programming vendor’s affiliation or nonaffiliation.”) (internal quotation marks omitted).

<sup>70</sup> NCTA Comments at 6 (emphasis in original). Relatedly, TWC agrees that “[r]equiring parties to submit ‘final offers’ for carriage would be illogical in cases where a defendant does not wish to carry the complainant’s programming” in the first instance. DirecTV Comments at ii.

The NPRM’s proposal to compel MVPDs to negotiate in good faith ignores this bedrock aspect of the statutory scheme. As an initial matter, requirements to negotiate in good faith typically reflect an underlying duty to reach agreement.<sup>71</sup> If the Commission were to deem any refusal by an MVPD to agree to carriage a “good faith” violation, it would be imposing precisely the sort of compelled carriage requirement that Congress chose *not* to impose in this context.<sup>72</sup> Moreover, as explained above and in TWC’s opening comments, compulsory carriage of programming on the theory that it would result in improved speech cannot pass muster under the First Amendment.<sup>73</sup>

Such a rule would serve only to create new opportunities for programming vendors to manufacture alleged violations of the rules in an effort to secure carriage. For example, as NCTA explains, programming vendors would have new incentives “to select content and formats that match those of networks that are owned by cable operators” in an effort to guarantee carriage for themselves.<sup>74</sup> In addition, programmer complainants would attempt to “construe interactions with an MVPD to be in bad faith, even though it may have never been the MVPD’s intention to enter into negotiations in the first place or the MVPD may merely have decided that it did not want to carry a given network for valid business reasons.”<sup>75</sup> Under either scenario, the

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<sup>71</sup> See, e.g., 47 U.S.C. § 251(c)(1) (imposing a duty for incumbent LECs to negotiate in good faith to effectuate the substantive market-opening obligations they bear under Sections 251(a), (b), and (c)).

<sup>72</sup> See Comcast Comments at 71 (“Where there is no presumption or obligation to carry, a good-faith negotiation requirement would have the effect of chilling an MVPD’s ability to decide that it simply does not want to carry a given programmer for legitimate reasons.”).

<sup>73</sup> See *supra* Section I; TWC Comments at 4.

<sup>74</sup> NCTA Comments at 24; see also Cablevision Comments at 9 (describing allegations made by Game Show Network in its program carriage complaint against Cablevision).

<sup>75</sup> Comcast Comments at 71.

proposed rule would implicate an MVPD's editorial discretion, as it would raise the possibility that an MVPD would be required to defend its carriage decisions in costly regulatory litigation.

MASN's wish list of bargaining obligations only underscores these concerns. MASN's complaint that an MVPD may engage in an "outright refusal to engage in any back-and-forth with an unaffiliated programming vendor" ignores an MVPD's constitutionally protected right to decline carriage as well as its statutory right to deny carriage for any of the multitude of reasons that are not proscribed by Section 616.<sup>76</sup> Likewise, MASN's further suggestion that an MVPD should be found in violation of the Commission's rules if it seeks to condition carriage on the programmer's acceptance of a particular tier cannot remotely be justified from a statutory or constitutional perspective.<sup>77</sup> And even apart from the obvious legal defects, there is no sound policy basis for assuring carriage on an expanded basic tier for programming vendors such as MASN given that MVPDs are not obligated to carry such programming in the first instance. To the contrary, giving MASN a regulatory leg-up in its efforts to secure such carriage in all instances would inappropriately force a large number of MVPD subscribers, most of whom have no interest in MASN's programming, to subsidize the high cost of carriage for the benefit of the few who do wish to view it.

Moreover, MASN's suggestion that the Commission "draw from ... [i]ts retransmission consent rules" to impose a good faith negotiation requirement ignores the critical differences between broadcast and non-broadcast carriage negotiations.<sup>78</sup> Carriage negotiations in the broadcast context take place against the backdrop of an artificial regulatory regime created by Congress and the Commission, which is intended to promote the public interest in continuous,

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<sup>76</sup> MASN Comments at 17.

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* at 16.

uninterrupted access to broadcast programming.<sup>79</sup> In light of broadcasters’ public interest obligations and the significant advantages bestowed on broadcasters under that regulatory regime—including the grant of immensely valuable spectrum rights at no charge, the right to demand compulsory carriage, and network non-duplication and syndicated exclusivity rights, among others<sup>80</sup>—Congress required broadcasters (and MVPDs) to negotiate in good faith.<sup>81</sup>

Critically, Congress chose *not* to impose comparable good faith requirements in the context of *non*-broadcast carriage. That choice reflects the absence of public interest obligations on the part of cable programmers and the absence of any compulsory carriage obligation on the part of MVPDs. As a result, unlike in the broadcast context, MVPDs and cable programming vendors negotiate and enter into licensing agreements in an *actual* marketplace based on the perceived merits of the programming. Imposing a duty to negotiate in good faith thus would only “distort the current marketplace-driven negotiati[on] [process] between MVPDs and programmers.”<sup>82</sup>

**2. *The Commission Should Reject Proposals To Establish More Expansive Discovery Rights.***

Finally, TWC urges the Commission to reject the expanded discovery procedures proposed in the NPRM and supported by some programming providers. As TWC explained in its opening comments, the Commission should be looking for ways to reduce governmental

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<sup>79</sup> See Cablevision Comments at 11 (“The retransmission consent rules govern carriage of must-have broadcast programming, where the expectation of all parties, the Commission and consumers is that the MVPD will carry the broadcast programming assuming it can reach an agreement to do so.”). See also Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 5-7 (filed May 27, 2011) (explaining that the existing retransmission consent regime is an artificial regulatory construct, not a market).

<sup>80</sup> See, e.g., 47 U.S.C. § 534; 47 C.F.R. §§ 76.56, 76.92, 76.101.

<sup>81</sup> 47 U.S.C. § 325(b)(3)(C)(ii).

<sup>82</sup> Comcast Comments at 73.

intrusion into MVPDs' carriage decisions and the associated burdens, not to expand them. TWC thus agrees with commenters, including one independent programming vendor,<sup>83</sup> that a party-controlled discovery process "would be fundamentally incompatible with [the] expeditious resolution of complaints and would impose undue burdens on defendants."<sup>84</sup> Likewise, TWC agrees that the NPRM's automatic document production proposal is "overly broad," "would add complexity, create more discovery disputes, and delay resolution of complaints," and "would create an incentive for networks to file complaints for the purpose of conducting fishing expeditions to obtain access to documents containing trade secrets and other commercially valuable information."<sup>85</sup> Indeed, in light of the Second Report and Order's complainant-friendly *prima facie* pleading standard,<sup>86</sup> not to mention some of the NPRM's proposals that would further relax a complainant's *prima facie* burden,<sup>87</sup> automatic document production essentially would promote the filing of unsupported, vague complaints.

Although MASN now seeks to blame the Commission's rejection of its meritless complaint against TWC on the lack of party-to-party discovery, it concedes that the Media Bureau has ample "powers to order discovery,"<sup>88</sup> including the authority to order "answers to written interrogatories, depositions or document production."<sup>89</sup> And, in MASN's litigation against TWC, there was indeed extensive discovery. MASN fails utterly to explain why *even*

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<sup>83</sup> See Bloomberg Comments at 21 (opposing adoption of party-led discovery in program carriage proceedings because such a "process has the potential to further delay resolution of carriage complaints").

<sup>84</sup> DirecTV Comments at 2; *see also, e.g.*, Cablevision Comments at 20-21.

<sup>85</sup> Comcast Comments at 33-34.

<sup>86</sup> See Second Report and Order ¶ 14.

<sup>87</sup> See, e.g., NPRM ¶ 66.

<sup>88</sup> MASN Comments at 29.

<sup>89</sup> 47 C.F.R. § 76.7(f).

*more* discovery is required in service of baseless allegations that are designed solely to confer additional bargaining leverage on an already-powerful RSN.

### CONCLUSION

Far from providing support for the NPRM's rule proposals, the opening comments confirm that any further expansion of the Commission's program carriage regime would impermissibly and unjustifiably infringe even further on MVPD's protected speech, while only emboldening programming vendors to file even more meritless complaints. TWC therefore urges the Commission to eliminate unnecessary restrictions on MVPDs' editorial discretion and reject calls to expand program carriage obligations.

Respectfully submitted,

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