

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Revision of the Commission's Program Carriage Rules)	MB Docket No. 11-131
)	
Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage)	MB Docket No. 07-42
)	

REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, LLC

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Discovery Communications, LLC (“Discovery”) hereby submits these reply comments in response to the Notice of Proposed Rulemaking released on August 1, 2011 by the Federal Communications Commission (“FCC” or “Commission”) regarding the Commission’s proposed revisions to its program carriage rules.^{1/} As commenting parties explain, adoption of the Commission’s proposals would create a preferred class of programmers that hold significant bargaining advantages over all other programmers when negotiating for carriage with multichannel video programming distributors (“MVPDs”). The record does not support interfering with private carriage negotiations in this manner. The Commission’s existing program carriage rules adequately address any imbalances in the program carriage marketplace.

INTRODUCTION AND SUMMARY

The initial comments reveal that adoption of the Commission’s proposals would cause a significant disruption in the programming industry without any record evidence justifying the

^{1/} *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) (“Second R&O” and “NPRM,” respectively).*

need for such upheaval. Interpreting Section 616 to consider an MVPD and a programmer “affiliated” if the programmer is affiliated with *any* MVPD constitutes a tortured reading of the statute; would unfairly effectively strip programmers currently protected by the rules of the ability to file program carriage complaints; and would skew the program carriage market in favor of the select group of programmers who are not considered affiliated for purposes of Section 616.

By expanding the definition of when MVPDs and programmers are “affiliated,” the rules would grant certain programmers – those not deemed affiliated with an MVPD – an undue preferred status. They would have an extremely large group of programmers to which they can assert similarity and whose terms of carriage they can scrutinize for any difference in treatment with those they have been offered. Making it easier for a select group of favored programmers to file program carriage complaints will give those programmers negotiating advantages that other programmers do not enjoy. Indeed, MVPD commenters candidly admit that their concerns about the low threshold for program carriage complaints will drive them to accede to requests for carriage from those favored programmers, on those programmers’ preferred terms and conditions, to minimize the risks associated with denying them, regardless of the quality of their programming or the value they offer to consumers. Consumers will bear the brunt of these negative impacts in the form of increasing costs and declining quality of cable service when more deserving programmers are disfavored.

The Commission’s proposal to expand discovery associated with program carriage complaints would similarly impose unfair burdens on disfavored programmers. While the majority of commenters agree that the Commission’s discovery proposals should be rejected as overbroad and over-burdensome, these proposals would further disadvantage non-favored

programmers by forcing them to participate in discovery for proceedings in which they are only marginally (or not at all) involved.

The record is devoid of evidence supporting any need for the Commission to interfere so extensively in the programming marketplace. While there are certain limited circumstances where government intervention is required, the factual basis for such a step is notably absent here, and the Commission's proposed changes appear to be based on hypothetical scenarios not demonstrated to have ever occurred by the Commission or the proponents of the Commission's proposed changes.

Moreover, as initial comments filed in this proceeding show, the proposed amendments to the program carriage rules stray far from the original intent and scope of the program carriage law. With no authority to adopt the proposed changes and no reason to believe they are necessary, the Commission should refrain from adopting them.

I. THE RECORD CONFIRMS THAT THERE IS NO NEED TO EXPAND THE PROGRAM CARRIAGE RULES AND DOING SO WOULD UNFAIRLY INTERFERE WITH COMPETITION AMONG PROGRAMMERS

As the comments demonstrate, the Commission's proposal to revise the program carriage rules would create an incentive for favored programmers to bring (or credibly threaten to bring) program carriage complaints against MVPDs rather than negotiate fair marketplace terms and conditions of carriage.^{2/} Such an approach would specifically contradict the Commission's

^{2/} See, e.g., Cox Communications, Inc. Comments at 3-4 ("Rather than creating a fairer cable programming market, these changes would bring further distortion to an already challenging programming market and encourage programmers to seek carriage through the Commission rather than through good-faith negotiation with cable operators."); Comcast Corporation Comments at 1 ("The Commission should be wary of adopting additional unnecessary regulations because they will increase the likelihood of illegitimate litigation, inevitably distort marketplace negotiations, massively increase costs and burdens, and interfere with the editorial discretion of MVPDs."); Charter Communications Comments at i ("Every one of Charter's routine discussions with independent programmers could trigger [the program carriage complaint] process, and distort the market in favor of litigious channels not otherwise desired by consumers.").

stated intent to implement the program carriage regime in a manner that prohibits the particular activities specified by Congress “without unduly interfering with legitimate negotiating practices between [MVPDs] and programming vendors.”^{3/} But it would also create serious repercussions for those programmers that are not in the newly-created “favored” class. Such intrusion into the program carriage marketplace is unwarranted and should be rejected.

A. The Commission’s Proposal Unfairly Disadvantages Disfavored Programmers In Negotiations With MVPDs.

The comments confirm that the proposal to expand the concept of when MVPDs and programmers are considered affiliated would create substantial bargaining disparity among programmers. Unsurprisingly, unaffiliated programmers generally support the proposal to allow them to assert the right to be treated in the terms and conditions of carriage just like nearly any other programmer of their choice, if that programmer is affiliated with the MVPD with whom the unaffiliated programmer is negotiating or with any another MVPD.^{4/} Adopting this proposal, however, would warp the program carriage marketplace, by essentially eliminating the bar that has served to ensure that only legitimate complaints move forward.

A programmer claiming discrimination has traditionally had to show evidence of discrimination by an MVPD by establishing that its programming is “similarly situated” to the programming of a programmer affiliated with the specific MVPD against which the complaint has been filed. This reflects the concern that MVPDs may have an incentive to favor their own programming services and so create an unfair playing field among programmers. Under the

^{3/} *NPRM* ¶ 6 (quoting *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 and Order, 9 FCC Rcd 2642, ¶ 1 (1993)).

^{4/} See Bloomberg L.P. Comments at 17-19; Crown Media Holdings Comments at 8; Current TV LLC; Game Show Network, LLC; NFL Enterprises LLC; and The Tennis Channel, Inc. Comments at 12-13; HDNet Entertainment LLC Comments at 12-15.

proposed rules, however, the same programmer would merely have to show that its programming is “similarly situated” to any programmer affiliated with *any* MVPD. As a result, a favored programmer wanting to create a claim against an MVPD would be able to do so easily, regardless of the merits of such suit, because given the Commission’s already expansive view of which services are “affiliated,” the potential pool of “similar” services would be extremely large.

MVPD commenters agree that this drastically lowered standard for filing program carriage complaints would create a threat to MVPDs of a program carriage complaint that would be so great that they would be severely pressured to grant the programmer the carriage rates, terms and conditions it seeks.^{5/} MVPDs believe they would have to accede to such requests even when they are above-market and regardless of whether the programming adds value to the line-up or is the programming most of interest to or requested by the MVPD’s subscribers.^{6/} As a result, such favored programmers would unfairly enjoy substantial benefits over all other programmers, distorting the program carriage marketplace.

The supposed underpinning of the proposal is that MVPDs may have an incentive to collude and each agree to favor the other’s programming services, but the *NPRM* offered no evidence supporting this theory, nor do any of the initial comments provide any such evidence.

^{5/} See, e.g., Charter Communications Comments at 6-7 (“A disgruntled program vendor would have significant opportunity to create unfair leverage against Charter by threatening or filing a complaint, because concern over discovery and other costs of litigation often causes parties to settle cases that otherwise would not settle on the merits. In this context, the Commission’s suggested rule change would impose extraneous regulatory pressure to carry channels that are otherwise not attractive in the market.”); Cox Communications, Inc. Comments at 5 (“[C]reating such a sweeping rule, based merely on an unproven and, in fact, false assumption about Cox’s behavior, would unfairly make Cox the target of meritless but costly litigation and of ‘negotiation’ through threats of such litigation.”).

^{6/} See, e.g., Comcast Corporation Comments at 34 (“The end result would be that, in practically every carriage dispute, MVPDs will be put in the untenable position of either (1) having to defend against a complaint and potentially being required to hand over their programming contracts – what have long been considered (and acknowledged by the Commission) as the “crown jewels” of the business – or (2) having to forego some part of their editorial discretion by acceding to programmers’ demands to avoid this outcome.”).

Absent evidence that MVPDs are actually favoring programming associated with other MVPDs due to the affiliation status of such programmers – and not based on the quality or other aspects of the programming – the Commission’s proposals simply cannot be sustained.^{7/} While a few commenters claim that the market-based negative reaction to unaffiliated programming in certain instances is due to a conspiracy among MVPDs to favor not only the MVPDs’ own programming but any other MVPD’s programming as well, they have offered only speculation, blanket statements, and outdated research for this far-fetched theory.^{8/} The FCC cannot regulate to protect against problems that have not even been shown to exist.^{9/}

^{7/} See, e.g., Comcast Corporation Comments at 55 (“The *Notice*’s proposal to allow programming networks to file complaints against MVPDs that are in no way affiliated with a similarly situated programming network is wholly without merit, outside of the Commission’s statutory authority, and ignores the fact that the marketplace is highly competitive.”); Cox Communications, Inc. Comments at 4 (“The Commission acknowledges, however, that both 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 this type of [collusive] behavior.”); DIRECTV, Inc. Comments at 3-6 (discussing that the Commission’s proposal must be rejected because the Commission has consistently required affiliation with the defendant MVPD and has never found evidence of collusion); National Cable & Telecommunications Association Comments at 8 (“But even the Commission concedes that there has been no evidence of such ‘I’ll favor yours if you’ll favor mine’ agreements – either tacit or explicit”).

^{8/} See Bloomberg L.P. Comments at 19 (stating that “[c]able operators are inclined to favor each other’s programming at the expense of independent programming” and citing as support an outdated study discussed in documents filed in a different proceeding); Current TV LLC; Game Show Network, LLC; NFL Enterprises LLC; and The Tennis Channel, Inc. Comments at 12 (stating only that they believe the practice is “common” and citing as support an abstract to a 2005 study); Crown Media Holdings, Inc. Comments at 8-9 (stating that “[t]he proposed broader interpretation would address a potential incentive for discriminatory conduct on the part of MVPDs” and citing as support statements Crown Media itself made in 2007); HDNet Entertainment LLC Comments at 13 (stating simply that “[t]he FCC should recognize the incentive for MVPDs to favor not only their own content, but also the content of other major players” because it believes that MVPDs have denied it carriage due to being forced “by big content providers to carry multiple affiliated channels that may be of less value in order to get must-have programming on reasonable terms”).

^{9/} As noted by commenters and in the *NPRM*, where the Commission previously has based rules on a premise of collusion that has not been shown to exist, its attempt has failed. Specifically, in striking down the Commission’s horizontal cable ownership cap, the D.C. Circuit found that the Commission failed “to provide support for the concept that cable operators ‘have incentives to agree to buy their programming from one another.’” See, e.g., *NPRM* ¶ 74 (quoting *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, 14 FCC Rcd 19098, ¶ 43 (1999), *rev’d and remanded in part and aff’d in part*, *Time Warner Entertainment Co. v.*

As commenters observe, even supposing the existence of collusion among MVPDs with respect to affiliated programmers were to exist, such collusion would only occur when the MVPDs were similar in market power or where each MVPD has something of equivalent value to offer the other.^{10/} If this was the case, adopting the Commission’s proposals would particularly harm programmers affiliated with MVPDs that are unable to exert such force or coercive power in the marketplace, due to size or geographic limitations.

Moreover, requests that the Commission prohibit not only discrimination based on affiliation or non-affiliation,” but also prohibit programming networks from offering bundled programming^{11/} are not only outside the scope of this proceeding and beyond the Commission’s authority, but would deprive consumers of the well-documented benefits that flow from programming vendors’ packaging programming networks together.^{12/}

While there are certain limited circumstances where government intervention is required – for example, in the event of market failure or in the event government-created preferences need to be counterbalanced or removed – this is not one of those limited instances. The Commission’s

FCC, 240 F.3d 1126, 1132 (D.C. Cir. 2001)); *DIRECTV, Inc.* Comments at 3-10; *Time Warner Cable Inc.* Comments at 8-9.

^{10/} See, e.g., *Cox Communications, Inc.* Comments at 6-7 (discussing the limited bargaining power of small MVPDs in comparison to large MVPDs and programming networks).

^{11/} *HDNet Entertainment LLC* Comments at 12-13.

^{12/} As programmers have demonstrated in the context of other proceedings, bundling programming reduces costs while promoting innovation and programming variety in the marketplace. See, e.g., *Reply Comments of Discovery Communications, LLC*, MB Docket Nos. 07-29, 07-198, at 11-16 (filed Feb. 12, 2008); *Reply Comments of A&E Television Networks*, at iii (filed Feb. 12, 2008) (“AETN’s ability to sell networks in bundles – which is a common tool used in many different markets to lower transaction costs, benefit from scale and scope economies, and enhance the attractiveness or convenience of products – is vital to its ability to obtain carriage by programming distributors. Doing so permits the use of innovation and the promise of diversity as bargaining tools, in an effort to offset advantages others have of obtaining carriage by regulatory fiat”); *Comments of Viacom Inc.*, MB Docket No. 07-198, at 17 (filed Jan. 4, 2008) (noting that “bundling generally promotes consumer welfare and increases efficiency by lowering the prices of goods and services,” quoting *Wholesale Packaging of Video Programming*, Bruce M. Owen (Jan. 4, 2008), attached to its comments).

proposed changes simply go too far in interfering with legitimate program carriage negotiations between programmers and MVPDs.^{13/}

B. The Commission’s Proposal Unfairly Subjects Disfavored Programmers To Extensive And Intrusive Discovery Requests.

In addition to facing an uphill battle in terms of obtaining fair and reasonable terms of carriage, programmers labeled as “affiliated” will face other disadvantages. For example, while most commenters agree that the Commission’s extensive discovery proposals would be extremely burdensome for any party directly involved in a dispute,^{14/} their adoption would unfairly impact programmers considered “affiliated” that are not involved in the dispute. To bring and defend against a claim that an “affiliated” programmer was similarly situated to an unaffiliated programmer, both the complainant and the defendant MVPD would request extensive discovery from the “affiliated” programmer that had been designated as “similarly situated” by the unaffiliated programmer. Such discovery requests would potentially include onerous automatic document production requirements and extensive involvement in program

^{13/} See, e.g., MSG Holdings, L.P. and Music Choice Comments at 10 (The proposed “heavy-handed regulation would force MVPDs to make carriage decisions based on factors other than the merits or quality of the programming being offered – an effect directly contrary to the public interest.”); National Cable & Telecommunications Association Comments at 24 (“Such preferential treatment [for unaffiliated programmers] is unfair to other networks. And it distorts the marketplace by artificially encouraging programmers to select content and formats that match those of networks that are owned by cable operators. There is no reason to further promote this preferential treatment by requiring MVPDs to negotiate with similarly situated networks that they do not believe will add value for consumers.”).

^{14/} See, e.g., Bloomberg L.P. Comments at 20-22 (“Allowing parties to control discovery would lead to overbroad requests, and disputes over relevance and scope.”); Crown Media Holdings, Inc. Comments at 11 (“Crown Media shares the Commission’s concern that expanded discovery procedures may trigger ‘overbroad discovery requests and extended disputes pertaining to relevance.’”); Comcast Corporation Comments at 35 (“Automatic document production not only would not be narrowly tailored, but also would impose significant, and potentially unnecessary, costs and burdens on the parties.”); National Cable & Telecommunications Association Comments at 11 (“It seems self-evident that such an expansion of discovery would likely result – and be intended by its proponents to result – in the production of additional documents that are neither necessary nor relevant, adding to the burdens of discovery and unjustifiably and unfairly disclosing sensitive competitive information.”); DIRECTV, Inc. Comments at 14-17 (discussing the administratively burdensome nature of the Commission’s discovery proposals).

carriage dispute proceedings.^{15/} Not only will participation in such discovery impose significant administrative burdens on affiliated programmers relating to disputes in which they are only marginally (or not at all) involved, but programmers and MPVDs both recognize that such participation could also result in the disclosure of competitively sensitive and proprietary information to competitors.^{16/} In fact, the Commission's proposed rule changes so drastically lower the bar to filing program carriage complaints as to encourage unaffiliated programmers to use such proceedings as fishing expeditions to obtain competitively sensitive information about competing programmers.^{17/} Indeed, the comments show that this is a real concern by indicating that unaffiliated programmers may already believe that they are entitled to access competitively sensitive information relating to the "universe" of "affiliated" programmers.^{18/}

^{15/} *NPRM ¶¶ 41-47; see also* DIRECTV, Inc. Comments at 17-18 ("All of these issues would, of course, be compounded were the Commission to expand the basis for a discrimination claim to include alleged bias in favor of a programmer affiliated with any MVPD. Under such a regime, an MVPD such as DIRECTV, which competes in all markets and therefore with all MVPDs, would be faced with the task of procuring highly confidential documents from a programmer affiliated with (or even controlled by) one of its MVPD rivals. In such a case, the link between the programmer and the proceeding would be so attenuated as to be virtually non-existent.").

^{16/} *See, e.g.,* Current TV LLC; Game Show Network, LLC; NFL Enterprises LLC; and The Tennis Channel, Inc. Comments at 26 (noting that the parties subject to discovery requirements in a program carriage dispute may have to submit confidential data to parties that may be competing against one another for "advertising, programming content, and distribution arrangements"); Comcast Corporation Comments at 30-31 (stating that the Commission's proposals "would unnecessarily expose highly-confidential contracts with third parties to improper disclosure"); DIRECTV, Inc. Comments at 18 ("As the Commission acknowledges, even documents within the defendant's control that are potentially relevant to a discrimination claim may also be subject to confidentiality restrictions . . . As programmers have made clear in a number of proceedings, moreover, such agreements are highly confidential and proprietary, and these 'crown jewels' are not to be disclosed absent demonstrated need and the most stringent protections.").

^{17/} *See, e.g.,* Comcast Corporation Comments at 33-34 (discussing that the discovery proposals 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").

^{18/} HDNet Entertainment LLC Comments at 5 (complaining that unaffiliated programmers are at an unfair "informational disadvantage" in program carriage negotiations due to non-disclosure clauses in connection with carriage negotiations and agreements, "which make it hard for independent programmers

The existing discovery rules already provide much-needed protection to affiliated programmer information while providing the Media Bureau with the discretion to tailor the discovery process to the individual circumstances of each case, and therefore should not be changed.^{19/} Parties arguing that adoption of the Commission’s discovery proposals would simplify and hasten the resolution of program carriage disputes grossly underestimate the burdens associated with complying with such proposals.^{20/} Suggestions to expand the Commission’s already too sweeping discovery proposal beyond the framework set forth in the NPRM likewise should be summarily rejected.^{21/}

C. The Commission’s Proposal Unfairly Revokes Programmers’ Ability To Bring Program Carriage Complaints.

Adoption of the Commission’s proposals would mean that many programmers will lose the right to file their own program carriage complaints. The Commission’s rule implementing the anti-discrimination provision states that no MVPD “shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to

to learn and compare what terms and conditions are available in the current universe of carriage contracts”).

^{19/} See, e.g., Comcast Corporation Comments at 34-35 (“Each program carriage dispute will have unique facts and issues, and the parties (and Media Bureau or ALJ . . .) will best understand what discovery will be necessary to illuminate the particular issues involved.”).

^{20/} See, e.g., Media Access Project and Public Knowledge Comments at 18 (“[The Commission’s proposed discovery requirements are] sensible and in no way would lead to overbroad requests or extended disputes – on the contrary, [they] would further hasten resolution, potentially by narrowing the scope of any additional discovery.”).

^{21/} See TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network Comments at 30 (proposing that “the Commission should clarify that a defendant MVPD must produce all documents reflecting the application to its similarly situated affiliated programming of the criteria on which the MVPD purportedly relied in denying carriage to the complainant programming vendor”); HDNet Entertainment LLC Comments at 8 (urging the Commission to adopt its extensive discovery proposals and require automatic production of any documents relating to “direct or indirect ownership interests and control, including past interests as well as present and future contingent interests (such as grants, warrants, or options to purchase) by the MVPD or its executives in other programmers producing competing programming, as well as documents that relate to any contractual relationships with such programmers”).

compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors . . .”^{22/} Under the existing rule, a programmer affiliated with one MVPD could avail itself of the protection of the rule with respect to negotiations with another MVPD, given that such programmer would qualify as an “unaffiliated video programmer” with respect to such other MVPD. If, however, the Commission adopts its proposal to define affiliation as any MVPD affiliation generally, a programmer affiliated with an MVPD would be categorically deemed an “affiliated” programming vendor for all purposes and therefore would never qualify as an “unaffiliated video programming vendor” for purposes of the rule. Stripping such networks of a remedy in the event they are subject to unfair treatment by an MVPD is unwarranted and, as further discussed below, contrary to the legislative intent of the statute to protect all programming vendors against unfair treatment by MVPDs with which they are not specifically affiliated.

II. THE COMMISSION HAS NO AUTHORITY TO EXPAND THE PROGRAM CARRIAGE RULES AS PROPOSED

While some commenters argue that Congress bestowed the Commission with unbounded authority to regulate the program carriage marketplace,^{23/} the Commission’s authority to govern program carriage is limited to establishing rules that address the specific behaviors Congress identified as a concern when it enacted the program carriage law. The *NPRM*’s proposals far exceed any action necessary to achieve that purpose. Congress was concerned that MVPDs would favor their own affiliated programming over other programming networks, leaving consumers, who at the time relied on cable service for access to programming networks, the

^{22/} 47 C.F.R. § 76.1301(c).

^{23/} See, e.g., Media Access Project and Public Knowledge Comments at 5 (stating that Section 616 “gives the Commission broad power to create prophylactic rules and adjust its adjudication as may be necessary to address the reality of MVPDs’ market power against independent programmers”).

ability to receive essentially only one viewpoint.^{24/} To address this precise harm, Congress gave the Commission very specific tools to prevent MVPDs from unfairly favoring their own programming over similar programming offered by unaffiliated programmers.^{25/}

A few commenters' efforts to interpret Section 616's anti-discrimination provision as requiring a comparison of how an MVPD treats a programming service with which it is not affiliated with how it treats similarly situated programming services associated with itself or *any other MVPD* flies in the face of the intended scope of the law.^{26/} Congress intended Section 616 to prevent MVPDs from favoring for anticompetitive reasons programmers directly affiliated with them,^{27/} not as a general grant of authority for the Commission to address hypothetical concerns that might arise in the future about any aspect of other MVPD-programmer agreements.

In fact, Congress did not identify favoritism by MVPDs of other MVPDs' affiliated programmers as a problem because Congress was concerned that MVPDs would *discriminate against*, not favor, programmers affiliated with other MVPDs. In particular, the legislative history shows that Congress was concerned by allegations that MVPDs were "denying system access to programmers affiliated with rival MSOs and discriminating against rival programming

^{24/} S. Rep. No. 102-92 (1991), at 25 (raising the concern that cable operators have "the incentive and ability to favor their affiliated programming services"); H.R. Rep. No. 102-628 (1992), at 41 (noting that "some cable operators favor programming services in which they have an interest."). See *NPRM* ¶ 4 (noting that "Congress "concluded that this harm to programming vendors could adversely affect both competition and diversity in the video programming market.").

^{25/} See 47 U.S.C. § 536(a)(1)-(a)(3) (prohibiting MVPDs from engaging in three specific types of conduct to prevent MVPDs from favoring programmers affiliated with them over all others).

^{26/} See, e.g., Bloomberg L.P. Comments at 18-19; Media Access Project and Public Knowledge Comments at 11-12.

^{27/} See, e.g., H.R. Rep. No. 102-628 (1992), at 41 (noting testimony that cable operators "have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services."); S. Rep. No. 102-92 (1991), at 25-26; *NPRM* ¶¶ 72-78; Charter Communications Comments at 7-9; National Cable & Telecommunications Association Comments at 9-10.

services with regard to price, channel positioning, and promotion.”^{28/} Consequently, the term “affiliated” as used in the anti-discrimination provision cannot reasonably be interpreted to dictate an MVPD’s actions vis-à-vis a programmer that is affiliated with another MVPD and any such interpretation is beyond the scope of the Commission’s authority.^{29/} Interpreting the anti-discrimination provision to prohibit bundling arrangements is likewise beyond the scope of the Commission’s authority; bundling is wholly unrelated to Congress’ specific concerns regarding the relationships between cable operators and programming vendors that provided the rationale for the program carriage regime.^{30/}

Further, interpreting the program carriage statute in the manner proposed effectively would remove any programmer deemed affiliated with an MVPD from the protection of the statute, thus drastically narrowing the universe of programmers Congress *did* intend to protect. As noted above, a programmer that is considered “affiliated” with an MVPD and is subject to discrimination by another MVPD would be left wholly without recourse under the Commission’s proposal. Given that Congress was specifically worried about MVPDs discriminating against programmers affiliated with other MVPDs, reading such protections out of the statute is contrary

^{28/} See, e.g., H.R. Rep. No. 102-628 (1992), at 41.

^{29/} See, e.g., *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 484 (2009) (“[A] statutory interpretation that does not effectuate Congress’ intent must fall.”); *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984) (finding that if it can be “ascertain[ed] that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”). Even if the Commission believes that MVPDs favor programming services considered “affiliated” with other MVPDs, that fact, even if true, would not authorize the interpretation of Section 616 that the Commission proposes. The Commission cannot reinterpret Section 616 to address a problem that Congress never identified as requiring government redress. See, e.g., *Am. Library Ass’n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005) (finding that the FCC cannot “overreach[] for regulatory authority that Congress has never granted”).

^{30/} See Reply Comments of Discovery Communications, LLC, MB Docket Nos. 07-29, 07-198, at 3-7 (filed Feb. 12, 2008) (prohibiting programming vendors from bundling their offerings is beyond the Commission’s statutory authority and inconsistent with Commission precedent); Comments of Viacom Inc., MC Docket No. 07-198, at 26-27 (filed Jan. 4, 2008) (“all Section 628 addresses is access to programming. Congress did not give the Commission carte blanche to regulate the way programming is sold”).

to Congressional intent and therefore wholly unsupportable.^{31/}

While there is simply no basis for *shrinking* the population of *programmers* protected by the program carriage rules, many commenters agree that the Commission also has no authority to grossly *expand* the definitions of “affiliated” and “attributable interest” for program carriage purposes to include relationships never before included in those terms.^{32/} Congress did not provide any indication that the Commission should assess contractual relationships and investments in sports teams and other sources of content in determining affiliation.^{33/} Moreover, such an interpretation would mean that the boundaries of entities “affiliated” with an MVPD would border on limitless. MVPDs have a multitude of business relationships throughout the media world – with programmers, sources of content, and many others – but there is no evidence whatsoever that these business relationships relate in discriminatory carriage decisions. Reading

^{31/} See, e.g., *Chevron*, 467 U.S. at 843 (finding that “administrative constructions which are contrary to clear congressional intent” must be rejected).

^{32/} See, e.g., Charter Communications Comments at 2 (“[T]he proposed inclusion of mere contractual relationships for the carriage of multiple channels would distort the market by giving program vendors new leverage in negotiations that are now driven by Charter’s independent evaluation of customer value.”); Comcast Communications Comments at 57-59 (“The Notice’s proposal to potentially include other upstream relationships in the definition of ‘affiliated’ (including production studios and sports teams that an MVPD may not even have an interest in) is even more unfounded and nonsensical, and well beyond the Commission’s authority. The statute cannot be read to further expand regulation to hundreds of other MVPDs whether or not the programming is affiliated with an MVPD defendant.”); DIRECTV, Inc. Comments at 21-22 (“In particular, expanding ‘affiliation’ to include (as suggested in the *Notice*) contractual relationships would be unreasonable and contrary to the statute’s intent.”); MSG Holdings, L.P. and Music Choice Comments at 10 (“[T]he definitions of ‘affiliated’ and ‘attributable interest’ in the rules likewise should not be broadened to include items other than those involving common ownership or management or to include relationships that have traditionally not been included in those terms, such as contractual relationships or investments in sports teams or other sources of content. There is no support for the idea that Congress intended to apply this statute beyond the generally accepted understanding of ‘attribution’ (if even that far), and such an expansive application of the law would similarly distort the marketplace for multichannel video Programming . . .”).

^{33/} *NPRM* ¶ 78; see also DIRECTV, Inc. Comments at 21-22 (“Such an expansion also would directly contravene Congress’s express and specific intent. The legislative history of the 1992 Cable Act makes quite clear that Congress was concerned that MVPDs would act anticompetitively with programmers in which they had a financial stake, not that they might negotiate anticompetitive contractual arrangements at arm’s length with.”).

these new categories of relationships into the definition of “affiliated” program carriage rules would impose far-reaching and significant costs and burdens on entities previously untouched by the program carriage regime and could impede the natural functioning of the marketplace by creating disincentives for entering into such relationships in the first place. In addition, like the Commission’s other proposals to expand the concept of “affiliation,” inclusion of such relationships would significantly lower the bar for filing program carriage complaints by expanding the ways in which favored programmers could trigger the rules. The Commission’s proposals in this regard stray far from the original, narrow intent of the statute and as such, are beyond its authority.^{34/}

^{34/} See, e.g., *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) (“An agency construction of a statute cannot survive . . . if a contested regulation reflects an action that exceeds the agency’s authority.”).

CONCLUSION

The Commission's proposed revisions to the program carriage rules would disadvantage programmers deemed affiliated with any MVPD to the detriment of the viewing public, cannot be justified by the current marketplace, and reach beyond the intended scope of the law.

Consequently, Discovery urges the Commission to reject its proposed revisions to the program carriage rules in accordance with the views expressed herein.

Respectfully submitted,

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