

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

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

**REPLY COMMENTS**



Matthew M. Polka  
President and Chief Executive Officer  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220  
(412) 922-8300

Ross J. Lieberman  
Vice President of Government Affairs  
American Cable Association  
2415 39<sup>th</sup> Place, NW  
Washington, DC 20007  
(202) 494-5661

Barbara S. Esbin  
James N. Moskowitz  
Cinnamon Mueller  
1333 New Hampshire Ave, N.W.  
2<sup>nd</sup> Floor  
Washington, DC 20036  
(202) 872-6881

Attorneys for the American Cable  
Association

January 11, 2012

**Table of Contents**

I. INTRODUCTION ..... 1

II. COMMENTERS FAIL TO PRESENT ANY BASIS IN THE STATUTE OR LEGISLATIVE HISTORY FOR EXTENDING THE NONDISCRIMINATION REQUIREMENT OF THE PROGRAM CARRIAGE RULES TO NON-VERTICALLY INTEGRATED MVPDS. ....2

III. COMMENTERS FAIL TO PRESENT ANY BASIS IN THE STATUTE OR LEGISLATIVE HISTORY FOR EXTENDING THE GOOD FAITH NEGOTIATION REQUIREMENT OF THE PROGRAM CARRIAGE RULES TO NON-VERTICALLY INTEGRATED MVPDS. ....7

IV. MVPDS' DECISIONS REGARDING THE PROGRAMMING THEY CARRY ARE PROTECTED BY THE FIRST AMENDMENT OF THE CONSTITUTION. ....8

V. CONCLUSION. ....11

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

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

**REPLY COMMENTS**



Matthew M. Polka  
President and Chief Executive Officer  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220  
(412) 922-8300

Ross J. Lieberman  
Vice President of Government Affairs  
American Cable Association  
2415 39<sup>th</sup> Place, NW  
Washington, DC 20007  
(202) 494-5661

Barbara S. Esbin  
James N. Moskowitz  
Cinnamon Mueller  
1333 New Hampshire Ave, N.W.  
2<sup>nd</sup> Floor  
Washington, DC 20036  
(202) 872-6881

Attorneys for the American Cable  
Association

January 11, 2012

## I. INTRODUCTION.

American Cable Association<sup>1</sup> (“ACA”) offers the following reply comments in the above-captioned matter.<sup>2</sup> ACA focused its comments in this proceeding on the question raised in the NPRM of whether Section 616(a)(3) of the 1992 Cable Act is best interpreted as preventing discrimination by *all* MVPDs (including both vertically and non-vertically integrated companies) against any programmer not affiliated with an MVPD.<sup>3</sup> In its Comments, ACA established that a review of the legislative history makes evident that the statute was not intended to apply to all MVPDs, but only to those that are affiliated with video programmers.<sup>4</sup>

Most commenters, including many independent programmers and public interest advocates, agree that the program carriage rules should remain focused on vertically integrated MVPDs.<sup>5</sup>

---

<sup>1</sup> ACA represents nearly 900 small and medium-sized MVPDs that serve about 7.6 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in 49 states and many U.S. territories. ACA’s members range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. More than half of ACA’s members serve fewer than 2,000 subscribers. Most ACA members provide video, voice, and data services, as part of a triple-play offering, delivering these critical services to smaller-market and rural subscribers across the nation.

<sup>2</sup> *In the Matter of Revision of the Commission’s Program Carriage Rules, Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, (2011) (“NPRM”).

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

<sup>4</sup> *In the Matter of Revision of the Commission’s Program Carriage Rules, Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Comments of the American Cable Association, MB Docket No. 07-42, at 4-6 (filed Nov. 28, 2011) (“ACA Comments”).

<sup>5</sup> See, e.g., *In the Matter of Revision of the Commission’s Program Carriage Rules*, MB Docket No. 11-131, Comments of the Media Access Project, at 11 (“Media Access Project Comments”) (“Section 616(a)(3) is best interpreted to prohibit *vertically integrated* MVPDs from discriminating on the basis of a programming vendor’s lack of affiliation with either that MVPD or with another MVPD.” (emphasis added)); see also *In the Matter of Revision of the Commission’s Program Carriage Rules*, MB Docket No. 11-131, Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, at 1-2 (filed Nov. 28, 2011) (“TCR/Mid-Atlantic Sports Comments”) (addressing comments to “vertically integrated MVPDs”); *In the Matter of Revision of the Commission’s Program Carriage Rules, Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42, Comments of MSG Holdings, L.P. and Music Choice Comments at 2 (filed Nov. 28, 2011); *In the Matter of Revision of the Commission’s Program Carriage Rules*, MB Docket No. 11-131, Comments of DirecTV, at 2-10 (filed Nov. 28, 2011) (“DirecTV Comments”); *In the Matter of Revision of the Commission’s Program Carriage Rules*, MB Docket No. 11-131, Comments of Verizon, at 1 (filed Nov. 28, 2011) (“Verizon Comments”).

However, several independent programmers argue that the Commission should use this proceeding to apply the non-discrimination and/or good faith bargaining provisions that were intended by Congress to apply only to vertically integrated MVPDs, to *all* MVPDs regardless of whether they are affiliated with any programming entities.<sup>6</sup>

As discussed in detail below, commenters have failed to present any evidence in the record demonstrating that Congress intended Section 616(a)(3) to apply to non-vertically integrated MVPDs. Further, if the Commission were to consider venturing beyond its delegated authority and imposing program carriage obligations on non-vertically integrated MVPDs, its action would be barred by the courts as running afoul of cable operators' established First Amendment rights.

## **II. COMMENTERS FAIL TO PRESENT ANY BASIS IN THE STATUTE OR LEGISLATIVE HISTORY FOR EXTENDING THE NONDISCRIMINATION REQUIREMENT OF THE PROGRAM CARRIAGE RULES TO NON-VERTICALLY INTEGRATED MVPDS.**

In the *NPRM* the Commission seeks comment “on whether to adopt a rule requiring vertically integrated MVPDs to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD (or with another MVPD).<sup>7</sup> The Commission noted that programmers have claimed that vertically integrated MVPDs favor not only their own affiliated programming, but also programming affiliated with other vertically integrated MVPDs.<sup>8</sup> In response to these concerns, the *NPRM* sought comment on

---

<sup>6</sup> *In the Matter of Revision of the Commission's Program Carriage Rules*, MB Docket No. 11-131, Comments of HD Net Entertainment, LLC, at 13-14 (filed Nov. 28, 2011) (“HD Net Comments”) (good faith requirement should not be limited to vertically-integrated MVPDs and those that have similarly situated programming); *see also In the Matter of Revision of the Commission's Program Carriage Rules*, MB Docket No. 11-131, Comments of Current TV, at iv, 12 (filed Nov. 28, 2011) (“Current TV Comments”) (FCC should clarify that program carriage rules preclude discrimination on the basis of a programming network's affiliation, or lack thereof, even if the relevant affiliation is with another MVPD that has received favorable reciprocal treatment unjustified by the performance of its affiliated programming), at 30 (FCC should “impose a good faith negotiation requirement on *all* MVPD-unaffiliated programmer negotiations, not just those in which the MVPD may have competitive, similarly situated services.) *In the Matter of Revision of the Commission's Program Carriage Rules*, MB Docket No. 11-131, Comments of Bloomberg L.P., at 17 (filed Nov. 28, 2011) (“Bloomberg Comments”).

<sup>7</sup> *NPRM* at ¶ 68.

<sup>8</sup> *NPRM* ¶ 72.

whether it “should address such situations by interpreting the discrimination provision in Section 616(a)(3) more broadly to preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor’s lack of affiliation with another MVPD.”<sup>9</sup>

The Commission also seeks comment on whether the program carriage rules should be broadened to apply to non-vertically integrated MVPDS. In the NPRM, it stated that it was

not aware of concerns that a non-vertically integrated MVPD would have an incentive to favor an MVPD-affiliated programming vendor over an unaffiliated programming vendor based on reasons of “affiliation” as opposed to legitimate business reasons. Accordingly, [the Commission] believe[d] it appropriate to limit this interpretation of Section 616(a)(3) to vertically integrated MVPDs only.<sup>10</sup>

However, the Commission noted its view that portions of the legislative history could be construed as providing it with authority to extend its program carriage rules to non-vertically integrated MVPDs and sought comment on this as well.<sup>11</sup>

In its initial comments, ACA made clear that there was nothing in either the 1992 Cable Act or its legislative history to support an application of the program carriage rules to non-vertically integrated MVPDs.<sup>12</sup> However, a few programming providers submitted comments arguing that the Commission should expand the scope of its rules to include non-vertically integrated MVPDs and advanced a number of theories in support of their proposals.<sup>13</sup> Of these, only Bloomberg attempts to

---

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 76 (stating that language from the legislative history “is unclear as to whether Congress was referring to the incentives of individual cable operators to favor their own affiliated programmers, of whether Congress was referring to the incentives of cable operators as a whole to favor cable-affiliated programmers . . .”).

<sup>12</sup> ACA Comments at 4-6.

<sup>13</sup> See Bloomberg Comments at 17-19 (providing no evidence of anticompetitive discrimination concerns involving non-vertically integrated MVPDs); Current TV Comments at 12-13; HD Net Comments at 11-13 (describing problems with wholesale bundling arrangements foisted upon non-vertically integrated MVPDs but providing no arguments or evidence that subjecting non-vertically integrated MVPDs to program carriage complaints would address these concerns). Other commenters argue in favor of extending the Commission’s non-discrimination provision to unaffiliated programmers, however, they do not seek to extend the program carriage rules to non-vertically integrated MVPDs, and are therefore not

argue that the language and legislative history of the 1992 Cable Act supports such action.<sup>14</sup> Bloomberg suggests that, under the plain language of Section 616(a)(3), cable operators “that favor another cable operator’s programming over independent programming” are “discriminating on video programming distribution on the basis of affiliation or nonaffiliation of vendors’ and such conduct therefore violates the Act.”<sup>15</sup> However, in advancing this argument, Bloomberg ignores all other language in the statute as well as the legislative history of the 1992 Cable Act that shows Congress intended Section 616(a)(3) to permit the Commission to regulate such discrimination *only* where it is engaged in by vertically integrated MVPDs.<sup>16</sup> Significantly, Congress did not express any concern in the legislative history that the activities of non-vertically integrated MVPDs could unreasonably restrain the ability of independent programmers to compete, nor did it choose to write the statute to reach such providers. As discussed in ACA’s comments, the legislative history makes clear that Congress’s sole focus in drafting Section 616(a)(3) was to curb potential discrimination by vertically integrated MVPDs.<sup>17</sup>

Bloomberg also presents another separate rationale for its position based on the fact that Congress stated in the legislative history that it was “concerned that vertically integrated cable

---

addressed here. See, e.g., Crown at 8-9 (supporting Commission’s proposal to extend Section 616(a)(3) to preclude *vertically integrated MVPDs* from discriminating on the basis of a programming vendor’s lack of affiliation).

<sup>14</sup> See Bloomberg Comments at 17; HD Net Comments at 11-12.

<sup>15</sup> Bloomberg Comments at 18 (quoting 47 U.S.C. § 536(a)(3)).

<sup>16</sup> 47 U.S.C. § 536(a)(3) (emphasis added).

<sup>17</sup> See ACA Comments at 4-6; H. R. Rep. No. 102-862 (1992) at 91 (“[T]he Senate bill bars national and regional cable programmers who are affiliated with cable operators from (1) unreasonably refusing to deal with any multichannel video programming distributor; and (2) discriminating in the price, terms, and conditions in the sale of their programming to multichannel video distributors if such action would impede retail competition.”); see also Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460-1461, §2(a)(5) (1992) (expressing Congress’ concerns regarding the vertical integration of cable programming providers with cable system operators).

operators would sell their programming at more favorable terms to other cable operators.”<sup>18</sup>

According to Bloomberg, this concern about *program access* “evidences a larger concern that competition would be unfairly restrained if cable operators favored other cable operators and excluded non-cable MVPDs”<sup>19</sup> and that the same principle applies to program carriage because cable operators are also able to favor another cable operator’s programming over independent programming.<sup>19</sup> Yet a review of the legislative history makes clear that Congress’s sole focus with regard to both program access and program carriage was on the potential harms caused by *vertically integrated* MVPDs.

For example in the legislative history Congress stated that:

To address the complaints of small cable operators that cable programmers will not deal with them or will unreasonably discriminate against them in the sale of programming, the legislation requires *vertically integrated*, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms, and conditions.<sup>20</sup>

Further, in addressing the program access concerns raised by non-cable MVPDs, Congress stated that:

the bill bars *vertically integrated*, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating the price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition.<sup>21</sup>

Bloomberg provides no insight as to how its conclusion that the program *carriage* rules should apply to non-vertically integrated MVPDs follows from the language it quotes from the legislative history explaining why the program *access* rules should apply to vertically integrated MVPDs. In sum, this argument simply fails to demonstrate that the legislative history supports an

---

<sup>18</sup> Bloomberg Comments at 18 (referring to S. Rep. No. 102-92, at 26 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1159 (“*Cable Act of 1992 Senate Report*”).

<sup>19</sup> Bloomberg Comments at 17-18.

<sup>20</sup> *Cable Act of 1992 Senate Report*, 1992 U.S.C.C.A.N. at 1160 (emphasis added).

<sup>21</sup> *Id.* at 1161 (emphasis added).

expansion of the program carriage rules to non-vertically integrated MVPDs. As a result, the Commission should not follow Bloomberg's invitation to apply its nondiscrimination rules to non-vertically integrated MVPDs as this would be contrary to both the plain language and intent of the statute.<sup>22</sup>

The remaining programmers that advocate for applying the program carriage non-discrimination requirement to non-vertically integrated MVPDs do not even attempt to show how the language of the statute or the legislative history would permit the Commission to act on their request, and instead simply rely on policy arguments to support their views. As an example, HD Net argues that the Commission should address concerns raised by ACA and others about wholesale bundling by applying the program carriage complaint regime to non-vertically integrated MVPDs.<sup>23</sup> Specifically, HD Net argues that a non-vertically integrated MVPD may be “forced” to discriminate by a powerful content provider that bundles carriage of undesirable programming with “must-have” programming as a condition of carriage.<sup>24</sup> HD Net points to concerns about “wholesale bundling” that ACA has expressed to the Commission and argues that the Commission should use the program carriage rules as a mechanism for addressing this problem.<sup>25</sup> While ACA shares the same concerns as HD Net and other independent programmers about the bundling practices of large programmers, and would like to see curbs put in place to address this problem, the Commission cannot ignore the language of Section 616(a)(3) and its legislative history, which clearly restrains the agency from expanding the program carriage rules to cover non-vertically integrated cable operators.

In sum, none of the parties advocating extension of the program carriage rules to non-vertically integrated MVPDs provide any sound statutory basis in support. As the legislative history

---

<sup>22</sup> See ACA Comments at 4-6; H. R. Rep. No. 102-862 (1992) at 91; *see also* Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat.1460-1461, §2(a)(5).

<sup>23</sup> HD Net Comments at 11-13.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 13.

shows, Section 616(a)(3) is focused on addressing discrimination by vertically integrated MVPDs against unaffiliated programming. There is no support in the statute or the legislative history for any action by the Commission to sweep non-vertically integrated MVPDs within the purview of the program carriage rules.

**III. COMMENTERS FAIL TO PRESENT ANY BASIS IN THE STATUTE OR LEGISLATIVE HISTORY FOR EXTENDING THE GOOD FAITH NEGOTIATION REQUIREMENT OF THE PROGRAM CARRIAGE RULES TO NON-VERTICALLY INTEGRATED MVPDS.**

In the NPRM, the Commission sought comment on whether to adopt a rule requiring vertically integrated MVPDs to negotiate in good faith with unaffiliated programming providers.<sup>26</sup> The Commission observed that it was “not aware of concerns regarding the negotiation tactics of non-vertically integrated MVPDs with respect to unaffiliated programming vendors.”<sup>27</sup> As a result, the Commission stated that it believes “it is appropriate to limit a good faith negotiation requirement to vertically integrated MVPDs.”<sup>28</sup>

A number of programming providers argue that the Commission should adopt a good faith negotiation requirement and that it should apply to non-vertically integrated MVPD.<sup>29</sup> However, similar to the arguments concerning non-discrimination, none of these proponents offer any rationale from either the language of the statute or the legislative history for applying a good faith negotiation requirement to non-vertically integrated MVPDs.<sup>30</sup> Nor do the proponents of this requirement make it clear how applying the good faith negotiation requirement to non-vertically integrated MVPDs would advance the Commission’s interest in preventing discrimination by vertically integrated MVPDs.<sup>31</sup>

---

<sup>26</sup> *NPRM* at ¶ 68.

<sup>27</sup> *Id.* at ¶ 69.

<sup>28</sup> *Id.*

<sup>29</sup> See Current TV Comments at 30-32; HD Net Comments at 11-13.

<sup>30</sup> See Current TV Comments at 30-32.

<sup>31</sup> See *NPRM* at ¶ 14, 69 (the Commission’s intent that this rule address discrimination by vertically integrated MVPDs is evident in its conclusion that there is only a basis to require good faith negotiations

Instead, for example, Current TV argues that this requirement would “create balance in the negotiation process” and “promote diversity and independent voices.”<sup>32</sup> HD Net simply asserts that “[f]ailure to negotiate in good faith is another form of discrimination and should be treated as such by the Commission’s final rules.”<sup>33</sup> However, absent statutory authority which the independent programmers have been unable to present in the record, the Commission cannot impose a good faith negotiation requirement on non-vertically integrated MVPDs.

#### **IV. MVPDS’ DECISIONS REGARDING THE PROGRAMMING THEY CARRY ARE PROTECTED BY THE FIRST AMENDMENT OF THE CONSTITUTION.**

Even if the Commission were to determine that applying the program carriage rules to non-vertically integrated MVPDs is appropriate, its ability to expand the statutory command in this manner is limited because of its impact on cable operators’ First Amendment rights. The Supreme Court has long held that MVPDs engage in protected free speech when they make decisions about which programming to include on their systems.<sup>34</sup> When making these decisions, “[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”<sup>35</sup> The Commission’s program carriage rules regulate and restrict this constitutionally protected form of free speech. Specifically, they allow the Commission to investigate whether a vertically integrated cable operator’s programming decisions

---

where an MVPD seeks to favor its own programming where the programming is similarly situated).

<sup>32</sup> Current TV Comments at 30.

<sup>33</sup> HD Net Comments at 11-13 (asserting that the failure to negotiate is a form of discrimination but providing no evidence of anticompetitive discrimination concerns involving non-vertically integrated MVPDs).

<sup>34</sup> *Turner Broadcasting Systems v. Federal Communications Comm’n*, 512 U.S. 622, 636 (1994) (“*Turner I*”) (citations omitted) (“Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’” (quoting *Los Angeles v. Preferred Communications, Inc.* 476 U.S. 488, 494 (1986))).

<sup>35</sup> *Id.* at 636 (citations omitted).

result in anticompetitive discrimination against unaffiliated programming that is “similarly situated” to its own affiliated programming.<sup>36</sup>

As discussed, a number of programming providers argue that the Commission should extend the good faith negotiation and non-discrimination provisions contained in its program carriage rules to non-vertically integrated MVPDs.<sup>37</sup> However, the constitutional prerequisites necessary for the Commission to extend its program carriage rules to non-vertically integrated MVPDs without violating their First Amendment rights are absent here. Specifically, Supreme Court precedent bars the Commission from extending its program carriage rules to non-vertically integrated MVPDs unless it can, at a minimum, demonstrate that doing so furthers an important government interest that is unrelated to the suppression of free expression and is narrowly tailored so “that the means chosen do not ‘burden substantially more speech than necessary to further the government’s legitimate interests.’”<sup>38</sup>

---

<sup>36</sup> *NPRM* at ¶ 14 (complainant programming vendor must provide evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors including genre, target audience, target advertisers, and target programming).

<sup>37</sup> HD Net Comments at 13-14 (good faith requirement should not be limited to vertically-integrated MVPDs and those that have similarly situated programming); see also Current TV Comments at iv, 12, (FCC should clarify that program carriage rules preclude discrimination on the basis of a programming network’s affiliation, or lack thereof, even if the relevant affiliation is with another MVPD that has received favorable reciprocal treatment unjustified by the performance of its affiliated programming); *id.* at 30 (FCC should “impose a good faith negotiation requirement on *all* MVPD-unaffiliated programmer negotiations, not just those in which the MVPD may have competitive, similarly situated services.); Bloomberg Comments at 17 (Commission should apply non-discrimination provisions to all cable operators).

<sup>38</sup> *Turner I*, 512 U.S. at 662 (quoting *Ward v. Rock Against Racism*, 491 U. S. 781 (1989)). This is the “intermediate scrutiny” test that is applied to content neutral government regulation of protected free speech. *Id.* The regulations at issue here involve a governmental review of the content of programming to determine whether it is “similarly situated.” See *NPRM* at ¶ 14. This review is based on a combination of factors relating to the content of the programming, including genre, target audience, target advertisers, and target programming. *Id.* The Supreme Court “appl[ies] the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Turner I* at 642. As a consequence, there is an issue as to whether these rules require adherence to a “strict scrutiny” analysis, under which the Commission’s prerogative to extend these regulations to non-vertically integrated MVPDs would be even further restricted. See *Turner I* at 636, 661 (must carry rules struck down by appellate court applying strict scrutiny, upheld by Supreme Court applying intermediate scrutiny).

In the 1992 Cable Act, Congress stated that there is a substantial government interest in “promoting a diversity of views provided through multiple technology media.”<sup>39</sup> Through its passage of Section 616(a)(3) Congress put in place a narrowly crafted means of advancing this interest by placing a check on the ability of vertically integrated MVPDs to discriminate against third-party programming providers.<sup>40</sup> There is no finding or mention of any harms that non-vertically integrated MVPDs pose to programming providers anywhere in the legislative history of the 1992 Cable Act. Indeed, the Commission itself has long recognized that the discrimination at issue in Section 616(a)(3) applies to MVPDs that are affiliated with programming providers.<sup>41</sup> Since there is no demonstrable government interest in expanding the scope of the program carriage terms to non-vertically integrated cable operators, courts would be expected to strike down such Commission action as a violation of these cable operator’s First Amendment rights.

Further, the First Amendment requires that any revision of the Commission’s program carriage rules must not “burden substantially more speech than necessary to further the government’s legitimate interests.”<sup>42</sup> Here, the narrowly tailored specific means for advancing Congress’ interest was by regulating vertically integrated MVPDs program carriage through rules promulgated under Section 616(a)(3).<sup>43</sup> Even assuming that the Commission has the authority to

---

<sup>39</sup> Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat.1460, 1461, §2(a)(5) (1992).

<sup>40</sup> See *id.* at 1460-1461, §2(a)(6).

<sup>41</sup> *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, ¶ 29 (1993) (“1993 Program Carriage Order”).

<sup>42</sup> *Turner I*, 512 U.S. at 662.

<sup>43</sup> See Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat.1460-1461, §§2(a)(5) (expressing Congress’ concerns regarding the vertical integration of cable programming providers with cable system operators), (6) (identifying government interest in promoting diversity of views). See also ACA Comments at 4-6 (explaining §2(a)(5) of the legislative history); see also H. R. Rep. No. 102-862 (1992) at 91 (“[T]he Senate bill bars national and regional cable programmers who are affiliated with cable operators from (1) unreasonably refusing to deal with any multichannel video programming distributor; and (2) discriminating in the price, terms, and conditions in the sale of their

expand the scope of Section 616(a)(3) to cover non-vertically integrated MVPDs, which it does not, under Supreme Court precedent, these rules must be based on actual harms that are real, not merely conjectural, and the Commission must demonstrate that “the regulation will in fact alleviate these harms in a direct and material way.”<sup>44</sup> No facts have been placed in the record of this proceeding to demonstrate that the activities of non-vertically integrated MVPDs pose a demonstrable risk of anticompetitive impact warranting a federal regulatory intrusion into their First Amendment rights.

Given the complete absence in the record of evidence that non-vertically integrated cable providers engage in discriminatory behavior that harms independent programmers, the Commission must not extend its program carriage rules to non-vertically integrated MVPDs in this proceeding. The Commission is not free to simply extend these requirements to non-vertically integrated MVPDs based on amorphous claims of policy benefits and anecdotal and unsubstantiated claims of anticompetitive practices when such an expansion would trample on fundamental first amendment rights.

## **V. CONCLUSION.**

Both the statutory language and legislative history of the program carriage rule reveal a federal concern with the discriminatory practices of vertically integrated MVPDs who favor their own affiliated programming in carriage decisions to the detriment of independent programmers. Not a shred of evidence has been adduced showing that non-vertically integrated MVPDs similarly favor the programming of their vertically integrated counterparts. Rather, the record conclusively demonstrates that the practices of non-vertically integrated operators are beyond the scope of Section 616(a)(3) and the narrow federal interest in reigning in the actions of vertically integrated MVPDs that gave rise to the program carriage rules. Even if non-vertically integrated operators were

---

programming to multichannel video distributors if such action would impede retail competition.”).

<sup>44</sup> *Id.* at 664.

within the scope of that interest, the record fails to demonstrate that their activities pose a demonstrable risk of anticompetitive harm warranting a federal regulatory intrusion into their well-established First Amendment rights to offer the programming it wishes. As a result, the Commission cannot, consistent with the Constitution of the United States, extend its program carriage rules to non-vertically integrated MVPDs in this proceeding.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**



By: \_\_\_\_\_

Matthew M. Polka  
President and CEO  
American Cable Association  
One Parkway Center  
Suite 212  
Pittsburgh, Pennsylvania 15220

Barbara S. Esbin  
James N. Moskowitz  
Cinnamon Mueller  
1333 New Hampshire Ave,  
2<sup>nd</sup> Floor  
Washington, DC 20036

(412) 922-8300

(202) 872-6881

Ross J. Lieberman  
Vice President of Government Affairs  
American Cable Association  
2415 39<sup>th</sup> Place, NW  
Washington, DC 20007

Attorneys for American Cable Association

(202) 494-5661

January 11, 2012