

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

Revision of the Commission's Program  
Carriage Rules

MB Docket No. 11-131

**REPLY COMMENTS OF TCR SPORTS BROADCASTING HOLDING, L.L.P.,  
d/b/a MID-ATLANTIC SPORTS NETWORK**

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January 11, 2012

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As MASN has shown, robust program-carriage protection for independent regional sports networks (RSNs) remains as vital as ever. RSNs are increasingly owned by vertically integrated cable companies: Comcast and Time Warner Cable (TWC) are now affiliated with twenty-seven RSNs – a major increase since the Commission's *Adelphia Order*. Vertically integrated cable companies, therefore, continue to have both the ability and incentive to stifle competition for must-have regional sports programming. By withholding carriage from independent RSNs — or offering it to them only on discriminatory terms — vertically integrated cable companies can seek to drive independent RSNs from the market or, at the very least, undermine their ability to compete fairly for new customers, programmers, and advertising. The Commission's program-carriage rules have long provided crucial protection against such anticompetitive practices, and the proposed reforms would constitute a welcome improvement to those rules.

MASN agrees with a number of the reforms the Commission has proposed to improve its procedures for protecting independent RSNs from carriage discrimination. Most importantly, the Commission should adopt the program-access burden-shifting framework endorsed by the Media Bureau in MASN's carriage dispute with TWC. As the comments demonstrate, adopting the program-access framework would not only harmonize the Commission's approach to two closely related regulatory regimes, but it would address the informational imbalance between cable

operators and independent programmers that currently hampers effective carriage litigation. It is telling that only three commenters — vertically integrated cable operators Comcast and Time Warner Cable (TWC), along with the National Cable Telecommunications Association (NCTA) — oppose this sensible reform. In so doing, they offer little more than recycled versions of the same First Amendment arguments that this Commission and the D.C. Circuit have already rejected. Regardless of the particular framework ultimately adopted, however, it is important that the Commission decide the issue and provide clarity to programmers and cable operators alike.

Second, the Commission should require vertically integrated cable operators to negotiate in good faith with unaffiliated programmers, and it should make clear that a cable operator's failure to offer contemporaneous justifications for denying carriage constitutes bad faith. Contrary to the cable operators' argument that such a requirement would spawn a wave of hypothesized frivolous complaints, this reform would encourage genuine dialogue between programmers and MVPDs, increasing the prospects of mutually acceptable carriage agreements. Moreover, by requiring cable operators to articulate contemporaneously the reasons for their carriage decisions, it would prevent those operators from concealing discrimination behind the *post-hoc* justifications later developed by their lawyers.

The comments likewise demonstrate the need to adopt the Commission's other proposed reforms, which are discussed below. Those reforms would go far toward ensuring the fair and prompt resolution of program-carriage cases. Accordingly, their adoption would provide valuable protection to independent RSNs, benefiting programmers and consumers alike.

## DISCUSSION

### I. INDEPENDENT REGIONAL SPORTS NETWORKS IN PARTICULAR REQUIRE ROBUST CARRIAGE PROTECTION

A. Every independent programmer to file comments, along with two groups representing the interests of the viewing public, agrees that vertically integrated cable operators retain the ability and incentive to discriminate in favor of affiliated programming.<sup>1</sup> Cox Communications and DirecTV likewise recognize that the program carriage rules continue to play an important role in protecting programmers from discrimination.<sup>2</sup> The only commenters to argue that that the market no longer requires strong program carriage rules are the vertically integrated cable companies. Their arguments, however, conflict with the bevy of evidence — recognized repeatedly by this Commission — demonstrating the continuing danger of carriage discrimination by vertically integrated cable operators, particularly with respect to RSNs.<sup>3</sup>

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<sup>1</sup> See Bloomberg Comments at 4-6; Crown Media Comments at 2; Current TV Comments at 2-7; HD Net Comments at 5-7; Media Access Comments at 1-4.

<sup>2</sup> See Cox Comments at 1 (“support[ing] the Commission’s efforts to take a hard look at the television programming market to better ensure fairness for both cable operators and programmers”); DirecTV Comments at 10 (acknowledging that “differential treatment of one’s own programming may legitimately prompt an inference of discrimination”).

<sup>3</sup> See Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 26 FCC Rcd 11494, ¶ 33 (2011) (“2011 Program Carriage Order and NPRM”) (finding that vertically integrated MVPDs continue to have the “incentive and ability to favor their affiliated programming vendors”); Memorandum Opinion and Order, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent To Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238, ¶ 3 (2011) (stating that Comcast-NBC merger would “effectuate an unprecedented aggregation of video programming content with control over the means by which video programming is distributed”); Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corp. to Time Warner Cable Inc., et al.*, 21 FCC Rcd 8203, ¶ 116 (2006) (“*Adelphia Order*”) (finding Adelphia acquisition “likely to increase the incentive and ability of Comcast and Time Warner to deny carriage” to unaffiliated RSNs); see also Initial Decision, *Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, MB Docket No. 10-204, FCC 11D-01, ¶ 57 (rel. Dec. 20, 2011) (“*Tennis Channel Initial Decision*”) (finding that

Indeed, the continuing need for muscular program carriage rules is nowhere more evident than in the RSN context. Although the cable operators go to great lengths to describe features of the general market for video distribution, none disputes that the market for sports programming is growing increasingly concentrated. A simple survey of cable-affiliated RSNs illustrates the point: Comcast and TWC are now affiliated with twenty-seven RSNs.<sup>4</sup> This reflects a major increase of their combined RSN ownership since the *Adelphia Order*, and together they now control nearly a quarter of the available subscription TV rights for American professional sports teams.<sup>5</sup> Recent examples, such as TWC's formation of a Lakers RSN and its pursuit of Dodgers broadcast rights, demonstrate that this trend is only intensifying.<sup>6</sup>

The emergence of direct-broadcast satellite and wireline programming distributors has done little to arrest the growth in RSN market concentration. In fact, those new entrants agree that it has grown increasingly difficult to compete for must-have regional sports programming.<sup>7</sup> By employing tactics such as geographic "clustering" within RSN footprints, cable operators

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Comcast's "practice is to transmit affiliated sports networks more broadly than unaffiliated sports networks").

<sup>4</sup> See Report, *The Regional Sports Network Marketplace*, MB Docket No. 11-128, DA 12-18, ¶ 16 n.52 (2012) (observing TWC's attributable ownership interest in fifteen RSNs, not counting HD and SD channels separately); *Tennis Channel Initial Decision* ¶ 10 (noting Comcast's affiliation in 2009 with eleven RSNs, which excludes its impending launch of CSN-Houston);

<sup>5</sup> See MASN Comments at 5 n.11 (showing that Comcast and TWC control the subscription TV rights to 20 of the 81 U.S.-based teams in MLB, NBA, and NHL).

<sup>6</sup> See, e.g., Joe Flint, *Time Warner Cable, Lakers Strike 20-Year TV Deal*, L.A. Times, Feb. 14, 2011, available at <http://articles.latimes.com/2011/feb/14/sports/la-sp-0215-lakers-time-warner-20110215>; Alex Sherman, *Time Warner Cable Said to Consider Bidding for Dodgers' Television Rights*, Bloomberg, Nov. 8, 2011, available at <http://www.bloomberg.com/news/2011-11-08/time-warner-cable-said-to-consider-bidding-for-dodgers-television-rights.html>.

<sup>7</sup> Comments of AT&T at 1, MB Docket No. 11-128 (FCC filed Sept. 9, 2011); Comments of Verizon at 1-2, MB Docket No. 11-128 (FCC filed Sept. 9, 2011); Comments of DirecTV, Inc. at 5-6, MB Docket No. 11-128 (FCC filed Sept. 9, 2011) ("DirecTV RSN Comments").

have achieved control of many distribution areas critical for sports programming, even as they have lost overall market share.<sup>8</sup> MASN has experienced first-hand this formidable geographic power exercised by vertically integrated cable operators, as TWC’s denial of carriage in North Carolina deprived MASN of the regional viewers necessary to compete fairly for the broadcast rights to Carolina Hurricanes’ games, as well as college basketball games.<sup>9</sup>

Such episodes underscore the unique danger of carriage discrimination in the RSN context.<sup>10</sup> RSNs such as MASN possess must-have programming that is “uniquely likely to significantly impact the MVPD market,”<sup>11</sup> and vertically integrated cable operators are motivated to gain control of that programming. Carriage discrimination furthers this objective by making independent RSNs less effective competitors for new programming, customers, and advertisers. The resultant competitive harm manifests itself in several ways. First, carriage discrimination deprives independent RSNs of the customers necessary to afford the high fees associated with their core offerings. This harms not only the RSNs, but the sports franchises themselves, as depressed competition over sports telecast rights forces those franchises to offer programming at artificially low rates.<sup>12</sup> Second, and relatedly, the denial of carriage — by limiting independent RSNs’ distribution — impedes them from competing fairly for new sports

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<sup>8</sup> See DirecTV RSN Comments at 6.

<sup>9</sup> See MASN Comments at 7-8.

<sup>10</sup> See *Adelphia Order* ¶ 116 (recognizing likelihood of vertical harms imposed by Adelphia acquisition with respect to RSNs in particular)

<sup>11</sup> Memorandum Opinion and Order, *Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, 26 FCC Rcd 15849, ¶ 9 (2011).

<sup>12</sup> See Br. of The Office of the Commissioner of Baseball as *Amicus Curiae in Support of Petitioner TCR Sports Broadcasting Holding, L.L.P., Urging Vacatur* at 10-11, *TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC*, No. 11-1151 (4th Cir. filed May 2, 2011) (“*Amicus Br.*”).

programming to supplement their core offerings.<sup>13</sup> Third, if carriage discrimination places sufficient economic pressure on an independent RSN, it can permit a cable operator to extract an equity stake in that RSN, or can even drive an independent RSN from the market entirely.<sup>14</sup> Once that happens — as was the case after TWC’s successful foreclosure of the Charlotte Bobcats’ RSN — the cable operator is free to acquire the independent RSN’s former programming for itself.<sup>15</sup>

Regardless of broader market trends, then, it is clear that independent RSNs in particular occupy a space in which cable operators’ ability and incentive to discriminate remain acute. Comcast, of course, insists that MASN is a “sophisticated compan[y] that need[s] no regulatory assistance,” and that it should “resolve[ ]” issues surrounding carriage discrimination through negotiations.<sup>16</sup> MASN’s sophistication, however, has been of no help when dealing with intransigent cable incumbents that rebuff all attempts at negotiation. Indeed, MASN was able to secure carriage on Comcast’s systems only after several *years* of program-carriage litigation; before MASN filed a complaint, attempts at negotiation led nowhere. Similarly, MASN’s efforts to secure carriage on fair terms from TWC have thus far proved futile. Despite six years of carriage requests, TWC persists with its refusal to offer MASN analog carriage, thus continuing to deprive its subscribers in eastern North Carolina of access to home-market baseball. Contrary to Comcast’s assertions, the Commission’s proposed reforms promise to level the playing field

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<sup>13</sup> See *Tennis Channel Initial Decision* ¶¶ 86-88 (describing how Comcast’s carriage discrimination lowered Tennis Channel’s distribution and thus prevented it from acquiring the rights to broadcast certain tournaments).

<sup>14</sup> *Id.* ¶ 59 (noting Comcast’s practice of giving a sports network “greater distribution when it acquires equity in” that network); *Amicus Br.* at 11-12.

<sup>15</sup> See MASN Comments at 7-8.

<sup>16</sup> Comcast Comments at 15.

and make the program-carriage complaint process more responsive to independent programmers, minimizing the odds that similar episodes will recur in the future.

**B.** The cable operators focus their opposition to the Commission’s proposals on the supposed burden that stronger rules would impose on vertically integrated cable operators. At the same time, however, those commenters emphasize that the current program-carriage regime has produced few complaints and even fewer victories for programmers.<sup>17</sup> This observation undermines the premise of the cable operators’ core argument. The eleven program-carriage proceedings initiated in the nearly two decades since the Cable Act’s inception hardly support fears that programmers stand ready to exploit strengthened rules in an effort to drive up litigation costs. Rather, the infrequency of complaints bespeaks the reluctance with which programmers have turned to program-carriage litigation. The comments reveal the reason for that reluctance: program-carriage litigation is an extraordinarily costly endeavor for resource-constrained independent programmers.<sup>18</sup> Many programmers simply cannot absorb the expense of protracted litigation, no matter how meritorious their underlying claims.

Vertically integrated cable operators, on the other hand, benefit from protracted litigation. For a large cable operator, the longer litigation drags on the better; every month that passes merely prolongs the denial of carriage and further impedes the independent programmer from competing fairly with the cable operator’s affiliated channels. And unlike many independent programmers, vertically integrated MVPDs possess the resources to absorb escalating litigation

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<sup>17</sup> See Comcast Comments at 3 (stating that “there have been very few program carriage complaints, and not a single adjudicated case of a program carriage violation”) (footnote omitted); NCTA Comments at 15.

<sup>18</sup> See Current TV Comments at 3; HD Net Comments at 6-7; Bloomberg Comments at 6; Crown Media Comments at 2.

costs.<sup>19</sup> MASN’s experience confirms this conclusion, as TWC — by steadfastly refusing to make a single offer to MASN for analog carriage in North Carolina — has embroiled MASN in litigation that now drags on into its fifth year.<sup>20</sup>

This is not to deny that the program-carriage rules have played an important role in protecting independent programmers. Several programmers have secured less discriminatory carriage terms from a defendant MVPD only after filing a complaint and demonstrating a *prima facie* case of discrimination.<sup>21</sup> But the record makes clear that, for the most part, independent programmers are loathe to resort to expensive and uncertain litigation against wealthier cable operators. By making discriminatory carriage practices less advantageous for cable operators, the Commission’s proposals would merely level the playing field.

## **II. THE PROGRAM ACCESS BURDEN-SHIFTING FRAMEWORK SHOULD GOVERN PROGRAM CARRIAGE DISPUTES**

The Commission has proposed two potential legal frameworks for assigning the evidentiary burdens in program carriage cases, both of which recognize that the initial burden to establish a *prima facie* case rests with the complainant.<sup>22</sup> The proposals, however, would adopt different presumptions upon a complainant’s satisfaction of this *prima facie* burden. Under the “program access” framework, establishing a *prima facie* case would shift the burden of persuasion to the defendant MVPD to demonstrate that legitimate business concerns motivated its differential treatment. Alternatively, under the proposed “intentional discrimination” framework, which the Commission proposes drawing from the employment discrimination

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<sup>19</sup> See Current TV Comments at 3.

<sup>20</sup> See MASN Comments at 6-7.

<sup>21</sup> See *id.* at 5-6 (describing MASN’s litigation with Comcast); Current TV Comments at 8-9 (describing litigation that prompted Comcast to carry NFL Network on a more-penetrated tier).

<sup>22</sup> 2011 Program Carriage Order and NPRM ¶ 80.

context, the use of circumstantial evidence to establish a *prima facie* case would shift only the burden of *production* to the defendant, requiring it to set forth some evidence of a legitimate reason for differential treatment. Once a defendant MVPD has articulated such a reason, the burden would shift to the programmer to prove that reason “so implausible” that it constituted a “pretext[.]”<sup>23</sup>

In MASN’s carriage dispute with TWC, the Media Bureau adopted the program-access burden-shifting framework.<sup>24</sup> The Commission should follow suit and hold that once a programmer satisfies its *prima facie* burden, the burden shifts to the defendant MVPD to demonstrate that legitimate business concerns motivated its differential treatment. Failing that, the Commission should at a minimum take this opportunity to establish a clear framework for assigning the evidentiary burdens in program-carriage cases. The Commission previously has declined to do so, even though adjudicators have issued conflicting rulings on the question.<sup>25</sup> The resultant uncertainty has made the carriage complaint process less efficient, forcing parties to litigate the governing legal framework on a case-by-case basis.

#### **A. The Commission Should Adopt the Program-Access Framework**

As MASN and other commenters have shown, there are several compelling reasons for this Commission to adopt the program-access framework.<sup>26</sup> First, this Commission has long

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

<sup>24</sup> See *Media Bureau Order* ¶¶ 22-23.

<sup>25</sup> Memorandum Opinion and Order, *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, ¶ 11 (2010) (expressly declining to clarify the “appropriate legal framework for assessing program carriage discrimination”), *appeal pending sub nom. TCR Sports Broadcasting Holding, L.L.P. v. FCC*, No. 11-1151 (4th Cir.); see also *2011 Program Carriage Order and NPRM* ¶ 79 (noting conflicting rulings in *MASN v. TWC* and *WealthTV* cases).

<sup>26</sup> See MASN Comments at 9-15; Bloomberg Comments at 20; Crown Media Comments at 9-10; Current TV Comments at 10-11; HD Net Comments at 7-9.

recognized that the program-access and program-carriage regimes operate in parallel and serve closely related ends<sup>27</sup>; it would be irrational to apply an inconsistent burden of proof across those regimes. Second, the program-access framework would reflect the reality that cable operators control the bulk of the relevant information relevant to their carriage decisions. It would thus relieve complainant programmers of the near-impossible burden of “proving a negative,” *i.e.*, that a cable operator’s proffered justification did *not* motivate a carriage decision.<sup>28</sup> Third, the program-access framework would accord with Congress’s finding that vertically integrated cable operators, unlike employers, face inherent and entirely rational economic pressures to engage in discrimination.<sup>29</sup> Given these pressures, differential treatment of similarly situated programming should trigger a powerful presumption of discrimination, requiring a cable operator to demonstrate affirmatively that such differential treatment was premised on a legitimate reason.

These same reasons counsel against the adoption of the proposed “intentional discrimination” framework. Although the two frameworks may well function similarly in most situations, differences could crop up in cases where the defendant MVPD articulates a weak justification — backed up by only a bare minimum of evidence — for its differential treatment. Under the program-access framework, a questionable justification supported by sparse evidence likely would fall short of rebutting a complainant’s *prima facie* case. But, under the intentional

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<sup>27</sup> 2011 Program Carriage Order and NPRM ¶ 25 n.100 (observing the “important parallels between the program access and program carriage regimes”); Second Report and Order, *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*, 9 FCC Rcd 2642, ¶ 23 (1993) (“1993 Program Carriage Order”) (noting that program-carriage complaint procedures are “derived” from the program-access rules).

<sup>28</sup> *National Communications Ass’n, Inc. v. AT&T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001) (holding that a defendant’s “better access to facts” in economic discrimination cases requires it to bear the burden of proving the reasonableness of differential treatment).

<sup>29</sup> See MASN Comments at 14.

discrimination framework, the mere production of such evidence would require the programmer then to prove the proffered reason “so implausible” that it constituted a “pretext[.]”<sup>30</sup> That requirement will likely prove an insurmountable obstacle for most programmers, given that cable companies rarely lay plain in a smoking-gun document their discriminatory motive for denying carriage. In other words, the proposed intentional discrimination framework would permit cable operators to prevail against meritorious complaints by simple virtue of their informational advantage over programmers.<sup>31</sup>

Further, the employment discrimination cases from which the Commission derives its proposed intentional discrimination framework are inapposite.<sup>32</sup> In cases of race- or gender-based discrimination, there is typically no economic incentive to discriminate. In fact, just the opposite is true: employers have a strong incentive to hire the most qualified applicant, regardless of race or gender. Discrimination claims in that context must therefore demonstrate that employers subordinated their economic best interest to irrational prejudice.<sup>33</sup> It makes sense that claimants must bear the burden of proving that an employer acted so irrationally. But here, the economic incentives are reversed: Congress and this Commission have made repeated findings that vertically integrated MVPDs face inherent and entirely rational economic pressures to discriminate against unaffiliated networks. The burden should rest with a defendant cable

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<sup>30</sup> *2011 Program Carriage Order and NPRM* ¶ 80.

<sup>31</sup> *See National Communications Ass’n*, 238 F.3d at 130-31 (holding that the “information asymmetry” between parties should shift the burden of “prov[ing] the reasonableness” of its actions to the defendant).

<sup>32</sup> *See 2011 Program Carriage Order and NPRM* ¶ 80 (citing employment discrimination cases).

<sup>33</sup> *See, e.g., Adeyemi v. District of Columbia*, 525 F.3d 1222, 1227 (D.C. Cir. 2008) (relying on the fact that employers do “not usually” hire a “less-qualified candidate” as rationale for requiring a heightened showing of pretext by plaintiff in employment discrimination context)

operator to establish that its differential treatment of similarly situated programming was motivated by something other than this natural economic incentive to discriminate.<sup>34</sup>

Alternatively, if this Commission does adopt the intentional discrimination framework, it should clarify that a defendant MVPD cannot discharge its burden of production by asserting just any reason for its carriage decision. Instead, the Commission should hold that a defendant MVPD meets its burden of production only by supporting a proffered business justification with (1) contemporaneous — not *post-hoc* — evidence that it actually relied on that justification in denying carriage; and (2) evidence that it applied the same criteria to its affiliated programming. A cable operator should not be permitted to escape liability for discrimination on the basis of theoretical justifications later concocted by its lawyers.<sup>35</sup> Nor should it be permitted to conceal discrimination behind facially neutral factors that it actually applied in a discriminatory fashion.<sup>36</sup> Only by assessing a proffered business justification through the lens of how a vertically integrated MVPD actually made its carriage decisions can the Commission make a reasoned assessment of potential discrimination.

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<sup>34</sup> See MASN Comments at 13-15.

<sup>35</sup> See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (noting that a reason developed only after discriminatory action takes place cannot justify the decision); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001) (holding that the “late appearance of [defendant’s] current justification” suggests that it is a “post-hoc rationale, not a legitimate explanation”); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (“We are disquieted . . . by an employer who ‘fully’ articulates its reasons for the first time months after the decision was made.”).

<sup>36</sup> See, e.g., *Ruiz v. County of Rockland*, 609 F.3d 486, 493 (2d Cir. 2010) (holding that, “if the employer is applying its criteria . . . in an inconsistent, arbitrary, or discriminatory manner,” this may be evidence that “the criteria merely provided a pretext for unlawful discrimination”); *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 294 (4th Cir. 2010) (holding that, to rebut a *prima facie* case of discrimination, the defendant must articulate a “legitimate, *non-discriminatory* justification” for the challenged action) (emphasis added).

**B. The Cable Operators' Objections to the Program-Access Framework Are Unpersuasive**

Only Comcast, TWC, and the NCTA (but not Cox)<sup>37</sup> oppose the Commission's proposal to adopt a burden-shifting regime; they instead advocate a framework under which a defendant MVPD would need not produce *any* evidence to support its proffered business justification for differential treatment.<sup>38</sup> Such a framework would be inferior even to the Commission's proposed intentional discrimination framework. The cable operators' arguments to the contrary are unpersuasive.

1. The cable operators do not dispute that the program-access and program-carriage regimes serve complementary ends, as both address the incentive and ability of cable operators to abuse their vertical integration in the parallel markets in which they operate.<sup>39</sup> They also cannot dispute that the Commission initially "derived" the very program-carriage procedures at issue here from those that it had established for program-access cases.<sup>40</sup> But the cable operators insist nonetheless that there are differences between the two regimes that justify the application of an inconsistent burden of proof. The differences they isolate, however, only underscore the need for the Commission to apply the program-access framework to the program-carriage context.

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<sup>37</sup> See Cox Comments at 3 (endorsing Commission's proposal to "clarify . . . the burden of proof in program carriage complaints").

<sup>38</sup> See Comcast Comments at 60-64; TWC Comments at 11-12; NCTA Comments at 24-26.

<sup>39</sup> See *2011 Program Carriage Order and NPRM* ¶ 25 n.100 (observing the "important parallels between the program access and program carriage regimes").

<sup>40</sup> *1993 Program Carriage Order* ¶ 23.

Comcast argues that the “greater complexity and unpredictability” of program-carriage cases warrants subjecting complainants to a stricter burden of proof.<sup>41</sup> At the outset, it is hard to understand how a dispute with a programmer over carriage is any more complex than one with a distributor over program access. But even if there is any force to that assumption, such complexity most strongly counsels in favor of the Commission’s proposed burden-shifting regime. As noted above, the complexity of program-carriage disputes often poses an insuperable obstacle to even meritorious complaints, because defendant MVPDs typically control access to the relevant information pertaining to their carriage decisions. Without ready access to the inner workings of an MVPD’s decisionmaking process, aggrieved programmers struggle with the “difficult task of proving a negative” — that is, proving that a proffered neutral justification did not actually motivate an MVPD’s differential treatment of unaffiliated programming. Given the “information asymmetry” between the parties, a requirement that programmers affirmatively prove a cable operator’s unlawful intentions would go far toward immunizing MVPDs altogether from program-carriage liability.<sup>42</sup>

Comcast also observes that the Commission has “adopted a relatively low initial burden for a program access complaint to proceed.”<sup>43</sup> That is a distinction without a difference. The program-access framework provides an appropriate model for the carriage context because it is tailored to ferreting out affiliation-based discrimination committed by vertically integrated MVPDs. The details of the initial burden imposed in those cases do not make the overall framework any less applicable. If anything, the relative stringency of the initial hurdle facing

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<sup>41</sup> Comcast Comments at 61.

<sup>42</sup> *National Communications Ass’n*, 238 F.3d at 131; *see also* HD Net Comments at 5-7 (detailing programmers’ “informational disadvantage” vis-à-vis cable operators).

<sup>43</sup> Comcast Comments at 61.

program-carriage complainants actually cuts against Comcast’s argument.<sup>44</sup> After all, courts in the employment discrimination context have expressed reluctance to shift the burden of persuasion to a defendant in part because of the “minimal” nature of the initial hurdle facing plaintiffs.<sup>45</sup> The Commission should have no such reluctance here, given that programmers bringing program-carriage complaints must initially come forward with evidence not only that they suffered differential treatment, but that their programming was similarly situated to affiliated programming favored by a defendant.<sup>46</sup> That sort of *prima facie* showing properly generates an inference of discrimination powerful enough to warrant shifting the burden of persuasion to the cable operator to justify its differential treatment.<sup>47</sup>

2. Nor does the Administrative Procedure Act (APA) preclude the Commission from harmonizing its program-access and program-carriage rules. Section § 7(c) of the APA forbids an agency only from shifting the ultimate burden of persuasion to the opponent of an order — that is, from adopting a rule providing that “when the evidence is evenly balanced the claimant wins.”<sup>48</sup> The Commission’s program access framework does no such thing. Rather, it

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<sup>44</sup> See MASN Comments at 14-15.

<sup>45</sup> *Barth v. Gelb*, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (noting that the “requirement of only a minimal *prima facie* showing . . . recognize[s] the plaintiff’s ultimate obligation to prove” the “illegality” of a defendant’s motive in employment cases)

<sup>46</sup> See *2011 Program Carriage Order and NPRM* ¶ 14 (requiring complainants to provide evidence that their programming is “similarly situated” along a series of factors); MASN Comments at 15 (noting that carriage *prima facie* showings are not merely “*de minimis*”).

<sup>47</sup> Comcast’s argument (Comments at 61) that program-access cases center on programming that the “defendant is *obligated to sell*” is similarly unavailing. Comcast offers no authority suggesting that this distinction explains the burden-shifting framework applicable in program-access cases. Moreover, vertically integrated MVPDs *do* have an “obligation to carry” unaffiliated programming on terms commensurate with their carriage of similarly situated affiliated programming.

<sup>48</sup> *Director, Office of Workers’ Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

recognizes that, where a complainant has satisfied its *prima facie* burden of demonstrating the differential treatment of its similarly situated programming, the evidence does *not* become “evenly balanced” upon the mere assertion of some neutral justification for that treatment. To the contrary, differential treatment of similarly situated programming serves as a powerful heuristic for discrimination, one that a cable operator must rebut by proving its reliance on a legitimate business justification. The APA permits such “statutory presumptions” that “eas[e] the[] burden” facing complainants.<sup>49</sup> Such presumptions comply with the APA as long as they stop short of requiring adjudicators to side with programmers where the overall “positions” of the two parties are “equiprobable.”<sup>50</sup>

Comcast has cited no case to the contrary. The D.C. Circuit decision on which it relies *upheld* a different type of evidentiary presumption, while noting in *dicta* that “agencies may . . . shift the burden of production and not the burden of persuasion.”<sup>51</sup> That statement casts no doubt on the validity of the Commission’s well-established program-access burden-shifting framework, which, as noted above, does not place the bottom-line “burden of persuasion” on a cable operator.<sup>52</sup> Moreover, the Commission has long relied on a similar burden-shifting

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<sup>49</sup> *Id.* at 280.

<sup>50</sup> *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 452-53 (8th Cir. 1997) (holding that the “burden of persuasion,” for purposes of APA § 7(c), refers only to presumptions that “affect the outcomes only of cases in which the trier of fact thinks that plaintiff’s and defendant’s positions equiprobable”) (internal quotation marks omitted); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 976 & n.14 (9th Cir. 2005) (observing that the Supreme Court’s “limited, technical holding” applying APA § 7(c) does not forbid agencies from utilizing “other procedural and interpretive techniques favoring claimants under remedial statutes”).

<sup>51</sup> *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (upholding presumption that withholding of RSN programming has an anticompetitive effect).

<sup>52</sup> *See Lovilia Coal*, 109 F.3d at 454-55.

framework in the context of economic discrimination under § 202, and the Second Circuit has upheld that framework.<sup>53</sup>

3. Finally, adoption of the program-access framework would not offend the First Amendment. Like the leased access provisions of the Cable Act,<sup>54</sup> the program-carriage rules regulate speech based not on its content but on its economic consequences.<sup>55</sup> After all, Congress’s aim in regulating carriage practices was not to suppress disfavored speech but to constrain the anticompetitive tendencies that arise from vertical integration in the cable industry. This is particularly true in the RSN context; when cable operators refuse to carry MASN’s must-have lineup of sports programming, they clearly do so in service of an economic — not ideological — agenda. Rules like the proposed burden-shifting regime that discourage such anticompetitive conduct easily survive First Amendment scrutiny.<sup>56</sup>

In addition, Comcast and TWC in particular cannot now invoke the First Amendment as an excuse to shirk their responsibilities imposed under the Commission’s merger conditions. The Supreme Court has held that, where a transaction is approved with a condition crucial to the agency’s determination that the transaction is in the public interest, a party that “consummated the merger and . . . enjoyed its benefits” cannot later “attack an officially approved condition of the merger while retaining at the same time all of its benefits.”<sup>57</sup> Neither Comcast nor TWC petitioned for review of the conditions attached to their acquisition of Adelphia (or Comcast’s

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<sup>53</sup> See *National Communications Ass’n*, 238 F.3d at 130-31.

<sup>54</sup> 47 U.S.C. § 536(a)(3).

<sup>55</sup> See *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996); see also *2011 Program Carriage Order and NPRM* ¶¶ 32-24.

<sup>56</sup> See *Cablevision*, 649 F.3d at 711 (recognizing that “promoting competition in the MVPD market . . . represents an important government interest” for the purpose of First Amendment scrutiny).

<sup>57</sup> *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 502 (1955).

merger with NBC); they are thus precluded from facially attacking the validity of the program-carriage remedies imposed. Accordingly, the cable operators' First Amendment arguments should have no bearing on cases — like MASN's pending appeal against TWC — filed pursuant to a merger condition order.

### **III. A DEFENDANT MVPD'S FAILURE TO NEGOTIATE IN GOOD FAITH WITH AN UNAFFILIATED PROGRAMMER CONSTITUTES PER SE DISCRIMINATION**

In MASN's experience, vertically integrated cable operators too often ignore carriage requests from independent programmers, or at most respond with only vague intimations of possible interest. Those techniques permit MVPDs effectively to accomplish carriage discrimination without ever issuing a formal denial. The record is replete with examples of MVPD's employing similar tactics.<sup>58</sup>

A requirement that vertically integrated MVPDs engage in good-faith carriage negotiations with unaffiliated programmers would prevent cable operators from circumventing the program carriage rules in this manner. It would also encourage parties to reach mutually satisfactory carriage arrangements without resort to expensive litigation. At the same time, requiring cable operators to provide contemporaneous reasons for their carriage decisions would foreclose them from rebuking carriage requests based on nothing more than a "gut" intuition about the demand for the programming in question.<sup>59</sup> As the Media Bureau found in MASN's case against TWC, such actions — coupled with a cable operator's failure to make any "good-

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<sup>58</sup> See MASN Comments at 6-7; Crown Media Comments at 3-4; Current TV Comments at 30; HD Net Comments at 16; *see also Tennis Channel Initial Decision* ¶ 22 (finding that Comcast's evaluation of Tennis Channel's carriage proposal was nothing more than a "ploy to shore up its defense strategy" for anticipated litigation).

<sup>59</sup> MASN Comments at 17-19.

faith investigation” into the merits of a programmer’s carriage proposal — can serve as “a pretext for discrimination.”<sup>60</sup>

A good-faith negotiation requirement would not impose an onerous burden on MVPDs. To comply with the requirement, vertically integrated MVPDs would only need to respond to a programmer’s carriage request with a reasoned counterproposal or rejection. This requirement has an established pedigree that traces back to the Commission’s retransmission consent rules, and the cable companies cannot argue that it has proved unduly burdensome in that context.<sup>61</sup> Indeed, in the case of clearly undesirable and non-similarly situated programming, like the NCTA’s hypothesized white supremacist channel,<sup>62</sup> it would be a simple matter for a cable operator to provide reasons for a denial of carriage. But what a cable operator that owns multiple RSNs could not do is respond to repeated carriage requests from an independent RSN with nothing more than an unexplained, wholly inadequate “take it or leave it” counteroffer.<sup>63</sup>

The Commission possesses ample legal authority to impose this good-faith negotiation requirement. The failure to negotiate in good faith with unaffiliated programmers constitutes discrimination on the basis of affiliation, which the Commission explicitly possesses authority to proscribe.<sup>64</sup> Moreover, the Commission’s authority extends beyond regulating the specifically

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<sup>60</sup> *Media Bureau Order* ¶ 32 n.127.

<sup>61</sup> See First Report and Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, ¶¶ 11-24 (2000).

<sup>62</sup> See NCTA Comments at 23.

<sup>63</sup> See MASN Comments at 17.

<sup>64</sup> See *2011 Program Carriage Order and NPRM* ¶ 70.

enumerated practices forbidden by the Cable Act.<sup>65</sup> Because a good-faith negotiation requirement would foreclose cable operators from concealing illegal discrimination behind justifications later invented for purposes of litigation,<sup>66</sup> it falls comfortably within the Commission's broad statutory authority.

#### **IV. CARRIAGE ORDERS SHOULD TAKE EFFECT IMMEDIATELY, UNLESS AN MVPD CAN SHOW THAT A STAY IS NECESSARY**

**A.** The Commission's current rules, which stay automatically any remedial order that would require an MVPD to "delete existing programming from its system," make discrimination more attractive to cable operators by prolonging their ability to reap the benefits of unlawful carriage denials. To delay enforcement of a carriage order, a defendant MVPD should be held to the same standards applicable to all parties seeking such a stay. Specifically, it should be required to demonstrate that (i) it is likely to prevail on the merits; (ii) it will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the granting of a stay will benefit the public interest.<sup>67</sup>

The cable operators have articulated no persuasive reason that they should be relieved from meeting these well-established requirements. Even if the deletion of programming were to implicate a cable operator's First Amendment interests,<sup>68</sup> that would demonstrate only that the cable operator might suffer "harm absent a stay." It would have little bearing, however, on whether the cable operator were likely to prevail on the merits or whether a stay would serve the

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<sup>65</sup> See 47 U.S.C. § 536(a) (providing the Commission authority to regulate "program carriage agreements and *related practices*") (emphasis added); see also MASN Comments at 24-26 (noting breadth of Commission's authority in this area).

<sup>66</sup> See MASN Comments at 18-20 (emphasizing importance of MVPDs providing *contemporaneous* justifications for their carriage decisions).

<sup>67</sup> See *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

<sup>68</sup> Cf. Comcast Comments at 52.

public interest. Indeed, delaying a carriage remedy and perpetuating illegal discrimination, merely to enable a vertically integrated cable operator to pursue a meritless appeal, serves no legitimate First Amendment interest. Eliminating the automatic stay and instead applying the Commission’s four-factor test would balance the equities appropriately while decreasing cable operators’ incentives to prolong carriage litigation.

**B.** Comcast’s legal objections to the elimination of the automatic stay have no merit. First, Comcast contends that APA § 10(c) forbids the Commission from making effective an order issued pursuant to delegated authority while also conditioning judicial review on the exhaustion of administrative appeals.<sup>69</sup> That provision, however, does not apply where, as here,<sup>70</sup> a statute expressly imposes an administrative exhaustion requirement.<sup>71</sup> Nor can it apply where, as here, Congress has explicitly declared that orders issued by a Bureau have the “same force and effect” as orders of the full Commission unless they have been “reviewed” by the Commission.<sup>72</sup>

Comcast’s argument based on the Communications Act fares no better. It observes that an order does not become effective if “reviewed” by the Commission “as provided in” paragraph 4 of section 5(c).<sup>73</sup> According to Comcast, the mere filing of an appeal triggers such “review” by the Commission and thus precludes an order from becoming effective.<sup>74</sup> This Commission, however, has long rejected that precise argument, interpreting the statutory language instead as referring to a “proceeding which has been reviewed,” not one in which there is a “mere filing of

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<sup>69</sup> *See id.* at 47-49.

<sup>70</sup> *See* 47 U.S.C. § 155(c)(7).

<sup>71</sup> *See* 5 U.S.C. § 704 (“Except as otherwise expressly required by statute . . .”).

<sup>72</sup> 47 U.S.C. § 155(c)(3).

<sup>73</sup> *Id.*

<sup>74</sup> *See* Comcast Comments at 49-51.

an application for review.”<sup>75</sup> The D.C. Circuit has squarely upheld this construction of the statute,<sup>76</sup> and the Commission just two months ago defended the same construction before the Second Circuit.<sup>77</sup> Comcast’s convoluted textual argument to the contrary cannot justify abandoning the Commission’s long-standing position.

C. Notably, not a single commenter argues that moving existing programming to a less penetrated tier constitutes the *deletion* necessary to trigger the automatic stay rule. Accordingly, if this Commission were to retain the current rule, it should clarify that a carriage order will become effective as long as a defendant MVPD can comply with the order merely by migrating existing programming to another tier.<sup>78</sup>

## V. THE COMMISSION SHOULD ADOPT ITS OTHER PROPOSALS THAT WOULD STRENGTHEN THE PROGRAM-CARRIAGE RULES

### A. Discovery

MASN and other commenters have demonstrated the need for expanded discovery procedures in program-carriage cases. Cable operators typically control the bulk of the relevant information pertaining to their carriage decisions; without access to this information, complainant programmers cannot litigate program-carriage cases effectively. In MASN’s experience, cable operators seek to exploit this information gap by obstructing programmers from receiving adequate discovery.<sup>79</sup> The Commission’s proposed automatic document production process would help level the playing field while furthering the goal of bringing

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<sup>75</sup> Memorandum Opinion and Order, *Continental Cablevision of New Hampshire, Inc.*, 96 F.C.C.2d 926, 928 (1984).

<sup>76</sup> See *Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986).

<sup>77</sup> Opp. of FCC at 16-18, *Cablevision Systems Corp. v. FCC*, No. 11-4104 (2d Cir. filed Oct. 20, 2011) (Docket No. 51).

<sup>78</sup> See MASN Comments at 27; Bloomberg Comments at 9; Current TV Comments at 29.

<sup>79</sup> See MASN Comments at 28-29.

carriage disputes to expeditious resolution.<sup>80</sup> The Commission should, however, place temporal and numerical limits on this process to prevent discovery from becoming another instrument of cable company obfuscation.

The Commission should also adopt the party-to-party discovery framework that governs program-access cases.<sup>81</sup> Complainant programmers are in the best position to identify the information necessary to prove their cases, and allowing programmers to serve requests directly on MVPDs would help combat the information asymmetry that currently characterizes program-carriage disputes.<sup>82</sup> That benefit — facilitating the sufficient flow of information between the parties — more than outweighs the cable companies’ overblown fears about inadvertent disclosure of third-party documents. Indeed, the only example in the record of an “inadvertent mistake[.]” in program-carriage discovery was a minor redaction error pertaining to one of MASN’s exhibits against TWC.<sup>83</sup> As the letter cited by Comcast indicates, the problem was quickly remedied by the invocation of normal Commission procedures.<sup>84</sup> And, in any event, the Commission is proposing adoption of a standard protective order that would minimize the likelihood of improper disclosure.<sup>85</sup>

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<sup>80</sup> *Id.* at 30; Bloomberg Comments at 14; Crown Media Comments at 10-13; HD Net Comments at 9-10.

<sup>81</sup> *See* 47 C.F.R. § 76.1003(j).

<sup>82</sup> MASN Comments at 29; Crown Media Comments at 10-11; Media Access Comments at 19-20; HD Net Comments at 5-7, 9 & n.9.

<sup>83</sup> *See* Comcast Comments at 31 n.84.

<sup>84</sup> *See* Letter from David C. Frederick, Counsel for MASN, to Marlene H. Dortch, Secretary, FCC, *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.* (Dec. 22, 2009) (requesting replacement of exhibit in public record with properly redacted version).

<sup>85</sup> *2011 Program Carriage Order and NPRM* ¶ 48.

## **B. Final-Offer Arbitration**

Program-carriage adjudicators should be required to impose a remedy derived from one of the parties' final submitted offers. As MASN and other commenters have explained, programming contracts often contain most-favored nation (MFN) clauses, which makes it imperative that programmers be able to predict the terms of any carriage remedy ultimately imposed.<sup>86</sup> Contrary to the views of some other programmers,<sup>87</sup> MASN believes that mandatory baseball-style arbitration enhances the predictability of the process, by making it less likely that an adjudicator will modify a programmer's proposed offer in a way that complicates its agreements with other distributors.

Final-offer adjudication also would incentivize the parties to provide reasonable offers and to settle their disputes.<sup>88</sup> Requiring the adjudicator to pick one of the final offers would discourage the parties from gaming the system, because if either side were to make an unreasonably draconian proposal, it would only encourage the adjudicator to accept the other side's offer. Permitting the adjudicator to combine elements of both final offers would eliminate this incentive and push the parties toward extreme proposals.<sup>89</sup> Cablevision responds by arguing that the introduction of arbitration has corresponded with rising player salaries in baseball,<sup>90</sup> but its argument fails to account for the fact that pre-arbitration player salaries were artificially

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<sup>86</sup> MASN Comments at 30-31; Current TV Comments at 32-33.

<sup>87</sup> Current TV Comments at 32-33.

<sup>88</sup> Bloomberg Comments at 7; Crown Media Comments at 14; Media Access Comments at 23.

<sup>89</sup> See MASN Comments at 31; Comcast Comments at 80-81.

<sup>90</sup> Cablevision Comments at 23.

depressed, with arbitration merely raising salaries closer to “fair market value.”<sup>91</sup> Not only that, but Cablevision cannot dispute that baseball-style arbitration has yielded a high settlement rate between players and owners, constraining costs and heading off prolonged and acrimonious grievances.<sup>92</sup> Its adoption would have similar salutary effects in the program-carriage context.

### **C. Retaliation**

MASN and other commenters also have demonstrated the need for the Commission to prohibit vertically integrated cable operators from retaliating against programmers who file a program carriage complaint.<sup>93</sup> The Commission’s current rules permit cable operators to retaliate with impunity against independent programmers, so long as the retaliation takes some form other than narrow carriage discrimination against similarly situated programming. Such retaliation frustrates the purpose of the Commission’s rules by dissuading independent programmers from availing themselves of those rules. Accordingly, the Commission should provide that any adverse action taken against a complainant programmer within two years of a complaint constitutes *prima facie* evidence of illegal retaliation. The record does not support fears that this rule will spawn frivolous complaints, which are, after all, already forbidden by this Commission.<sup>94</sup>

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<sup>91</sup> Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 Marquette Sports L. Rev. 109, 132 (2009).

<sup>92</sup> *See id.* at 131 (noting that 97% of players who filed for arbitration in 2009 “resolved their differences through negotiated settlement”).

<sup>93</sup> *See* MASN Comments at 22-26; Bloomberg Comments at 15-17; Crown Media Comments at 6-8; Current TV Comments at 13-14; HD Net Comments at 10-12; Media Access Comments at 15.

<sup>94</sup> *See* 47 U.S.C. § 536(a)(6); 47 C.F.R. § 76.6(c).

#### **D. Damages**

This Commission should likewise make monetary damages available to an injured programmer who has suffered illegal carriage discrimination.<sup>95</sup> Without damages, illegal discrimination carries little downside for cable operators, who pay no price for (but benefit greatly from) prolonging carriage denials as long as possible. By making discrimination more costly for cable operators, a damages remedy would deter those operators from flouting the program-carriage rules in the first place.

#### **E. Statute of Limitations**

The Commission should *not* adopt its proposed limitations period that would run inflexibly for one year from “the act that allegedly violated the program carriage rules.”<sup>96</sup> That rule would deprive programmers of clear notice of when their claims accrue, because cable operators often string out carriage negotiations in a manner that obscures the moment at which the statutory “violation” actually takes place.<sup>97</sup> Statutes of limitations need to be clearly defined, so that all parties know when they must exercise their rights.<sup>98</sup> Accordingly, any limitations rule should emphasize that claims accrue only once discrimination is reasonably apparent to an aggrieved programmer.

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<sup>95</sup> MASN Comments at 28; Bloomberg Comments at 10-11; Current TV Comments at 27-28; HD Net Comments at 16-17.

<sup>96</sup> *2011 Program Carriage Order and NPRM* ¶ 39.

<sup>97</sup> MASN Comments at 20-21.

<sup>98</sup> *See Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (overruled on other grounds) (“Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.”) (internal quotation marks omitted).

## VI. THE COMMISSION'S PROPOSED RULES DO NOT VIOLATE THE PAPERWORK REDUCTION ACT

The Commission's proposed reforms comply with the Paperwork Reduction Act ("PRA"). To comply with the PRA, an information collection requirement need only possess sufficient "practical utility" so that it is "necessary for the proper performance" of the Commission's functions.<sup>99</sup> The Commission's discovery proposals — which would go far toward "ensur[ing] the expeditious resolution" of program-carriage complaints — easily satisfy this standard.<sup>100</sup> Although Comcast asserts generically that the proposed rules would impose "massive paperwork burdens on industry,"<sup>101</sup> it isolates no specific proposal that would run afoul of the PRA, nor does it attack the burden estimates already calculated by the Commission.<sup>102</sup> Those estimates found the total annual cost of the reforms to be less than two million dollars,<sup>103</sup> a figure which pales in comparison to the cost imposed on programmers and consumers by illegal carriage discrimination.<sup>104</sup> Moreover, by providing "clear guidance" to MVPDs and programmers alike on the information necessary to adjudicate program-carriage disputes in an

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<sup>99</sup> 44 U.S.C. § 3506(c)(3)(A).

<sup>100</sup> *2011 Program Carriage Order and NPRM* ¶ 41.

<sup>101</sup> *See* Comcast Comments at 81-82.

<sup>102</sup> *See* Review of the Commission's Program Carriage Rules, MB Docket No. 11-131, 76 Fed. Reg. 60675, 60675-76 (2011).

<sup>103</sup> *Id.* at 60676.

<sup>104</sup> *See* Bloomberg Comments at 21-22 (stating that carriage denials can "threaten the very existence of an independent programmer"); *Amicus Br.* at 10-12 (noting that carriage discrimination depresses competition for MLB programming rights); *see also* Hal J. Singer and J. Gregory Sidak, *Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators*, 6 Rev. Network Econ. 348 (2007) (describing how vertical foreclosure results in higher prices and less consumer choice).

expeditious manner, the proposed rules actually advance the purpose of the PRA.<sup>105</sup> That conclusion is reinforced by the proposed information collection requirements largely deriving from well-established procedures already followed by the Commission in other contexts.<sup>106</sup>

## CONCLUSION

The Commission should adopt rules consistent with MASN's proposals, set forth above.

Respectfully submitted,

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January 11, 2012

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<sup>105</sup> Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Sections 716 and 717 of the Communications Act of 1934, As Enacted By the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 14557, ¶ 323 (2011).

<sup>106</sup> See 2011 Program Carriage Order and NPRM ¶ 43 (modeling party-to-party discovery proposal on program-access rules), ¶ 44 (modeling automatic document production proposal on comparative broadcast rules).