

**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

**COMMENTS OF MEDIA ACCESS PROJECT
AND PUBLIC KNOWLEDGE**

Chrystiane Pereira
Andrew Jay Schwartzman

MEDIA ACCESS PROJECT
1625 K Street NW
Washington, DC 20006
(202) 232-4300

Harold Feld
Jodie Griffin

PUBLIC KNOWLEDGE
1818 N Street, NW, Suite 410
Washington, DC 20036
(202) 861-0020

November 28, 2011

TABLE OF CONTENTS

SUMMARY ii

I. INTRODUCTION..... 1

II. CONGRESS ENDOWED THE COMMISSION WITH BROAD POWERS UNDER SECTION 616 TO PROTECT THE PUBLIC’S INTEREST IN COMPETITION AND DIVERSITY IN CABLE PROGRAMMING..... 4

III. THERE IS A CONTINUED NEED IN THE VIDEO PROGRAMMING MARKETPLACE FOR A FAIR, EFFECTIVE, AND EFFICIENT PROGRAM CARRIAGE COMPLAINT PROCESS. 7

IV. THE COMMISSION SHOULD EXPLICITLY PROHIBIT DISCRIMINATION AGAINST UNAFFILIATED PROGRAMMERS IN FAVOR OF PROGRAMMERS AFFILIATED WITH COMPETING MVPDS. 11

V. THE COMMISSION SHOULD IMPOSE A SHOT CLOCK WITHOUT AN ALJ EXTENSION..... 13

VI. THE COMMISSION SHOULD ADOPT THE PROGRAM ACCESS DISCRIMINATION FRAMEWORK FOR ALLOCATING THE BURDEN OF PROOF IN CABLE CARRIAGE DISPUTES..... 15

VII. THE COMMISSION SHOULD EXPEDITE DISCOVERY THROUGH A STANDING ORDER, REASONABLE LIMITS, AND OVERSIGHT. 18

VIII. THE COMMISSION CAN AND SHOULD ADOPT A STANDSTILL REQUIREMENT..... 20

IX. THE PARTIES SHOULD BE SUBJECT TO BASEBALL-STYLE ARBITRATIONS..... 22

X. THE PROGRAM CARRIAGE RULES SHOULD PROTECT COMPETITION AND DIVERSITY IN ONLINE VIDEO. 23

CONCLUSION 25

SUMMARY

With the 1992 Cable Act, Congress prescribed an antidote against the ecosystem harms caused by powerful cable programmers that acted to maximize their own wealth at the public's expense. By endowing the FCC with authority to regulate program carriage practices, Congress intended that competition thrive in negotiations between MVPDs and independent vendors and encourage entrance by new programmers. Thereby, the public would receive not only the economic benefit of competition but also gains in the number of media voices and viewpoints.

Consistent with Congress' intent, the Commission promulgated rules to prevent vertically-integrated multichannel video programming distributors (MVPDs), which acted both as part-owners of affiliated programmers and as gatekeepers between independent programmers and home viewers, from placing their own interests above the public's interest in access to a broad and diverse range of content, services and viewpoints. Unfortunately, the Commission's previous attempt to establish rules to promote competition and more diverse program offerings did not have the intended effect. MVPDs were able to take advantage of gaps in the rules, in a manner benefitting their own programming and harming competition and diversity. Moreover, lax and delayed enforcement of the rules added to the growing sentiment among video programming vendors that pursuing a program carriage complaint would be a moot point. The recent revisions of the program carriage rules, combined with the proposals in the NPRM, do much to reconcile the rules regime with Congressional intent. Media Access Project and Public Knowledge commend the Commission for taking action to protect the

public's interest in competition and diversity in cable programming and further to that end, propose several suggestions and modifications to the new rules.

To satisfy its Congressional mandate, the Commission's program carriage rules should promote a fair, effective, and efficient complaint process. The current complaint process can be very long and expensive to pursue - many recent complaints have taken several years to reach any resolution. The Commission should adopt in the program-carriage context the same evidentiary presumption adopted in the program-access context. The same rationale underlies both sets of rules: the need to prevent vertically-integrated MVPDs from engaging in discriminatory, exclusionary, and anti-competitive practices. Media Access Project and Public Knowledge also support reforming the adjudicatory process by imposing a shot clock and establishing discovery standards and limits. Together with standstill orders, which ensure that the programming in question maintains carriage throughout the process, and baseball-style arbitrations, which encourage the submission of reasonable offers by both parties, these changes can provide the expedited review envisioned by the Cable Act and alleviate the potential harms to viewers. Finally, the Commission may prevent further harms to the public's interest in cable diversity and competition by explicitly prohibiting discrimination against video programming vendors based on affiliation and taking action to protect the burgeoning online video market against related anticompetitive practices in program carriage agreements.

COMMENTS OF MEDIA ACCESS PROJECT AND PUBLIC KNOWLEDGE

Media Access Project and Public Knowledge (jointly “Public Interest Counsel”) submit these comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking, released August 1, 2011,¹ to conduct a critical reexamination of the Commission’s rules protecting the public’s interest in diverse program carriage offerings under Section 616.

I. INTRODUCTION

Public Interest Counsel represent the viewing public. Under the First Amendment, “[i]t is the right of the viewers and listeners...which is paramount.”² The viewers are the intended beneficiaries of the program carriage regime, per the stated Congressional intent to “assure that cable systems are responsive to the needs and interests of the local community,”³ and “provide the widest possible diversity of information sources and services to the public.”⁴ Accordingly, Public Interest Counsel applaud the Commission’s accomplishments with its Second Report and Order⁵ and the further improvements proposed in its most recent Notice of Proposed Rulemaking.⁶ Promoting a fair and effective program carriage complaint process that encourages negotiations and quick resolutions in carriage disputes best meets the twin Congressional

¹ *Revision of the Commission’s Program Carriage Rules*, MB Docket No 11-131, Notice of Proposed Rulemaking, *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42, Second Report and Order, 26 FCCRcd 11494 (2011) (hereinafter “NPRM”).

² *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

³ 47 USC §521(2).

⁴ 47 USC §521(4).

⁵ NPRM ¶¶8-36.

⁶ *Id.* ¶¶37-81.

goals to promote competition and diversity in the video programming and distribution marketplace.⁷ This purpose in turn fits into Congress’s overall intent to “assure that cable systems are responsive to the needs and interests of the local community”⁸ and encourage “cable communications . . . to provide the widest possible diversity of information sources and services to the public.”⁹

To effectuate its goals, Congress endowed the Commission with broad regulatory powers over the program carriage process. The Commission crafted rules intended to meet its Congressional mandate, and promote competition and diversity in programming offerings. Unfortunately, in practice, the rules have not operated as intended, but rather were susceptible to exploitation by multichannel video programming distributors (MVPDs) seeking to advantage their own programming over potential and actual competitors. Lax and delayed enforcement of the rules, together with the rules’ failure to contemplate that interim relief can be granted in program carriage cases even given initial rulings against a given MVPD and in favor of a complainant, created the perception that availing oneself of the right to pursue carriage complaints did no good. Beyond this, retaliation from MVPDs further promoted the concern among independent programmers that a carriage complaint, in fact, only could harm their cause.

Other evidence suggested that the carriage complaint process may have been frustrating its intended effects. In 2007, the Commission admitted that diversity – and

⁷ See NPRM ¶1; *Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCCRcd 2642, 2642 (1993); *Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCCRcd 4415, 4415 (1994).

⁸ 47 USC §521(2).

⁹ 47 USC §521(4).

competition – in the video programming market remained below the level that Congress intended when it passed the 1992 Cable Act.¹⁰ That same year, in the important category of programming addressing the interests of racial and ethnic minorities, a study found “[a]lthough the number of minority-targeted programs is large, they only get about 8.4 percent of the carriage on cable systems. Moreover, 44 networks [then] owned in whole or in part by large broadcast and cable entities account for over two-thirds (69 percent) of that carriage.”¹¹ Concerning placement, the same study revealed that MVPDs placed only one-sixth of those minority-targeted programmers in the expanded basic tier, and charged consumers who wanted to gain access to the vast majority of minority-targeted programming increases in cable cost between \$15 and \$50.¹²

The relevance of the program carriage rules, and the need for a fair and effective process, only have increased with the prominence of vertically integrated MVPDs and their dominion over today’s video programming marketplace. With this NPRM, the Commission moves one step beyond acknowledging the rules’ failings to recognizing that something can and must be done to improve competition and diversity in video programming. Significantly, the Commission attempts to abate fears of retaliation and

¹⁰ *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCCRcd 15783 (2008) at ¶49, n 199 (citing to FCC decision subsequently affirmed by *Cablevision Systems Corp., et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010)) .

¹¹ Further Comments of Consumers Union, Consumer Federation of America and Free Press, filed in 2006 Quadrennial Regulatory Review, MB Docket No. 06-121, at 313 (2007) (excerpt from Adam Lynn & Mark Cooper, *Minority Programming: Still At the Back of the Bus* (2007)) .

¹² *Id.* at 315-16. “Moreover, five networks, three owned by broadcasters and one by a major cable programmer, account for 80 percent of the carriage in the basic tier.” *Id.* Thus the study confirms the tendency by MVPDs to favor their affiliates where programming with potentially more limited appeal is concerned.

address the skepticism regarding its interest in protecting independent programmers, by enacting protections for victims of discrimination and otherwise promoting streamlined negotiations and resolution of any complaints. Thereby, the Commission takes substantive measures toward rectifying a regime that has failed to meet Congressional intent to promote competition and diversity on behalf of television viewers.

Public Interest Counsel commend the Commission for proposing to eradicate several of the barriers standing between the viewing public and differing and diverse sports, entertainment and news programming, and respectfully submit several suggestions in response to the Commission's request for related comments. They urge the Commission to prohibit explicitly MVPDs from favoring video programmer vendors affiliated with competing MVPDs over unaffiliated vendors under the discrimination provision of the program carriage statute.¹³ Rules securing the viability of independent programmers against bad-faith discrimination may promote their growth into stronger competitors. Further toward improving competition in the marketplace, we ask the Commission ensure that anticompetitive practices in program carriage agreements do not hamper the burgeoning online video market. These actions are vital to protecting valuable independent programming from anticompetitive conduct and encouraging a vibrant and diverse online video marketplace.

II. CONGRESS ENDOWED THE COMMISSION WITH BROAD POWERS UNDER SECTION 616 TO PROTECT THE PUBLIC'S INTEREST IN COMPETITION AND DIVERSITY IN CABLE PROGRAMMING.

Balanced competition leads to a better overall product for consumers. Moreover, greater competition in the cable industry can lead to lower prices for consumers and a

¹³ See 47 USC §536(a)(3).

wider range of choices. So concluded Congress at the time of its passage of the 1992 Cable Act when it prescribed an antidote against the ecosystem harms caused by powerful cable programmers acting to maximize their own benefit at the public's expense. In no uncertain terms, Congress stated its finding of fact that "[t]he cable industry has become vertically integrated," giving cable operators "the incentive and ability to favor their affiliated programmers,"¹⁴ and instructed the Commission to establish regulations to prevent that incentive and ability from imposing an unreasonable restraint upon fair competition.¹⁵ Congress intended that competition thrive in negotiations between MVPDs and independent vendors and encourage entrance by new programmers, compounding the public's benefit from competition with gains in the numbers of media voices and viewpoints available to consumers.¹⁶

The plain language of Section 616 gives the Commission broad power to create prophylactic rules and adjust its adjudication as may be necessary to address the reality of MVPDs' market power against independent programmers. Congress recognized that MVPDs can dictate terms of carriage through their essential ownership of the customer.¹⁷ Congress further recognized that discriminatory effects harm the public regardless of their benign causes, and that programmers (and the Commission) may be incapable of establishing whether a given MVPD's refusal to carry independent programming resulted

¹⁴ 1992 Cable Act §2(a)(5).

¹⁵ 47 USC §536(a)(3).

¹⁶ 1992 Cable Act §2(b), §2(a)(4)-(6).

¹⁷ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, §2(a)(2), (4)-(5); S. REP. 102-92, "Cable Television Consumer Protection Act of 1991," at 8-9, 23-29 (1991).

from improper exercise of market power or simply arms' length negotiations.¹⁸

Accordingly, Congress crafted a statute giving the Commission wide berth to

prevent a multichannel video programming distributor from engaging in conduct *the effect of which* is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection of terms or conditions for carriage of video programming provided by such vendors.

Section 616(a)(3)(emphasis added). To address the effect of power abuses by vertically-integrated MVPDs upon the public,¹⁹ Congress directed the Commission to “establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors.”²⁰ The point of the statute was to address a “conduct[’s]” “effect,”²¹ regardless of whether a gatekeeper acted with malevolent intent. Indeed, one of the co-sponsors of the 1992 Cable Act, then-Senator Gore, presented the legislation as Congress’ attempt to prevent “decent, honorable entrepreneurs” “simply trying to maximize profits” from caving into the temptation to take advantage of their market strength.²² Accordingly, it should suffice that the MVPD made a cable carriage decision that treats an independent operator differently from an affiliate with regards to terms or

¹⁸ *Id.* at 24, 28.

¹⁹ *1992 Cable Act* §2(a)(5). *See also id.* §2(a)(4); 138 CONG. REC. S754 (daily ed. Jan. 31, 1992)(statement of Sen. Lieberman, co-sponsor of the 1992 Cable Act, to the effect that the situation where multisystem cable operators controlled two thirds of cable’s most popular programming “directly harmed the ability of any potential competitors to enter the market, provide an alternative to consumers, and create pressure to lower prices,” because it led to discrimination.).

²⁰ 47 USC §536.

²¹ *See* 47 USC §536(a)(3).

²² 138 CONG. REC. S427 (daily ed. Jan. 27, 1992).

conditions for carriage, the effect of which is to restrain unreasonably the ability of that unaffiliated programmer to compete fairly.

III. THERE IS A CONTINUED NEED IN THE VIDEO PROGRAMMING MARKETPLACE FOR A FAIR, EFFECTIVE, AND EFFICIENT PROGRAM CARRIAGE COMPLAINT PROCESS.

In determining what rules to adopt in furtherance of that Congressional mandate, the Commission opted for restraint. Uncertain of what market changes would take place in the wake of the 1992 Act, the Commission optimistically limited the scope of its Section 616 rules to allow for fact-based, case-by-case determinations that deferred to what it envisioned would be vigorous, fair marketplace negotiations leading to greater availability of programming to the multichannel video marketplace.²³

Unfortunately, the present marketplace is not susceptible to characterizations of fairness. Instead, stronger cable operators increasingly favor programming affiliated with cable operators, while independent programmers increasingly struggle to secure carriage on terms that cannot provide the kind of long-term viability that may enable vigorous, arms' length negotiations.

The video programming market still needs program carriage rules that are affordable and fair to all to encourage a vibrant video programming ecosystem. Recent and ongoing program carriage disputes continue to demonstrate that asserting a program carriage complaint is a lengthy and expensive process. Before programmers can be expected to utilize the program carriage complaint process, they must be assured that the

²³ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCCRcd 2642, 2643, 2648-49 (1993).

system will operate fairly and efficiently, and “[s]peedy resolution of disputes is critical”²⁴ to programmers who are being denied carriage or lack sufficient resources to support an expensive and protracted complaint process. Programmers that expect a program carriage complaint to be too burdensome or drawn-out will be dissuaded from utilizing the system at all. In addition, newly vertically integrated MVPDs have increased opportunity and incentive to discriminate against independent programmers, making programmers even more reliant on a fair and effective program carriage complaint process.

Recent and ongoing program carriage complaints demonstrate that the length and expense of the complaint process has likely discouraged programmers from bringing even meritorious complaints. Since their enactment eighteen years ago, not one programmer has obtained redress under the program carriage rules, and complaint proceedings have been consistently long, expensive affairs for the parties involved. For example, in Herring Broadcasting, Inc.’s (“WealthTV”) complaint against Comcast, WealthTV waited 20 months for the Media Bureau’s Hearing Designation Order,²⁵ another year for the Administrative Law Judge’s Recommended Decision,²⁶ and an additional 20 months for the Media Bureau’s ruling on its exceptions to the Recommended Decision.²⁷ WealthTV filed a timely Petition for Reconsideration,²⁸ but

²⁴ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession)*, Statement of Commissioner Robert M. McDowell, 21 FCCRcd 8203, 8383 (2006).

²⁵ *See Herring Broadcasting Inc., d/b/a WealthTV, et al.*, 23 FCCRcd 14787 (2008).

²⁶ *See Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, 24 FCCRcd 12967 (2009).

²⁷ *See Herring Broadcasting Inc., d/b/a WealthTV, et al.*, 26 FCCRcd 8976 (2011).

withdrew the petition 3 months later, before the Commission had acted upon it and almost 3.5 years after the original complaint was filed.²⁹ Similarly, the Media Bureau took 10 months to issue a Hearing Designation Order in response to a program carriage complaint filed by the Tennis Channel.³⁰ Even under an expedited discovery and procedural schedule,³¹ 23 months after the filing of the complaint, the case remains unresolved. Most recently, Bloomberg L.P. filed a program carriage complaint 5 months ago,³² on which the Media Bureau has yet to rule or issue a Hearing Designation Order.

While proceedings like these are burdensome enough on established independent video programming vendors, for upstart video programmers they are crippling. Young upstart video programmers simply do not have two years and a million dollars to spend on obtaining fair consideration by MVPDs. Public Interest Counsel are optimistic that the Commission's recent rulemaking³³ will make important strides toward fixing the program carriage complaint process, and urge the Commission to be mindful of the continued need for fair and efficient procedures.

²⁸ See Petition for Reconsideration of Herring Broadcasting Inc., *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, MB Docket No. 08-214 (July 13, 2011).

²⁹ See Notice of Withdrawal of Petition for Reconsideration of Herring Broadcasting Inc., *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, MB Docket No. 08-214 (Oct. 7, 2011).

³⁰ See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, 25 FCCRcd 14149 (2010); *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Program Carriage Complaint, MB Docket No. 10-204 (filed Jan. 5, 2010).

³¹ See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Order, MB Docket No. 10-204 (ALJ, rel. Dec. 9, 2010).

³² See *Bloomberg L.P. v. Comcast Cable Communications, LLC*, Complaint, MB Docket No. 11-104 (filed June 13, 2011).

³³ *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 26 FCCRcd 11494 (2011).

In a landscape with more vertically integrated MVPDs, a vertically integrated MVPD has both increased incentives to discriminate against competing video programmers and increased opportunities to discriminate in more subtle ways. Since the vertically integrated MVPD owns video programming that directly or indirectly competes with that of an independent programmer, the MVPD has motivation to discriminate against competing programming. However, a vertically integrated MVPD also has the incentive to hinder new entrants to the video programming market altogether, because disruptive video programming vendors will compete with the MVPD as it sells programming to other MVPDs. As a result, a vertically integrated MVPD has a financial incentive to discriminate against independent programmers, even if their programming is not significantly similar to the MVPD's programming. Thus, the dynamics of today's video programming market demonstrate that the need for fair, effective program carriage rules is greater than ever before.

The Commission wisely has acknowledged that these times call for measures that more adequately meet its Congressional mandate, and better aim to protect competition and engender diversity in a video programming marketplace in which MVPD discrimination is both real and damaging to the public interest. As it proposes, the Commission can readjust the rules to achieve the goals of competition and diversity intended by Congress. Further to that end, Public Interest Counsel also support changes to the following effect:

1. *Prohibiting Discrimination in Favor of Programmers Affiliated with Competing MVPDs;*
2. *Imposing a Shot Clock Without an ALJ Extension;*
3. *Adopting the Program Access Discrimination Framework for Allocating the Burden of Proof;*
4. *Expediting Discovery Through a Standing Order, Limits and Oversight;*
5. *Extending Carriage Terms Via a Standstill;*
6. *Subjecting Parties to Baseball-Style Arbitrations; and*
7. *Protecting Competition and Diversity in Online Video.*

IV. THE COMMISSION SHOULD EXPLICITLY PROHIBIT DISCRIMINATION AGAINST UNAFFILIATED PROGRAMMERS IN FAVOR OF PROGRAMMERS AFFILIATED WITH COMPETING MVPDS.

Section 616(a)(3) of the Communications Act is best interpreted to prohibit vertically integrated MVPDs from discriminating on the basis of a programming vendor's lack of affiliation, either with that MVPD or with another MVPD.³⁴ Such an interpretation comports both with the text of Section 616 and with Congress's intent in enacting the Cable Television Consumer Protection and Competition Act of 1992.

The plain text of Section 616(a)(3) prevents "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors . . ." and neither requires nor implies that the favored vendor must be affiliated with the discriminating MVPD, as opposed to another MVPD. Rather, the critical question in a discrimination claim is whether an MVPD made a carriage decision based on the programming vendor's affiliation, or lack thereof, with any MVPD, instead of the video programming's value to the MVPD's customers. This prevents MVPDs from mutually

³⁴ See *id.*; NPRM ¶ 72.

agreeing to prefer each other's affiliated programming over unaffiliated vendors' programming. In addition to being the most logical reading of the statute's text, this interpretation comports with congressional intent to protect competition and diversity in the video programming marketplace.

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 to:

“(1) promote information diversity; (2) rely on the marketplace, to the maximum extent; (3) ensure that cable systems can continue to grow and develop; (4) protect consumers by regulating where effective competition does not exist as a substitute for market forces; and (5) ensure that consumers and programmers are not harmed by undue market power.”³⁵

When enacting the legislation, Congress explicitly expressed concern about “undue market power for the cable operator as compared to that of consumers and video programmers,” in a “dominant nationwide video medium.”³⁶ Congress noted that concentration in the cable industry had created “barriers to entry for new programmers and a reduction in the number of media voices available to consumers.”³⁷ Concentration of resources and market share increases MVPDs' ability to leverage their positions as gatekeepers to prevent competition between video programming vendors. Independent programmers are clearly denied a fair opportunity to enter the marketplace if MVPDs give preference to their own affiliated programming, but independent programmers are equally harmed when MVPDs make a private deal to discriminate against unaffiliated programmers in favor of each other's affiliated programming. Either way, the independent programmer is denied even a seat at the negotiating table, much less a fair

³⁵ H.R. REP. NO. 102-862, at 51, 58 (Conf. Rep.).

³⁶ *Id.* at 56.

³⁷ *Id.*

opportunity to compete with other, better connected, video programming vendors. The Commission should protect competition and discourage exclusionary MVPD interactions by implementing a complete and robust interpretation of the Section 616 discrimination prohibition.

V. THE COMMISSION SHOULD IMPOSE A SHOT CLOCK WITHOUT AN ALJ EXTENSION.

We agree that establishing deadlines for the program carriage complaint process “will help to resolve disputes quickly and efficiently and thus fulfill [the] statutory mandate to ‘provide for expedited review’ of program carriage complaints.”³⁸ However, we disagree that ALJs need be involved as an adjudicator, and are concerned that such involvement in fact will undermine the goal of expedited review.

The Commission proposes that, post-discovery, “if the Media Bureau determines that disposition of the complaint or discrete issues raised in the complaint requires resolution of factual disputes or other extensive discovery in an adjudicatory proceeding, the Media Bureau will refer the proceeding or discrete issues arising [therein] for an adjudicatory hearing before an ALJ.”³⁹ The Commission proposes an additional 240-calendar-day clock, which does not begin running until after a party elects not to pursue ADR or the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR (given 10 calendar days for such election), for the ALJ’s initial decision (as against the 60+60 calendar day Media Bureau deadline, or the 60+150 calendar days proposed for Bureau cases involving discovery).⁴⁰ The Commission suggests

³⁸ NPRM ¶19.

³⁹ *Id.* ¶21.

⁴⁰ *Id.*

furthermore that ALJs may not be held even to that deadline insofar as it will not affect their performance appraisals.⁴¹

The Commission's proposal already allows for the parties jointly to request tolling for any reason upon which they may agree, and for the adjudicator *sua sponte* to toll the deadline out of fairness or due process concerns.⁴² Certainly if the case requires extended discovery or settlement is imminent, the parties or the Bureau will toll the deadline, no ALJ necessary. Moreover, as the Commission acknowledges, the Office of Administrative Law Judges has scant adjudicatory resources – indeed the Commission proposes that the 240-day extension itself may be tolled “in light of the adjudicatory resources available at the time in the [ALJ Office].”⁴³

This ALJ toll provides no assurance that complaints will be heard in a timely manner. On the contrary, it ensures that independent channels will be discouraged from undertaking the difficult and risky program carriage complaint process. Because of their comparatively greater resources, MVPDs currently have the incentive to drag out procedures in a way that is detrimental to independent programmers. Under the proposed ALJ framework all an MVPD need do to at least double the timeframe for resolution is raise the likelihood of extensive discovery, which it easily can do given it holds all the relevant documents bearing on its rationale regarding carriage. In no way will this scenario be conducive to the Commission's compliance with its Congressional mandate to ensure expedited review. To the extent otherwise, it will needlessly distract the Commission's substantially diminished ALJ resources (presently it has one ALJ) away

⁴¹ *Id.*

⁴² NPRM ¶23.

⁴³ *Id.*

from the more dramatic issues before the Commission, such as its review of mergers. Time is money. Particularly for parties that are time-limited in the first place, adding an ALJ will reduce the value of any eventual award. Faced with potentially being deprived of half its remedy, combined with the real risk of retaliation by MVPDs, no rational, wealth-maximizing, independent programmer would want to file. It is the public that stands to suffer most from a system that discourages independent and diverse offerings by rendering them too expensive to propose. Thus, while Public Interest Commenters commend the Commission for proposing a shot clock, they urge against delegation to an ALJ, which is certain to add exponentially more time and cost to the complaint resolution process.

VI. THE COMMISSION SHOULD ADOPT THE PROGRAM ACCESS DISCRIMINATION FRAMEWORK FOR ALLOCATING THE BURDEN OF PROOF IN CABLE CARRIAGE DISPUTES.

The Commission seeks comment on two alternative frameworks for assigning the burden of proof after a *prima facie* determination.⁴⁴ Under the program access discrimination framework, the burdens of production and persuasion shift to the defendant to establish a non-discriminatory reason for its carriage decision.⁴⁵ Under the intentional discrimination framework, only if the complainant establishes a *prima facie* violation using direct (rather than circumstantial) evidence do the burdens of production and persuasion shift to the defendant to show that the carriage decision would have been

⁴⁴ *Id.* ¶¶79-81. A complainant still would bear the burden of establishing a *prima facie* case of a program carriage violation, which the Commission proposes be kept under any rules revision. *Id.* ¶¶9-17. Per the Commission's rules revision, the Media Bureau then would have 60 days to make its determination of whether the complainant carried that burden. *Id.* ¶20.

⁴⁵ *Id.* ¶80.

the same without affiliation considerations.⁴⁶ Should a defendant meet that burden, the complainant then would bear the burden of showing that the non-discriminatory reasons are pretextual.⁴⁷ Public Interest Counsel believe that the program access discrimination framework as described by the Commission in this NPRM is most consistent with the statutory scheme of Section 616, its underlying policy objectives and legislative history, and the public's interest in media diversity through greater competition.

The legislative history indicates the drafters intended Section 616 to work in concert with Section 612, Section 613 (channel occupancy limits and horizontal ownership limits) and Section 628 (program access).⁴⁸ Furthermore, the Commission has noted the “important parallels between the program access and program carriage regimes, inasmuch as both are based on concerns with the impact of vertical integration on competition in the video distribution and video programming markets.”⁴⁹

The ease with which vertically-integrated MVPDs could hide discriminatory motive was a subject of the Floor Debate, suggesting that the regime Congress envisioned for program carriage complaints would not facilitate such gamesmanship by placing the burden of proving discrimination upon the complainant.⁵⁰ As one of the co-sponsors of the 1992 Cable Act, Senator Gore set the stage for the floor debate with an example of the harms of concentrated power in the hands of a few cable companies, which he termed

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See* S. REP. 102-92, at 23.

⁴⁹ NPRM ¶25, n.100.

⁵⁰ *See* NPRM ¶14, n.54 (citing, *inter alia*, Outdoor Channel letter noting that “the only evidence of discriminatory intent [] is found only in the control of an MVPD.”).

a “brilliant exploitation of monopoly pricing power and loopholes.”⁵¹ At issue was Tele-Communications Inc.’s (TCI, then the nation’s largest cable TV company) apparent manipulation of tiering to weaken the nonaffiliated Learning Channel, leading up to its purchase thereof on behalf of the Discovery Channel, a TCI affiliate. According to one public account of the purchase, in danger of being outbid, TCI cited quality concerns and dropped the channel on TCI cable systems. Having foreclosed the channel from one third of its total subscribers, TCI prompted a loss in interest from other potential buyers, and then snapped it up for a lower price. Following its purchase, TCI decided the programming was worth keeping for a larger number of subscribers after all.⁵²

The Learning Channel anecdote is a perfect example of discrimination that could go completely unchecked with the burden on the complainant. All of the evidence at issue per the presentation on the Senate floor was circumstantial, and all of the documents bearing on TCI’s rationale in dropping the channel, purchasing it, and then elevating it would be under TCI’s custody and control. That complaint, even now with rules in place to address precisely its situation, could fail or be dropped due to the expense that protracted discovery and confidentiality battles can entail at an incentivized MVPD’s election. While burden shifting (and, as discussed *infra*, improving the discovery process) may not ferret out all the negative actors, it can go a long way toward encouraging victims of such activity to file a complaint. Thus the Commission may better promote diversity and competition in cable TV offerings, and meet its Congressional mandate, by minimizing the burden upon those with few resources and

⁵¹ 138 CONG. REC. S423 (daily ed. Jan. 27, 1992).

⁵² *Id.* at 426, 430.

limited access to evidence and placing it where it belongs – upon the gatekeeper, vertically-integrated MVPD.

VII. THE COMMISSION SHOULD EXPEDITE DISCOVERY THROUGH A STANDING ORDER, REASONABLE LIMITS, AND OVERSIGHT.

The Commission also seeks comment on whether to adopt expanded discovery procedures, *i.e.*, procedures in addition to the Media Bureau’s current ability to order discovery under 47 C.F.R. §76.7(f). Specifically, as with the placement of the burden of proof, the Commission queries as to the propriety of adopting procedures similar to those in place for program access cases.⁵³ The Commission queries as to the wisdom of various measures, including requiring the defendant to provide as part of its answer any document expressly referenced or relied upon in asserting a defense or responding to a material allegation.⁵⁴ This requirement is sensible and in no way would lead to overbroad requests or extended disputes – on the contrary, it would further hasten resolution, potentially by narrowing the scope of any additional discovery. The same may be said for the other changes the Commission proposes.

It is more efficient and faster, not to mention a better allocation of the Commission’s resources, to allow the parties to serve requests for discovery directly on each other, and only require the attention of the Media Bureau in the event of disputes, rather than tax the Bureau with conducting discovery through letters of inquiry or document requests. *Id.* A standing discovery order, accompanied by a standard protective order, also would serve the twin goals of administrative efficiency and prompt

⁵³ See NPRM ¶42.

⁵⁴ *Id.*

complaint resolution. With an automatic document production rule as proposed,⁵⁵ the parties know before filing or responding to a complaint what documents they will be expected to produce, and thus may identify those documents – and informally resolve any potential disputes over their confidentiality or relevance – in advance of the discovery deadlines. Subsequently, the parties’ requests upon one another would be narrowly tailored to meet gaps in the original production or answer questions prompted thereby. Combining an overarching standard order with provisions allowing limited additional discovery would ensure adequate opportunity for the adjudicator and the parties to understand the course of the negotiations and the fair market value of a given programming alternative comparative to affiliated programming, as well as the resolution of complaints within a reasonable, cost-effective timeframe.

The Commission further may expedite the discovery phase by imposing numerical and temporal limits on discovery requests and requiring collaboration on the discovery plan,⁵⁶ as these provisions would discourage abusive discovery by requiring the parties to focus their requests on material, disputed issues. Parameters governing confidentiality, as the proposed standard protective order could do,⁵⁷ would ensure that certain basic protections are not up for dispute, and that discovery moves more expeditiously toward the set deadlines for dispute resolution.

To enforce discovery obligations while minimally expending the Commission’s resources and time, it is only reasonable to attach serious consequences to the failure to meet discovery obligations, including an order in accordance with the complaint’s

⁵⁵ *Id.* ¶¶44-47.

⁵⁶ *Id.* ¶¶42-43.

⁵⁷ *Id.* ¶48.

allegation or dismissing it with prejudice, as may be appropriate.⁵⁸ Although the program carriage dispute rules should permit broad discovery while minimally taxing the Commission's resources, they should also allow a party to object to discovery requests for documents that are neither relevant nor within its custody or control. Accordingly, some oversight by the Media Bureau is necessary during the discovery phase. But the Commission can significantly limit that need by providing guidance at the outset, as it would do by adopting standard discovery and protective orders and reasonable numerical limits.

VIII. THE COMMISSION CAN AND SHOULD ADOPT A STANDSTILL REQUIREMENT.

Under Section 4(i)⁵⁹ of the Communications Act, the Commission or the Media Bureau may order a temporary standstill of an existing contract pending resolution of the claim.⁶⁰ The new procedure, whereby a complainant must make a timely filing⁶¹ and a showing of public interest benefit, likelihood of success on the merits, irreparable harm, and lack of substantial harm to other parties,⁶² substantially promotes the public's interest in competition and diversity.

⁵⁸ *Id.*

⁵⁹ 47 USC §§154(i), 303(r).

⁶⁰ NPRM ¶26.

⁶¹ *Id.* ¶27.

⁶² *Id.* The procedure detailed is very protective toward defendants, who have ample time to respond to the filing. *Id.* ¶28. Moreover, in a ruling on the merits, the terms of the new agreement would take effect as of the expiration of the previous contract, and parties would reimburse each other for over- or under-payments under the standstill. *Id.* If the ruling on the merits does not order carriage at all, the adjudicator can resolve the issue on a case-by-case basis according to procedures proposed in the new NPRM. *Id.* ¶29.

Section 616 expressly requires the Commission to adopt preventative regulations against discrimination and provide a related, “expedited review of any complaints...by a video programming vendor...”⁶³ With a standstill rule that removes carriers’ incentives to delay the process, and a shot clock expediting review, the Commission finally may meet its Congressional mandate.

By the plain language of the statute, Congress prescribed a scheme that does not allow MVPDs to proceed with acts that may constitute impermissible coercion or with other wrongful conduct against independent programmers, and by extension the viewing public. *See id.* Provided a channel was carried and its programmer alleges violation in the form of termination of carriage or relegation to some lightly viewed and compensated tier, the public should receive the carriage it had prior to the alleged violation. The public benefits from cable programming that meets its expectations notwithstanding discrimination by MVPDs. It also benefits from diversity and competition, rather than the kind of homogeneous offerings that predominate when MVPDs are allowed to muscle their way past legal barriers.

The standstill requirement is essential to making the complaint process meaningful for independent programmers, which typically receive compensation through subscriber fees and advertising and thus suffer severe hardships when forced to accept carriage in a lightly subscribed tier for any length of time. Moreover, at the independent programmer’s election, it can prevent collateral effects such as triggering of “most favored nations” clauses (typically found in independent programmers’ contracts with MVPDs) forcing that programmer to accept the same terms from all MVPDs that it was

⁶³ 47 U.S.C. §536(a)(1)-(4).

coerced into by the alleged discrimination, and/or permanent loss of audience due to viewer habits and confusion. Nor will the standstill requirement pose any hardship upon MVPDs – as imposed on a case-by-case basis, it simply briefly maintains the distribution that the MVPD already had provided, until a determination of its liability for carriage discrimination. If the Commission provides an expedited review and discovery proceeds without abuse, the time interval involved in the standstills should be modest.

In any event, Congress declared that “[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views” in cable.⁶⁴ Consistent with that interest, “[o]ne of the Commission’s goals is to maintain diversity of programming in the marketplace.”⁶⁵ The public’s access to a multiplicity of media voices is best assured through enforcement of the rules fostering and protecting an ecosystem that encourages diversity. One such rule is a standstill requirement in the pendency of cable carriage disputes.

IX. THE PARTIES SHOULD BE SUBJECT TO BASEBALL-STYLE ARBITRATIONS.

The Commission seeks comment on its proposed rule allowing an adjudicator to order each party to submit a final offer for rates, terms, and conditions for the video programming at issue.⁶⁶ Specifically the Commission asks whether the adjudicator should then be required to select one of the offers as the final remedy, or have discretion

⁶⁴ 1992 Cable Act §2(a)(6).

⁶⁵ *Time Warner Entertainment Co., LP, v. FCC*, 240 F.3d 1126, 1134-36 (D.C. Cir. 2001) (instructing that the Commission may set a horizontal ownership limit based in part on diversity of programming outlets when it sets a limit primarily designed to achieve Congress' directive of promoting fair and effective competition).

⁶⁶ NPRM ¶54.

to craft a remedy that combines the two.⁶⁷ We believe that requiring the adjudicator to select one of the two offers as the final remedy best promotes the interests behind Section 616.

The application of “baseball-style” mandatory arbitration best serves the public interest by efficiently and equitably promoting competition and diversity in video programming. It encourages both parties to submit realistic offers facilitating dispute resolution. Further, it avoids the need for the adjudicator to fashion a detailed remedy concerning the specific compensation rates and terms of carriage of the programming service, while giving the adjudicator the benefit of the parties’ expertise.

X. THE PROGRAM CARRIAGE RULES SHOULD PROTECT COMPETITION AND DIVERSITY IN ONLINE VIDEO.

In implementing the program carriage rules, the Commission should be mindful of protecting competition and diversity in the emergent online video marketplace. Online video technology creates new opportunities for video programmers to reach audiences on innovative platforms.⁶⁸ Online video increases the public’s access to content, expands the potential market for video programming owners and distributors, and is particularly beneficial for independent programmers with niche content, which can use online distribution to reach a geographically-diverse customer base more easily. But if an MVPD can demand exclusive online rights to programming as a condition of carriage over traditional cable systems or otherwise discriminate against a video programmer that

⁶⁷ *Id.* ¶55.

⁶⁸ See Comments of Public Knowledge, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 1-3 (June 8, 2011).

innovates in the online video market, the video programmer will never be able to explore the possibilities of online video distribution.

As the largest buyers of video programming, MVPDs have the leverage to prevent video suppliers from offering their content over the Internet.⁶⁹ And since online video distributors compete directly with MVPDs, MVPDs have a strong incentive to prevent video programming vendors from distributing their content online. For example, in approving a recent merger between Comcast Corporation and NBC Universal, Inc., the Commission noted that Comcast and NBCU's joint entity will have "increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."⁷⁰ MVPDs' ability and motivation to stifle competition in the online video market, if left unchecked, could extinguish or diminish all of the potential benefits that online video technology has to offer.

The Commission should protect online video and prohibit MVPDs from discriminating against programming vendors based on their affiliation with online video

⁶⁹ Competitive Impact Statement of the Department of Justice, *United States v. Comcast Corp.*, 1:11-cv-00106, (DC Cir. Jan. 18, 2011) (hereinafter DoJ Analysis) at 11, available at <http://www.justice.gov/atr/cases/f266100/266158.pdf> (finding that MVPDs have incentives to discriminate against online video distributors).

⁷⁰ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCCRcd 4238, 4284, ¶116 (2011). See also *Petition to Deny of WealthTV, Inc., Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, at 16-17 (arguing that Comcast's "predisposition to granting discriminatory carriage access to its own channels over independent programmers" will be exacerbated by its merger with NBCU); *Reply to Comcast-NBCU Opposition of Bloomberg LP, Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, at 17-20 (discussing economic support for the claim that vertically integrated MVPDs tend to discriminate against unaffiliated programming vendors).

distributors.⁷¹ Alternatively, the Commission could apply the program carriage rules' exclusivity prohibition to MVPD demands for exclusive rights to online video distribution in return for carriage on traditional cable systems.⁷² This would preserve video programming vendors' ability to obtain carriage on traditional cable systems without sacrificing the opportunity to experiment, offer new video services, and reach new audiences in the online space.

CONCLUSION

The Commission has taken important steps toward improving and updating the program carriage rules. Public Interest Counsel supports these efforts and specifically asks the Commission to take a few further steps to protect the public's interest in competition and diversity in video programming. The program carriage rules benefit consumers by encouraging a vibrant, diverse video marketplace, and the Commission should ensure that the rules continue to protect that marketplace even as new business practices and technologies develop.

⁷¹ See 47 USC §536(a)(3).

⁷² See 47 USC §536(a)(2).

Respectfully submitted,

/s/ Chrystiane Pereira

Chrystiane Pereira
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
1625 K Street, NW, Suite 1000
Washington, DC 20006
(202) 232-4300

Jodie Griffin
Harold Feld
PUBLIC KNOWLEDGE
1818 N Street, NW, Suite 410
Washington, DC 20036
(202) 861-0020

November 28, 2011