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

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

SECOND REPORT AND ORDER IN MB DOCKET NO. 07-42 AND NOTICE OF PROPOSED RULEMAKING IN MB DOCKET NO. 11-131

Adopted: July 29, 2011 **Released: August 1, 2011**

Comment Date: [60 days after date of publication in the Federal Register]
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By the Commission: Commissioners Copps and Clyburn issuing separate statements; Commissioner McDowell dissenting in part and issuing a statement.

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I. INTRODUCTION

1. In 1993, the Commission adopted rules implementing a provision of the 1992 Cable Act[1] pertaining to carriage of video programming vendors by multichannel video programming distributors ("MVPDs") intended to benefit consumers by promoting competition and diversity in the video programming and video distribution markets (the "program carriage" rules).[2] As required by Congress, these rules allow for the filing of complaints with the Commission alleging that an MVPD has (i) required a financial interest in a video programming vendor's program service as a condition for carriage;[3] (ii) coerced a video programming vendor to provide, or retaliated against a vendor for failing to provide, exclusive rights as a condition of carriage; [4] or (iii) unreasonably restrained the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage.[5] Congress specifically directed the Commission to provide for "expedited review" of these complaints and to provide for appropriate penalties and remedies for any violations.[6] Programming vendors have complained that the Commission's procedures for addressing program carriage complaints have hindered the filing of legitimate complaints and have failed to provide for the expedited review envisioned by Congress.

2. In this *Second Report and Order* in MB Docket No. 07-42,[7] we take initial steps to improve our procedures for addressing program carriage complaints by[8]:

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[1] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); *see also* 47 U.S.C. § 536.

[2] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642 (1993) ("*1993 Program Carriage Order*"); *see also Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994) ("*1994 Program Carriage Order*"). The Commission's program carriage rules are set forth at 47 C.F.R. §§ 76.1300 - 76.1302.

[3] *See* 47 C.F.R. § 76.1301(a); *see also* 47 U.S.C. § 536(a)(1).

[4] *See* 47 C.F.R. § 76.1301(b); *see also* 47 U.S.C. § 536(a)(2).

[5] *See* 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C. § 536(a)(3).

[6] *See* 47 U.S.C. § 536(a)(4).

[7] The initial *Notice of Proposed Rulemaking* in MB Docket No. 07-42 was released in June 2007 and pertains to both program carriage and leased access issues. *See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage,* MB Docket No. 07-42, Notice of Proposed Rule Making, 22 FCC Rcd 11222 (2007) ("*Program Carriage NPRM*"). The Commission released a *Report and Order and Further Notice of Proposed Rulemaking* in this docket in February 2008 pertaining only to leased access issues.

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- Codifying in our rules what a program carriage complainant must demonstrate in its complaint to establish a *prima facie* case of a program carriage violation;
- Providing the defendant with 60 days (rather than the current 30 days) to file an answer to a program carriage complaint;
- Establishing deadlines for action by the Media Bureau and Administrative Law Judges ("ALJ") when acting on program carriage complaints; and
- Establishing procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.

3. In the *Notice of Proposed Rulemaking* in MB Docket No. 11-131, we seek comment on the following proposed revisions to or clarifications of our program carriage rules, which are intended to further improve our procedures and to advance the goals of the program carriage statute:

- Modifying the program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the rules;
- Revising discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery is conducted, including expanded discovery procedures (also known as party-to-party discovery) and an automatic document production process, to ensure fairness to all parties while also ensuring compliance with the expedited resolution deadlines adopted in the *Second Report and Order* in MB Docket No. 07-42;
- Permitting the award of damages in program carriage cases;
- Providing the Media Bureau or ALJ with the discretion to order parties to submit their best "final offer" for the rates, terms, and conditions for the programming at issue in a complaint proceeding to assist in crafting a remedy;
- Clarifying the rule that delays the effectiveness of a mandatory carriage remedy until it is upheld by the Commission on review, including codifying a requirement that the defendant MVPD must make an evidentiary showing to the Media Bureau or an ALJ as to whether a mandatory carriage remedy would result in deletion of other programming;
- Codifying in our rules that retaliation by an MVPD against a programming vendor for filing a program carriage complaint is actionable as a potential form of discrimination on the basis of affiliation and adopting other measures to address retaliation;

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See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, Report and Order, 23 FCC Rcd 2909 (2008), *stayed by United Church of Christ, et al. v. FCC,* No. 08-3245 (6th Cir. 2008).

[8] The new procedures adopted in the *Second Report and Order* do not apply to program carriage complaints that are currently pending or to program carriage complaints that are filed before the effective date of the new procedures adopted herein. *See The Tennis Channel Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P (filed January 5, 2010); *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104 (filed June 13, 2011).

- Adopting a rule that requires a vertically integrated MVPD to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD;
- Clarifying that the discrimination provision precludes a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD; and
- Codifying in our rules which party bears the burden of proof in program carriage discrimination cases.

We also invite commenters to suggest any other changes to our program carriage rules that would improve our procedures and promote the goals of the program carriage statute.

II. BACKGROUND

4. In the 1992 Cable Act, Congress sought to promote competition and diversity in the video distribution market as well as in the market for video programming carried by cable operators and other MVPDs. Congress expressed concern that the market power held by cable operators would adversely impact programming vendors, noting that "programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system."[9] Congress also explained that increased vertical integration in the cable industry could harm programming vendors because it gives cable operators "the incentive and ability to favor their affiliated programmers."[10] Congress concluded that this harm to programming vendors could adversely affect both competition[11] and diversity[12] in the video

[9] S. Rep. No. 102-92 (1991), at 24, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1157; *see also id.* ("[T]he Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors."); H.R. Rep. No. 102-628 (1992), at 41 ("Submissions to the Committee also suggest that some vertically integrated MSOs have agreed to carry a programming service only in exchange for an ownership interest in the service.").

[10] 1992 Cable Act § 2(a)(5) ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."); *see also* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("vertical integration gives cable operators the incentive and ability to favor their affiliated programming services"); *see id*. ("For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers."); H.R. Rep. No. 102-628 (1992), at 41 ("Submissions to the Committee allege that some cable operators favor programming services in which they have an interest, denying system access to programmers affiliated with rival MSOs and discriminating against rival programming services with regard to price, channel positioning, and promotion.").

[11] *See* S. Rep. No. 102-92 (1991), at 25-26, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158-59 ("Because of the trend toward vertical integration, cable operators now have a clear vested interest in the competitive success of some of the programming services seeking access through their conduit."); H.R. Rep. No. 102-628 (1992), at 41 ("[T]he Committee received testimony that vertically integrated operators have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services."); *see also* 47 U.S.C. § 536(a)(3) (requiring the Commission to adopt regulations prohibiting discrimination on the basis of affiliation that has "the effect of . . . unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly"); *1993 Program Carriage Order*, 9 FCC Rcd at 2643, ¶ 2 ("Congress concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems. Cable operators or programmers that compete with the vertically integrated entities may suffer harm to the extent that they do not receive such favorable terms.").

programming market, as well as hinder competition in the video distribution market.[13]

5. To address these concerns, Congress passed Section 616 of the Communications Act of 1934, as amended (the "Act"), which directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[14] Congress mandated that these regulations shall include provisions prohibiting a cable operator or other MVPD from engaging in three types of conduct: (i) "requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems" (the "financial interest" provision);[15] (ii) "coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other [MVPDs] as a condition of carriage on a system" (the "exclusivity" provision);[16] and (iii) "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 nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors" (the "discrimination" provision).[17] Section 616 also directs the Commission to (i) "provide for expedited review of any complaints made by a video programming vendor pursuant to" Section 616;[18] (ii) "provide for appropriate penalties and remedies for violations of [Section 616], including carriage";[19] and (iii) "provide penalties to be assessed against any person filing a frivolous complaint pursuant to" Section 616.[20]

6. In the *1993 Program Carriage Order*, the Commission implemented Section 616 by adopting procedures for the review of program carriage complaints as well as penalties and remedies.[21] In doing so, the Commission explained that its rules were intended to prohibit the activities specified by Congress "without unduly interfering with legitimate negotiating practices between [MVPDs] and

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[12] *See* H.R. Rep. No. 102-628 (1992), at 41 ("The Committee received testimony that vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services.").

[13] In addition to promoting competition and diversity in the video programming market, the Commission has explained that the program carriage provision of the 1992 Cable Act is also intended to promote competition in the video distribution market by ensuring that MVPDs have access to programming. *See 1994 Program Carriage Order*, 9 FCC Rcd at 4419, ¶ 28 ("[I]n passing Section 616, Congress was concerned with the effect a cable operator's market power would have both on programmers and on competing MVPDs . . . ."); *see also* S. Rep. No. 102-92 (1991), at 23, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1156 ("In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.").

[14] 47 U.S.C. § 536. A "video programming vendor" is defined as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b).

[15] 47 U.S.C. § 536(a)(1); *see also* 47 C.F.R. § 76.1301(a).

[16] 47 U.S.C. § 536(a)(2); *see also* 47 C.F.R. § 76.1301(b).

[17] 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c).

[18] 47 U.S.C. § 536(a)(4).

[19] 47 U.S.C. § 536(a)(5).

[20] 47 U.S.C. § 536(a)(6).

[21] *See 1993 Program Carriage Order*, 9 FCC Rcd 2642 (1993); *see also 1994 Program Carriage Order*, 9 FCC Rcd 4415 (1994).

programming vendors."[22] The Commission's procedures generally provide for resolution of a program carriage complaint in one of four ways: (i) if the Media Bureau determines that the complainant has not made a *prima facie* showing in its complaint of a violation of the program carriage rules, the Media Bureau will dismiss the complaint;[23] (ii) if the Media Bureau determines that the complainant has made a *prima facie* showing and the record is sufficient to resolve the complaint, the Media Bureau will rule on the merits of the complaint based on the pleadings without discovery;[24] (iii) if the Media Bureau determines that the complainant has made a *prima facie* showing but the record is not sufficient to resolve the complaint, the Media Bureau will outline procedures for discovery before proceeding to rule on the merits of the complaint; [25] and (iv) if the Media Bureau determines that the complainant has made a *prima facie* showing but the disposition of the complaint or discrete issues raised in the complaint will require resolution of factual disputes in an adjudicatory hearing or extensive discovery, the Media Bureau will refer the proceeding or discrete issues arising in the proceeding for an adjudicatory hearing before an ALJ.[26] The Commission decided that appropriate relief for violations of the program carriage rules would be determined on a case-by-case basis, and could include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.[27]

7. In June 2007, the Commission released the *Program Carriage NPRM* seeking comment on revisions to the Commission's program carriage rules and complaint procedures.[28] The Commission sought comment on whether and how the processes for resolving program carriage complaints should be modified;[29] whether the elements of a *prima facie* case should be clarified;[30] whether the deadline for resolving the program carriage complaint at issue in the *MASN I HDO* or a similar deadline should apply

[22] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2643, ¶ 1.

[23] *See id*. at 2655, ¶ 31.

[24] *See id.* at 2652, ¶ 23 and 2655, ¶ 31; *see also* 47 C.F.R. § 76.1302(c), (d), (e).

[25] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶¶ 31-33; *see also* 47 C.F.R. § 76.7(f).

[26] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34; *see also* 47 C.F.R. § 76.7(g)(1). In cases referred to an ALJ, the parties have ten days after the Media Bureau's *prima facie* determination to elect whether to attempt to resolve their dispute through Alternative Dispute Resolution ("ADR"). *See* 47 C.F.R. § 76.7(g)(2); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34.

[27] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2653, ¶ 26. Eleven program carriage complaints have been filed in the approximately two decades since Congress passed Section 616 in the 1992 Cable Act, two of which are currently pending before an ALJ or the Media Bureau. *See The Tennis Channel Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149 (MB 2010) ("*Tennis Channel HDO*"); *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104 (filed June 13, 2011). In addition, the Commission has resolved on the merits a program carriage claim arising through the program carriage arbitration condition applicable to Regional Sports Networks ("RSNs") adopted in the *Adelphia Order*. *See TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.,* Order on Review, 23 FCC Rcd 15783 (MB 2008), *reversed by* Memorandum Opinion and Order, 25 FCC Rcd 18099 (2010) ("*MASN v. Time Warner Cable*"), *appeal pending sub nom. TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC*, No. 11-1151 (4th Cir.).

[28] *See Program Carriage NPRM*, 22 FCC Rcd 11222 (2007).

[29] *See id.* at 11227, ¶ 14.

[30] *See id*.

to all program carriage complaints;[31] and whether additional rules are necessary to protect programming vendors from potential retaliation for filing a program carriage complaint.[32]

III. SECOND REPORT AND ORDER IN MB DOCKET NO. 07-42

8. As discussed below, the record reflects that our current program carriage procedures are ineffective and in need of reform.[33] Among other concerns, programming vendors and other commenters cite uncertainty concerning the evidence a complainant must provide to establish a *prima facie* case,[34]

[31] *See id.* at 11227, ¶ 15; *see also TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8995, ¶ 13 (MB 2006) ("*MASN I HDO*"). In the *MASN I HDO*, the ALJ was required to issue a recommended decision on a program carriage complaint within 45 days. *See MASN I HDO*, 21 FCC Rcd at 8995, ¶ 13.

[32] *See Program Carriage NPRM*, 22 FCC Rcd at 11227, ¶ 16.

[33] *See Ex Parte* Reply Comments of HDNet (June 2, 2010) at 6 ("A right without an effective remedy is like having no right at all. Today, neither MVPDs nor independent programmers have reason to think that a possible statutory violation will be redressed by the FCC in a timely and effective manner."); Comments of Black Television News Channel, LLC at 4 ("BTNC Comments"); Comments of National Alliance of Media Arts and Culture *et a*l. at 18-19 ("NAMAC Comments"); Comments of NFL Enterprises LLC at 6-8 ("NFL Enterprises Comments"); Comments of The America Channel at 9-11 ("TAC Comments"); Reply Comments of Crown Media Holdings, Inc. at 10-11 ("Hallmark Channel Reply"); Reply Comments of HDNet at 1 ("HDNet Reply"); Reply Comments of National Alliance of Media Arts and Culture *et al*. at 18-19 ("NAMAC Reply"); Reply Comments of NFL Enterprises LLC at 5-6 ("NFL Enterprises Reply"); Reply Comments of WealthTV at 1-2 ("WealthTV Reply"); *see also* Letter from Stephen A. Weiswasser, Counsel for the Outdoor Channel, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 16, 2007) at 2 ("Outdoor Channel Nov. 16 2007 *Ex Parte* Letter"); Letter from Larry F. Darby, American Consumer Institute, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007) at 14 ("ACI Nov. 20 2007 *Ex Parte* Letter"); Letter from David S. Turetsky, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007) at 1-2 ("HDNet Nov. 20 2007 *Ex Parte* Letter"); Letter from Kathleen Wallman, Counsel for National Association of Independent Networks ("NAIN"), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 5, 2008), Attachment ("NAIN June 5 2008 *Ex Parte* Letter"); Letter from John Lawson, Executive Vice President, ION Media Networks, to Kevin J. Martin, Chairman, FCC, MB Docket No. 07-42 (Dec. 11, 2008), Attachment at 1 ("ION Dec. 11 2008 *Ex Parte* Letter"). Members of Congress have also expressed concern with the program carriage complaint process. *See* Letter from Kathleen Wallman, Counsel for WealthTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Aug. 4, 2008) ("WealthTV Aug. 4 2008 *Ex Parte* Letter") (attaching Letter from U.S. Sen. Kay Bailey Hutchison to Kevin J. Martin, Chairman, FCC (July 27, 2008) at 1 (expressing continued concern that "the existing dispute resolution processes are not encouraging the timely resolution of these disputes or providing the proper incentives for the parties to negotiate terms")); *id*. (attaching Letter from U.S. Sen. Amy Klobuchar to Kevin J. Martin, Chairman, FCC (July 24, 2008) at 1 ("Without an effective and timely FCC process to decide complaints . . . the integrity of any safeguards against program carriage discrimination is undermined.")); Letter from David S. Turetsky, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 22, 2008) ("HDNet July 22 2008 *Ex Parte* Letter") (attaching Letter from U.S. Sen. Herb Kohl to Kevin J. Martin, Chairman, FCC (June 23, 2008) at 2 (urging the Commission "to strengthen the program carriage rules and to simplify and make more efficient the process by which program carriage complaints are adjudicated")); *id.* (attaching Letter from U.S. Reps. Gene Green, Mike Doyle, and Charles Gonzalez to Kevin J. Martin, Chairman, FCC (June 30, 2008) at 1-2 ("The current complaint process is not as efficient as it could be . . . . [W]e urge you to provide more effective remedies and streamline the complaint process . . . .")).

[34] *See* TAC Comments at 10; NAMAC Reply at 18-19; WealthTV Reply at 1; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1; Letter from Harold Feld, Counsel for NAMAC *et al*., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (May 2, 2008) at 1 ("NAMAC May 2 2008 *Ex Parte* Letter").

unpredictable delays in the Commission's resolution of complaints,[35] and fear of retaliation[36] as impeding the filing of legitimate program carriage complaints. While MVPDs contend that the limited number of program carriage complaints filed to date demonstrates that the current procedures are working and that rule changes are not necessary,[37] programming vendors contend that the lack of complaints is a direct result of our inadequate procedures, not a lack of program carriage claims.[38] As discussed below, we take initial steps to improve these procedures by: (i) codifying in our rules what a program carriage complainant must demonstrate in its complaint to establish a *prima facie* case of a program carriage violation; (ii) providing the defendant with 60 days (rather than the current 30 days) to file an answer to a program carriage complaint; (iii) establishing deadlines for action by the Media Bureau and an ALJ when acting on program carriage complaints; and (iv) establishing procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.

A. *Prima Facie* Case

9. In the *1993 Program Carriage Order*, the Commission described the evidence a program carriage complainant must provide in its complaint to establish a *prima facie* case.[39] Among other things, the Commission stated that the "complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an authorized representative or agent of the complaining programming vendor) setting forth the basis for the complainant's allegations."[40] The Commission also emphasized that the complaint "may not merely reflect conjecture or allegations based only on

[35] *See* Letter from Jonathan D. Blake, Counsel for the National Football League, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 5, 2009) at 2 ("Based on the experience in the now-settled NFL Network/ Comcast hearing, the NFL believes that the Commission's processes are too slow . . . ."); BTNC Comments at 4; TAC Comments at 9; Letter from David S. Turetsky, Counsel for HDNet, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 16, 2010), at 5 ("HDNet June 16 2010 *Ex Parte* Letter"); *see also* NAMAC Comments at 18; HDNet Reply at 1; NFL Enterprises Reply at 8; WealthTV Reply at 1; ION Dec. 11 2008 *Ex Parte* Letter, Attachment at 1; NAIN June 5 2008 *Ex Parte Letter*, Attachment at 1.

[36] *See* BTNC Comments at 4; NAMAC Comments at 18-19; NFL Enterprises Comments at 8 n.28; NFL Enterprises Reply at 6; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1.

[37] *See* Comments of Comcast Corporation at 27, 33 ("Comcast Comments"); Comments of the National Cable and Telecommunications Association at 14-15 ("NCTA Comments"); Comments of Time Warner Cable Inc. at 27-29 ("TWC Comments"); Reply Comments of Comcast Corporation at 21-23 ("Comcast Reply"); Reply Comments of the National Cable and Telecommunications Association at 18-19 ("NCTA Reply"); Reply Comments of Time Warner Cable Inc. at 2-3 ("TWC Reply"); Reply Comments of Verizon at 9-10 ("Verizon Reply").

[38] *See* Letter from Stephen A. Weiswasser, Counsel for the Hallmark Channel, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 6, 2007) at 1-2 ("[T]he absence of complaints under the existing program carriage regime is not evidence of lack of discrimination, but, to the contrary, a reflection of the difficulties presented to independents by the high burdens of going forward under the existing rules and the prospects for retaliation by MVPDs.") ("Hallmark Channel Nov. 6 2007 *Ex Parte* Letter"); *see also* BTNC Comments at 4 (citing fear of retaliation, unpredictable cost and delay, and uncertainty regarding evidence required and adequacy of relief as reasons for why few program carriage complaints have been filed to date); Hallmark Channel Reply at 11 ("[I]t simply is not the case that only two programmers have experienced discrimination during the time the rules have been in effect. The reality is that programmers do not bring complaints under the existing rules because of their high burden of proof with respect to predatory practices, the difficulty of fashioning meaningful resolutions, and the fear of retribution, not because discrimination does not, in fact, occur.").

[39] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29 (footnotes omitted).

[40] *See id*.

information and belief."[41] The record reflects that programming vendors are uncertain as to what evidence must be provided in a complaint to meet the *prima facie* requirement.[42] The National Association of Independent Networks ("NAIN"), for example, notes that our rules do not contain a definition of what constitutes a *prima facie* case and that this lack of clarity impedes programming vendors from asserting their program carriage rights through the complaint process.[43]

10. While one commenter notes that the *prima facie* step is not required by the statute and urges the Commission to eliminate this step entirely,[44] we believe that retaining this requirement is important to dispose promptly of frivolous complaints and to ensure that only legitimate complaints proceed to further evidentiary proceedings. We agree, however, that clarifying what is required to establish a *prima facie* case and codifying these requirements in our rules will help to reduce uncertainty regarding the *prima facie* requirement. In the following paragraphs, we clarify the requirements for establishing a *prima facie* case.

11. As an initial matter, all complaints alleging a violation of any of the program carriage rules (*i.e.*, the financial interest, exclusivity, or discrimination provisions) must contain evidence that (i) the complainant is a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's rules or an MVPD as defined in Section 602(13) of the Act and Section 76.1300(d) of the Commission's rules;[45] and (ii) the defendant is an MVPD as defined in Section 602(13)

[41] *See 1994 Program Carriage Order*, 9 FCC Rcd at 4420, ¶ 33.

[42] *See* TAC Comments at 10 ("[T]here are no clear guidelines on what constitutes a *prima facie* case of discrimination."); NAMAC Reply at 18-19 ("[T]he current *prima facie* case requirement actively prevents the Commission from fulfilling the statutory command to resolve complaints 'expeditiously.' Similarly, evidence in the record from independent programmers demonstrates that the *prima facie* case requirement may dissuade independent programmers from bringing genuine complaints due to confusion over the appropriate standard . . . ."); WealthTV Reply at 1 ("It is critical for independent programmers to know exactly what kind of evidence, and how much evidence, they need to present to move forward with a complaint."); *see also* HDNet July 22 2008 *Ex Parte* Letter (attaching Letter from U.S. Reps. Gene Green, Mike Doyle, and Charles Gonzalez to Kevin J. Martin, Chairman, FCC (June 30, 2008) at 2 (urging the Commission to adopt a "better defined and more reasonable definition of a *prima facie* case"); NAMAC May 2 2008 *Ex Parte* Letter at 1 ("If the Commission elects to retain the *prima facie* screen, the Commission must clarify what applicants must prove to meet this burden . . . .").

[43] *See* NAIN June 5 2008 *Ex Parte* Letter, Attachment ("Currently, there is no definition in the rules of what constitutes a *prima facie* case. Consequently, defendants argue their own versions of the standard to try to get independent programmers' complaints dismissed. This lack of clarity is a problem for independent programmers who are in litigation before the Commission, and for programmers who are contemplating litigation to vindicate their rights.").

[44] *See* NAMAC Reply at 18 ("[T]he Commission adopted the requirement to establish a *prima facie* case solely on the basis of its own initiative. . . . [N]othing in Section 616 requires the Commission to use a *prima facie* case requirement to limit the number of potentially frivolous complaints.").

[45] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29; *see also* 47 U.S.C. §§ 522(13), 536(b); 47 C.F.R. § 76.1300(d), (e). In the *1994 Program Carriage Order*, the Commission amended the program carriage rules to allow MVPDs, in addition to video programming vendors, to file complaints alleging a violation of the program carriage rules. *See 1994 Program Carriage Order*, 9 FCC Rcd at 4418-20, ¶¶ 24-33. The Commission expressed concern that a video programming vendor that had been coerced into granting anticompetitive concessions, including exclusivity, to a cable operator might be dissuaded from filing a program carriage complaint based on fears of alienating the cable operator. *See id*. at 4416, ¶ 10 and 4420, ¶¶ 30-31. Accordingly, the Commission amended its rules to provide MVPDs aggrieved by a violation of Section 616 to file a program carriage complaint with the Commission. *See id*. at 4415, ¶ 3 and 4418-19, ¶ 24.

of the Act and Section 76.1300(d) of the Commission's rules.[46] We note that, as originally adopted in the *1993 Program Carriage Order*, the Commission's rules provided that a complaint must contain the "address and telephone number of the complainant, the type of multichannel video programming distributor *that describes the defendant*, and the address and telephone number of the defendant."[47] In 1999, the Commission reorganized the Part 76 pleading and complaint process rules and, in the course of doing so, amended this rule to require the complaint to contain the "type of multichannel video programming distributor *that describes complainant*, the address and telephone number of the complainant, and the address and telephone number of each defendant."[48] We find this revised language confusing because it fails to reflect that a program carriage complainant can be either an MVPD or a video programming vendor.[49] We amend this rule to clarify that the complaint must specify "whether the complainant is a multichannel video programming distributor or video programming vendor, and, in the case of a multichannel video programming distributor, identify the type of multichannel video programming distributor, the address and telephone number of the complainant, what type of multichannel video programming distributor the defendant is, and the address and telephone number of each defendant."[50]

12. Evidence supporting a program carriage claim may be based on an explicit or implicit threat.[51] In complaints alleging a violation of the exclusivity or financial interest provisions, the complaint must contain direct evidence (either documentary or testimonial) supporting the facts underlying the claim. For example, a complainant alleging that an MVPD has coerced a programming vendor to grant exclusive carriage rights or required a financial interest in a program service must provide documentary evidence, such as an email from the defendant MVPD, documenting the prohibited action, or an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting the alleged violation of the program carriage rules.

13. For complaints alleging a violation of the discrimination provision, however, direct evidence supporting a claim that the defendant MVPD discriminated "on the basis of affiliation or non-affiliation" is sufficient to establish this element of a *prima facie* case but is not required. For example, an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the programming vendor because it is not affiliated with the MVPD will generally be sufficient to establish this element of a *prima facie* case. However, such documentary evidence is highly unlikely to be

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[46] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29; *see also* 47 U.S.C. § 522(13); 47 C.F.R. § 76.1300(d).

[47] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2665, Appendix D (47 C.F.R. § 76.1302(c)(1)(ii)). This rule now appears at Section 76.1302(c)(1).

[48] *See 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules,* Report and Order, 14 FCC Rcd 418, 440, Appendix A (1999) ("*1998 Biennial Regulatory Review Order*"); *see also* 47 C.F.R. § 76.1302(c)(1).

[49] *See supra* n.45.

[50] *See infra*, Appendix B (47 C.F.R. § 76.1302(c)(1)).

[51] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2650, ¶ 18 ("[W]e reject TCI's suggestion that we should require evidence of explicit threats, because we believe that actual threats may not always comprise a necessary condition for a finding of coercion. Requiring such evidence would establish an unreasonably high burden of proof that could undermine the intent of Section 616 by allowing multichannel distributors to engage in bad faith negotiations that apparently would not violate the statute and our regulations simply because explicit threats were not made during such negotiations. In contrast, we believe that Section 616(a)(2) was intended to prohibit implicit as well as explicit behavior that amounts to 'coercion.'").

available to a programming vendor in advance of discovery, and may not exist at all.[52] In addition, an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting a claim that a representative of the defendant MVPD informed the vendor that the MVPD took an adverse carriage action because the vendor is not affiliated with the MVPD will generally be sufficient to establish this element of a *prima facie* case. Again, however, we recognize that such direct evidence of affiliation-based discrimination will seldom be available to complainants and is not required to establish this element of a *prima facie* case.[53]

14. Because it is unlikely that direct evidence of a discriminatory motive will be available to potential complainants,[54] we clarify that a complainant can establish this element of a *prima facie* case of a violation of the program carriage discrimination provision by providing the following circumstantial evidence of discrimination "on the basis of affiliation or non-affiliation." First, the complainant programming vendor must provide evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD,[55] based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming,[56] and other factors.[57] We emphasize that a finding at the *prima facie* stage that affiliated

[52] *See* Hallmark Channel Reply at 10 ("[D]iscrimination is often subtle, and the evidence of its existence is likely outside the control of an independent programmer."); NFL Enterprises Reply at 5-6 ("[T]he best evidence of discriminatory motive is under the exclusive control of the MVPD. . . . [V]ertically integrated MVPDs are determined not to provide potential complainants with direct evidence of the underlying purpose of their discriminatory conduct.").

[53] *See supra* n.52.

[54] *See* NFL Enterprises Reply at 6 (stating that requiring only documentary evidence of improper motive before a programmer can file a complaint "would make it extremely difficult to bring any complaint, since . . . vertically integrated MVPDs are skillful at ensuring that the best evidence of discrimination – and the only evidence of discriminatory intent – is found only in the control of the MVPD"); Outdoor Channel Nov. 16 2007 *Ex Parte* Letter at 2 ("Because evidence of predatory intent is commonly controlled by the MVPD, and not the programmer, it is unrealistic to expect a programmer to have clear evidence of predation before it can bring a claim.").

[55] In the *1993 Program Carriage Order*, the Commission interpreted the discrimination provision in Section 616(a)(3) to require a complainant alleging discrimination that favors an "affiliated" programming vendor to provide evidence that the defendant MVPD has an attributable interest in the allegedly favored "affiliated" programming vendor. *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29 ("For complaints alleging discriminatory treatment that favors 'affiliated' programming vendors, the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in Section 76.1300(a)."); *see also* 47 C.F.R. § 76.1300(a) ("For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities."); *Review of the Commission's Cable Attribution Rules*, Report and Order, 14 FCC Rcd 19014, 19063, ¶ 132 n.333 (1999) (amending definition of "affiliated" in the program carriage rules to be consistent with definition of this term in other cable rules); *but see NPRM* in MB Docket No. 11-131, *infra* ¶¶ 72-77 (seeking comment on whether to interpret the discrimination provision in Section 616(a)(3) more broadly to preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD).

[56] By "target programming," we refer to programming rights that a video programming vendor seeks to acquire to display on its network.

[57] The Media Bureau will assess on a case-by-case basis whether the complaint contains evidence to establish at the *prima facie* stage that the affiliated and unaffiliated video programming is similarly situated. In previous cases assessing at the *prima facie* stage whether the complaint contains evidence that the affiliated and unaffiliated video programming is similarly situated, the Media Bureau has assessed similar factors. *See Tennis Channel HDO*, 25 FCC Rcd at 14159-60, ¶¶ 17-18; *Herring Broadcasting Inc., d/b/a WealthTV, et al.,* Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14795-97, ¶¶ 12-17 (MB 2008) ("*WealthTV HDO*"); *NFL Enters. LLC v. Comcast Cable Communications, LLC*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd

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and unaffiliated video programming is similarly situated should be based on examination of a combination of factors put forth by the complainant. Although no single factor is necessarily dispositive, the more factors that are found to be similar, the more likely the programming in question will be considered similarly situated to the affiliated programming. On the other hand, it is unlikely that programming would be considered "similarly situated" if only one of these factors is found to be similar. For example, a complainant is unlikely to establish a *prima facie* case of discrimination on the basis of affiliation by demonstrating that the defendant MVPD carries an affiliated music channel targeted to younger viewers but has declined to carry an unaffiliated music channel targeted to older viewers with lower ratings and a higher license fee. Second, the complaint must contain evidence that the defendant MVPD has treated the video programming provided by the complainant programming vendor differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage.[58] In the absence of direct evidence supporting the claim that the defendant MVPD discriminated "on the basis of affiliation or non-affiliation," the circumstantial evidence discussed here will establish this element of a *prima facie* case of a violation of the program carriage discrimination provision.

15. In addition, we note that the program carriage discrimination provision prohibits only conduct that has "the effect of . . . unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly."[59] Thus, regardless of whether the complainant relies on direct or circumstantial evidence of discrimination "on the basis of affiliation or non-affiliation," the complaint must also contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly.[60]

16. We emphasize that a Media Bureau finding that a complainant has established a *prima facie* case does not mean that the complainant has proven its case or any elements of its case on the merits. Rather, a *prima facie* finding means that the complainant has provided sufficient evidence in its complaint, without the Media Bureau having considered any evidence to the contrary, to proceed.[61] If the

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14787, 14822-23, ¶ 75 (MB 2008) ("*NFL Enterprises HDO*"); *TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14835-36, ¶ 108 (MB 2008) ("*MASN II HDO*").

[58] *See Tennis Channel HDO*, 25 FCC Rcd at 14160-61, ¶ 19; *WealthTV HDO,* 23 FCC Rcd at 14797, ¶ 18, 14801, ¶ 28, 14806, ¶ 40, 14812, ¶ 52; *NFL Enterprises HDO*, 23 FCC Rcd at 14823, ¶ 76; *MASN II HDO*, 23 FCC Rcd at 14836, ¶ 109; *MASN I HDO,* 21 FCC Rcd at 8993-94, ¶ 11; *but see Hutchens Communications, Inc. v. TCI Cablevision of Georgia, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 4849, 4853, ¶ 27 (CSB 1994) (finding that complainant programming vendor did not make a *prima facie* showing of discrimination on the basis of affiliation because it failed to demonstrate that it was offered different price, terms, or conditions as compared to that offered to an affiliated programming vendor).

[59] *See* 47 U.S.C. § 536(a)(3).

[60] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 14 (citing 47 U.S.C. § 536(a)(3)). The Media Bureau will assess on a case-by-case basis whether the complaint contains evidence at the *prima facie* stage to establish that the effect of the defendant MVPD's conduct is to unreasonably restrain the ability of the complainant video programming vendor to compete fairly. In previous cases, the Media Bureau has made this assessment based on the impact of the defendant MVPD's adverse carriage action on the programming vendor's subscribership, licensee fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale. *See Tennis Channel HDO*, 25 FCC Rcd at 14161-62, ¶¶ 20-21; *WealthTV HDO,* 23 FCC Rcd at 14798, ¶ 19, 14802, ¶¶ 29-31, 14807-08, ¶¶ 41-42, 14812-13, ¶¶ 53-54; *NFL Enterprises HDO*, 23 FCC Rcd at 14823-25, ¶¶ 77-78; *MASN II HDO*, 23 FCC Rcd at 14836, ¶ 110; *MASN I HDO,* 21 FCC Rcd at 8993-94, ¶ 11.

[61] *See* TWC Comments at 30 n.105.

complainant establishes a *prima facie* case but the record is not sufficient to resolve the complaint, the adjudicator (*i.e*., either the Media Bureau or an ALJ) will allow the parties to engage in discovery[62] and will then conduct a *de novo* examination of all relevant evidence on each factual and legal issue. For example, although the Media Bureau may find that a complaint contains sufficient evidence to establish a *prima facie* case that a defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly, thus allowing the case to proceed, the adjudicator when ruling on the merits may reach an opposite conclusion after conducting further proceedings and developing a more complete evidentiary record.[63]

17. We also clarify that the Media Bureau's determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only.[64] If the Media Bureau determines that the complainant has established a *prima facie* case, the Media Bureau will then review the answer (including any attachments) and reply to determine whether there are procedural defenses that might warrant dismissal of the case (*e.g*., arguments pertaining to the statute of limitations); whether there are any issues that the defendant MVPD concedes; whether there are substantial and material questions of fact as to whether the defendant MVPD has engaged in conduct that violates the program carriage rules; whether the case can be addressed by the Media Bureau on the merits based on the pleadings or whether further evidentiary proceedings are necessary; and whether the proceeding should be referred to an ALJ in light of the nature of the factual disputes. For example, if the Media Bureau determines that the complainant has established a *prima facie* case but the defendant MVPD provides legitimate and non-discriminatory business reasons in its answer for its adverse carriage decision, the Media Bureau might conclude that there are substantial and material questions of fact that warrant allowing the parties to engage in discovery or referring the matter to an ALJ for an adjudicatory hearing, or it might conclude that the complaint can be resolved on the merits based on the pleadings.

[62] Under the current program carriage rules, discovery is Commission-controlled, meaning that Media Bureau staff identifies the matters for which discovery is needed and then issues letters of inquiry to the parties on those matters or requires the parties to produce specific documents related to those matters. *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id*. at 2652, ¶ 23 (providing that discovery will "not necessarily be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff"); *see also* 47 C.F.R. § 76.7(f). In the *NPRM* in MB Docket No. 11-131, we propose to revise these procedures by providing for expanded discovery, whereby parties to a program carriage complaint may serve requests for discovery directly on opposing parties rather than relying on the Media Bureau staff to seek discovery through letters of inquiry or document requests. *See NPRM* in MB Docket No. 11-131, *infra* ¶¶ 42-43. We also seek comment on an automatic document production process whereby both parties would have a certain period of time after the Media Bureau's *prima facie* determination to produce basic threshold documents listed in the Commission's rules that are relevant to the program carriage claim at issue. *See NPRM* in MB Docket No. 11-131, *infra* ¶¶ 44-47.

[63] *Compare WealthTV HDO*, 23 FCC Rcd 14787 *with Herring Broadcasting Inc., d/b/a WealthTV, et al.,* Recommended Decision, 24 FCC Rcd 12967 (Chief ALJ Sippel 2009) ("*WealthTV Recommended Decision*") *and Herring Broadcasting Inc., d/b/a WealthTV, et al*., Memorandum Opinion and Order, FCC 11-94 (2011) ("*WealthTV Commission Order*"). We note, however, the Media Bureau in the course of making a *prima facie* determination may rule on the merits of certain elements of the case based on the pleadings and refrain from referring these specific issues for further evidentiary proceedings. For example, to the extent that the parties concede that the complainant is a video programming vendor and the defendant is an MVPD, further evidentiary proceedings on these issues are unnecessary.

[64] *See* Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (April 28, 2008).

B. Deadline for Defendant's Answer to a Program Carriage Complaint

18. Our current rule provides that an MVPD served with a program carriage complaint shall answer the complaint within 30 days of service.[65] We amend this rule to provide an MVPD with 60 days to answer a program carriage complaint.[66] Having established specific evidentiary requirements for what the complainant must provide in its complaint to establish a *prima facie* case of a program carriage violation, we believe it is appropriate to provide the defendant with additional time to answer the complaint in order to develop a full, case-specific response, with supporting evidence, to the evidence put forth by the complainant. As discussed in the next section, Congress directed the Commission to "provide for expedited review" of program carriage complaints,[67] and we adopt deadlines herein for the Media Bureau and ALJs when acting on program carriage complaints to satisfy this requirement.[68] Providing additional time for a defendant to file an Answer to a complaint does not conflict with this requirement. By requiring a complainant to provide specific evidence in its complaint and providing a defendant with additional time to respond to this evidence and provide specific evidence supporting its response, the rules we adopt today will allow for the development of a more robust factual record earlier in the complaint process than under our current rules. We believe that this will better enable the Media Bureau to either resolve cases on the merits based on the pleadings without referring the matter to an ALJ, or narrow the factual issues in dispute that warrant discovery or referral to an ALJ. As a result, this will lead to the more expeditious resolution of disputes than under other current program carriage complaint procedures.

C. Deadlines for Media Bureau and ALJ Decisions

19. The record reflects that the unpredictable and sometimes lengthy time frames for Commission action on program carriage complaints have discouraged programming vendors from filing complaints.[69] Both programming vendors[70] and MVPDs[71] support expeditious action on program carriage

[65] *See* 47 C.F.R. § 76.1302(d)(1).

[66] *See* Letter from Ryan G. Wallach, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Dec. 10, 2008), Attachment at 2 (urging the Commission to allow defendants 60 days to file an answer); Letter from Arthur H. Harding, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 1, 2011), at 2 (stating that a program carriage defendant needs a full and fair opportunity to respond to a complaint) ("Time Warner Cable June 1 2011 *Ex Parte* Letter").

[67] *See* 47 U.S.C. § 536(a)(4).

[68] *See infra* ¶¶ 19-24.

[69] *See* TAC Comments at 9 ("Faced with the likelihood of FCC inaction, combined with the real risk of retaliation by cable operators, [] no independent channel would want to file with the FCC."); HDNet June 16 2010 *Ex Parte* Letter at 5 ("Independent programmers simply cannot commence proceedings against potential carriers, even in cases of clear misconduct, unless these proceedings are truly expedited, as Congress directed, because they risk retaliation and, for some independent programmers, financially ruinous delays in acquiring carriage for their programming."); *see also* BTNC Comments at 4.

[70] *See* TAC Comments at 9 (requesting that the Commission provide a "shot clock," such as a requirement that the Commission hear and resolve the complaint within 60 to 90 days); NFL Enterprises Reply at 8 (explaining that, given the time-sensitivity of program carriage disputes, it is critical that the Commission adopt a streamlined complaint process and an expedited timeline for dispute resolution); HDNET Reply at 1 (endorsing an expedited complaint resolution process); WealthTV Reply at 1 (same); *see also* NAMAC Comments at 18; ION Dec. 11 2008 *Ex Parte* Letter, Attachment at 1; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1; HDNet July 22 2008 *Ex Parte* Letter (attaching Letter from U.S. Sen. Herb Kohl to Kevin J. Martin, Chairman, FCC (June 23, 2008) at 2 ("I urge that the FCC set a deadline by which program carriage complaints by programmers be decided in prompt and reasonable time . . . .")); *id*. (attaching Letter from U.S. Sen. Byron L. Dorgan to Kevin J. Martin, Chairman, FCC (June 13, 2008) at 1 ("I worry that while the FCC has a shot clock for consideration of forbearance petitions, in a

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complaints. We believe that establishing deadlines for the Media Bureau and ALJs when acting on program carriage complaints will help to resolve disputes quickly and efficiently and thus fulfill our statutory mandate to "provide for expedited review" of program carriage complaints.[72] While the Commission in the *1993 Program Carriage Order* directed both the Media Bureau and ALJs to resolve cases "expeditiously," we now conclude that a specific deadline codified in our rules is needed to ensure that this goal is achieved.[73]

20. Action on program carriage complaints entails a two-step process: the initial *prima facie* determination by the Media Bureau, followed (if necessary) by a decision on the merits by an adjudicator (*i.e.*, either the Media Bureau or an ALJ).[74] We adopt deadlines herein for both of these steps. For the first step, we direct the Media Bureau to release a decision determining whether the complainant has established a *prima facie* case within 60 calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed). Based on our past experience in addressing program carriage complaints, we believe that 60 calendar days after the complainant files its reply[75] provides sufficient time for the Media Bureau to make a *prima facie* determination while providing for the "expedited review" required by Congress. In light of this expedited timeframe for the Media Bureau's *prima facie* determination, we again emphasize that complainants should not raise new matters in a reply[76] and that additional pleadings outside of the pleading cycle will not be accepted.[77]

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separate area of programming discrimination, the Commission lacks any type of timeline.")); *id*. (attaching Letter from U.S. Reps. Gene Green, Mike Doyle, and Charles Gonzalez to Kevin J. Martin, Chairman, FCC (June 30, 2008) at 2 (urging the Commission to adopt a "shot clock")).

[71] *See* Comcast Comments at 28; Comcast Reply at 35; *see also* Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 30, 2010), at 2.

[72] *See* 47 U.S.C. § 536(a)(4).

[73] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32 (directing Media Bureau staff to "develop a discovery process and timetable to resolve the dispute expeditiously"); *see id*. at 2656, ¶ 34 ("ALJs are expected to resolve program carriage complaints expeditiously, and should hold an immediate status conference to establish timetables for discovery, hearing and submission of briefs and proposed findings of fact and conclusions of law.").

[74] A potential third step applies to the extent a party appeals the decision of the Media Bureau or an ALJ to the Commission. *See* 47 C.F.R. §§ 1.115, 76.10(c)(1) (pertaining to Applications for Review of actions taken on delegated authority); 47 C.F.R. §§ 1.276, 76.10(c)(2) (pertaining to exceptions to initial decisions of an ALJ). We decline at this time to establish a deadline for Commission action on review of decisions by the Media Bureau or an ALJ.

[75] As amended herein, the program carriage rules provide for a 80-calendar-day initial pleading cycle (*i.e.*, a 60-calendar-day period for filing an answer to a complaint and a 20-calendar-day period for filing a reply to the answer). *See infra*, Appendix D (47 C.F.R. § 76.1302(e)(1), (f)).

[76] *See* 47 C.F.R. § 76.1302(e) (stating that a reply "shall be responsive to matters contained in the answer and shall not contain new matters").

[77] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 23 ("Given the statute's explicit direction to the Commission to handle program carriage complaints expeditiously, additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff."); *see id*. at 2654-55, ¶ 30 n.51 ("[U]nless specifically requested by the Commission or its staff, additional pleadings such as motions to dismiss or motions for summary judgment will not be considered. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.") (emphasis in original).

21. For the second step, we impose different deadlines for a ruling on the merits of the complaint depending upon whether the adjudicator is the Media Bureau or an ALJ. After the Media Bureau concludes that the complaint contains sufficient evidence to establish a *prima facie* case, the Media Bureau has three options for addressing the merits of the complaint: (i) the Media Bureau can rule on the merits of the complaint based on the pleadings without discovery;[78] (ii) if the Media Bureau determines that the record is not sufficient to resolve the complaint, the Media Bureau may outline procedures for discovery before proceeding to rule on the merits of the complaint;[79] or (iii) 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 in the proceeding for an adjudicatory hearing before an ALJ.[80] We establish the following deadlines for the adjudicator's decision on the merits. For complaints that the Media Bureau decides on the merits based on the pleadings without discovery, the Media Bureau must release a decision within 60 calendar days after its *prima facie* determination. We believe this timeframe is sufficient to allow the Media Bureau to review the record and draft and release a decision on the merits. For complaints that the Media Bureau decides on the merits after discovery is conducted, the Media Bureau must release a decision within 150 calendar days after its *prima facie* determination. We believe this timeframe is sufficient to allow for the entry of a protective order, discovery, and the submission of supplemental briefs and other information required by the Media Bureau, as well as for the Media Bureau to review the record and draft and release a decision on the merits. For complaints referred to an ALJ for a decision on the merits, we believe that a longer timeframe is warranted to allow for, among other things, the preparation for and conduct of a fair hearing, the submission of proposed findings of fact and conclusions of law, and the ALJ's preparation of an initial decision and, if necessary, formulation of a remedy. Accordingly, we direct the ALJ to release an initial decision within 240 calendar days after one of the parties informs the Chief ALJ that it elects not to pursue ADR or, if the parties have mutually elected to pursue ADR, within 240 calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR.[81] To the extent that the Media Bureau refers only discrete issues raised in the proceeding to the ALJ rather than the entire proceeding, we expect that the ALJ will be able to act in less than 240 calendar days. We note that the Commission has previously stated that "[t]ime limits on the ALJs are permissible so long as they do not unduly interfere with a judge's independence to control the course of the proceeding . . . or subject the

[78] *See id*. at 2652, ¶ 23 ("[W]e hereby adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply."); *but see id.* at 2652, ¶ 24 ("As a practical matter, however, given that alleged violations of Section 616, especially those involving potentially 'coercive' practices, will require an evaluation of contested facts and behavior related to program carriage negotiations, we believe that the staff will be unable to resolve most program carriage complaints on the sole basis of a written record as described above. Rather, we anticipate that resolution of most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations.").

[79] *See id.* at 2655-56, ¶¶ 31-33; *see also* 47 C.F.R. § 76.7(f).

[80] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34; *see also* 47 C.F.R. § 76.7(g)(1). In cases referred to an ALJ, the parties have ten days after the Media Bureau's *prima facie* determination to elect whether to attempt to resolve their dispute through ADR. *See* 47 C.F.R. § 76.7(g)(2); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 24 and 2656, ¶ 34.

[81] Section 76.7(g)(2) of the Commission's rules currently states that a party must submit in writing to the Commission its election as to whether to proceed to ADR. *See* 47 C.F.R. § 76.7(g)(2). We amend this rule to further specify that this election must also be submitted with the Chief ALJ.

judge to performance appraisals."[82] We do not believe that the 240-calendar-day deadline adopted herein will unduly interfere with the ALJ's independence, and this deadline will not be used for performance appraisals.[83]

22. We also amend certain procedural deadlines applicable to adjudicatory hearings to reflect that an adjudicatory hearing involving a program carriage complaint does not commence until a party elects not to pursue ADR pursuant to Section 76.7(g)(2) or, if the parties have mutually elected to pursue ADR, the parties fail to resolve their dispute through ADR. We also adopt expedited deadlines to account for the 240-calendar-day deadline for the ALJ's initial decision. First, we revise the deadline for filing a written appearance in a program carriage matter referred to an ALJ. Section 1.221(c) of the Commission's rules provides that a written appearance must be filed within 20 days of the mailing of the HDO.[84] We amend this rule to provide that, in a program carriage complaint proceeding that the Media Bureau refers to an ALJ, a party must file a written appearance within five calendar days after the party informs the Chief ALJ that it elects not to pursue ADR or, if the parties have mutually elected to pursue ADR, within five calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR. Because the parties would have already been involved in a complaint proceeding before the Media Bureau resulting in the *prima facie* determination and will have had the opportunity to retain counsel for litigating the complaint before the Media Bureau, we believe that reducing the time for filing a written appearance in a program carriage matter referred to an ALJ from 20 to five days is reasonable. We also amend our rules to specify the consequences of failing to timely file a written appearance in a program carriage matter referred to an ALJ. If the complainant fails to file a written appearance by this deadline, or fails to file prior to the deadline either a petition to dismiss the proceeding without prejudice or a petition to accept, for good cause shown, a written appearance beyond such deadline, the Chief ALJ shall dismiss the complaint with prejudice for failure to prosecute.[85] If the defendant fails to file a written appearance by this deadline, or fails to file prior to this deadline a petition to accept, for good cause shown, a written appearance beyond such deadline, its opportunity to present evidence at hearing will be deemed to have been waived.[86] If the hearing is so waived, the Chief ALJ will

[82] *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, Report and Order, 5 FCC Rcd 157, ¶ 40 n.26 (1990) (citing *Butz v. Economou*, 438 U.S. 478, 513 (1978) and 5 C.F.R. § 930.211) ("*1990 Comparative Hearing Order*").

[83] We note that only one previous ALJ decision has addressed the merits of a program carriage complaint. *See WealthTV Recommended Decision*. In that case, the ALJ reached a decision one year after the Media Bureau's HDO. We do not believe this timeframe is necessarily reflective of the time required to reach a decision on the merits of a program carriage complaint given the unique circumstances of this case, including the following: (i) the case consolidated four separate complaints involving the same complainant against four separate defendant MVPDs; and (ii) the proceeding was delayed by the Media Bureau's decision to take back jurisdiction over the case, which was subsequently rescinded by the Commission. *See Herring Broadcasting Inc., d/b/a WealthTV, et al.,* Memorandum Opinion and Order, 23 FCC Rcd 18316 (MB 2008), *rescinded by Herring Broadcasting Inc., d/b/a WealthTV, et al.,* Order, 24 FCC Rcd 1581 (2009). Although the type and complexity of cases referred to ALJs vary considerably, we note that the ALJ has ruled within approximately 240 calendar days after referral in previous cases. *See Under His Direction, Inc.*, Initial Decision, 11 FCC Rcd 16831 (ALJ Luton 1996) (approximately eight months from HDO to ALJ's decision); *AJI Broad., Inc.*, Initial Decision, 11 FCC Rcd 19756 (ALJ Luton 1996) (approximately eight months from HDO to ALJ's decision); *Community Educ. Ass'n*, Initial Decision, 10 FCC Rcd 3179 (ALJ Chachkin 1995) (approximately eight months from HDO to ALJ's decision); *Aurio A. Matos*, Initial Decision, 8 FCC Rcd 7920 (ALJ Gonzalez 1993) (approximately seven months from HDO to ALJ's decision).

[84] *See* 47 C.F.R. § 1.221(c).

[85] *See, e.g., Tennis Channel HDO*, 25 FCC Rcd at 14164, ¶ 27.

[86] *See id*. at 14164, ¶ 28.

terminate the proceeding and certify to the Commission the complaint for resolution based on the existing record.[87] Second, we revise the deadline for filing a motion to enlarge, change, or delete issues.[88] Section 1.229(a) provides that a motion to enlarge, change, or delete issues shall be filed within 15 days after the HDO is published in the *Federal Register*.[89] We amend this rule to provide that, in a program carriage complaint proceeding that the Media Bureau refers to an ALJ, a motion to enlarge, change, or delete issues shall be filed within 15 calendar days after the deadline for filing a written notice of appearance. Third, we revise the deadline for holding an initial prehearing conference. Section 1.248 of the Commission's rules provides that, to the extent an initial prehearing conference is scheduled, it shall be scheduled 30 days after the effective date of the HDO, unless good cause is shown for scheduling the conference at a later date.[90] We amend this rule to provide that, to the extent the ALJ in a program carriage complaint proceeding conducts an initial prehearing conference, the conference shall be held no later than ten calendar days after the deadline for filing a written notice of appearance, or within such shorter or longer period as the ALJ may allow consistent with the public interest.[91]

23. We believe that the deadlines established herein for a decision by the Media Bureau or an ALJ on a program carriage complaint provide sufficient time for the adjudicator to reach a decision on the merits while also providing for the "expedited review" required by Congress and ensuring fairness to all parties.[92] We will allow the adjudicator to toll these deadlines only under certain circumstances. First, the adjudicator can toll a deadline if the parties jointly request tolling in order to pursue settlement discussions or ADR or for any other reason that the parties mutually agree justifies tolling.[93] Second, the adjudicator may toll a deadline if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness. Finally, in extraordinary situations, tolling a deadline may be necessary in light of the adjudicatory resources available at the time in the Office of Administrative Law Judges. The Commission has a number of alternatives under such circumstances to ensure expedited review, but a brief tolling of deadlines may be required in pending hearing cases.[94] To

[87] *See id*.

[88] *See* 47 C.F.R. § 1.223(b).

[89] *See* 47 C.F.R. § 1.229(a).

[90] *See* 47 C.F.R. § 1.248(a), (b).

[91] We note that the parties may commence discovery before the prehearing conference is held. *See* 47 C.F.R. § 1.311(c)(2).

[92] We note that the Commission in the *1993 Program Carriage Order* rejected a 90-day deadline for resolution of program carriage complaints. *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655, ¶ 32 n.52. We continue to believe that a 90-day deadline is impractical, but the longer deadlines established herein are realistic given our experience with program carriage cases since 1993. We also note that the Commission previously declined to adopt revised deadlines for resolving program access complaints, stating that "overly accelerated pleading and discovery time periods can lead to increased litigation costs if the parties are required to hire additional staff and counsel in attempting to meet unrealistic deadlines." *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 22 FCC Rcd 17791, 17857, ¶ 108 (2007) ("*2007 Program Access Order*"). We find these concerns are not presented here because the deadlines we adopt for resolving program carriage complaints are not "overly accelerated" or unrealistic.

[93] For example, if the parties jointly request to toll the Media Bureau's 60-calendar-day deadline for reaching a *prima facie* determination to pursue settlement discussions or ADR, the Media Bureau will toll the deadline until the parties jointly inform the Media Bureau that efforts to resolve the dispute were unsuccessful. Similarly, if the parties jointly request to toll the deadline for reaching a decision on the merits, the adjudicator will toll the deadline until the parties jointly inform the adjudicator that efforts to resolve the dispute were unsuccessful.

[94] *See, e.g.,* 5 C.F.R. § 930.208.

the extent an ALJ decides to toll the deadline, we emphasize that this interlocutory decision will not be appealable to the Commission as a matter of right.[95] Rather, pursuant to Section 1.301(b) of the Commission's rules, an appeal to the Commission of an ALJ's decision to toll the deadline shall be filed only if allowed by the ALJ.[96] To the extent the ALJ does not allow an appeal, or if no permission to file an appeal is requested, an objection to the ALJ's decision to toll the deadline may be raised on review of the ALJ's initial decision.[97]

24. Taken together, the 80-calendar-day initial pleading cycle, the 60-calendar-day deadline for a *prima facie* determination, the 10-calendar-day ADR election period in cases referred to an ALJ, and the 60- or 150-calendar-day (in cases decided by the Media Bureau, depending on whether discovery is conducted) or 240-calendar-day (in cases decided by an ALJ) deadline for a ruling on the merits mean that program carriage complaints will be resolved within approximately seven or ten months (in cases decided by the Media Bureau, depending on whether discovery is conducted) or thirteen months (in cases decided by an ALJ) after a complaint is filed, assuming that the parties do not elect ADR or seek to toll the deadlines. While these timeframes are longer than our aspirational goals for resolving program access complaints,[98] we believe these time frames are necessary given the often fact-intensive nature of program carriage claims, which will often focus on the details of the negotiation process and similarities and differences in programming.[99]

D. Temporary Standstill of Existing Contract Pending Resolution of a Program Carriage Complaint

25. We establish specific procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract. The procedures we adopt herein mirror the procedures adopted previously for temporary standstills involving program access complaints.[100] The

[95] *See* 47 C.F.R. § 1.301(a).

[96] *See* 47 C.F.R. § 1.301(b).

[97] *See* 47 C.F.R. § 1.301(b)(1).

[98] *See 2007 Program Access Order*, 22 FCC Rcd at 17857, ¶ 108 (retaining goal of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases).

[99] *See* Comcast Comments at 31-33 (arguing that program carriage cases are more complex than program access cases).

[100] *See* 47 C.F.R. § 76.1003(l); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 794-797, ¶¶ 71-75 (2010) ("*2010 Program Access Order*"), *vac'd in part, Cablevision Sys. Corp. v. FCC*, 2011 WL 2277217 (D.C. Cir. June 10, 2011). Comcast contends that the Commission "should be wary" of importing a standstill adopted for program access complaints into the program carriage context because, unlike the program access context where a network is under an obligation not to withhold the network from an MVPD, there is no duty to carry a network in the program carriage context. *See* Letter from David P. Murray, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 25, 2011), at 3 n.9 ("Comcast July 25 2011 *Ex Parte* Letter"). In fact, the Commission adopted a program access standstill requirement for both satellite-delivered and terrestrially delivered networks, despite the fact that a terrestrially delivered network is under no obligation to refrain from withholding the network from an MVPD in the absence of a Commission order. *See 2010 Program Access Order*, 25 FCC Rcd at 794, ¶ 71. We also note that there are 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. Moreover, Comcast ignores the fact that the program carriage regime may also impose a duty on an MVPD to carry a programming vendor if the MVPD otherwise refuses to do so on the basis of affiliation or non-affiliation.

record reflects that, absent a standstill, an MVPD will have the ability to retaliate against a programming vendor that files a legitimate complaint by ceasing carriage of the programming vendor's video programming, thereby harming the programming vendor as well as viewers who have come to expect to be able to view that video programming.[101] Moreover, absent a standstill, programming vendors may feel compelled to agree to the carriage demands of MVPDs, even if these demands violate the program carriage rules, in order to maintain carriage of video programming in which they have made substantial investments.[102] While some MVPDs may offer month-to-month extensions after expiration of a carriage contract, programming vendors explain that such extensions may lead to uncertainty for viewers and programming vendors and impede the ability of programming vendors to attract financing.[103]

26. The Supreme Court has affirmed the Commission's authority to impose interim injunctive relief, in the form of a standstill order, pursuant to Section 4(i).[104] The Commission recently relied on this authority in adopting standstill procedures for program access cases.[105] Under Section 4(i), the Commission is authorized to "make such rules and regulations . . . as may be necessary in the execution of its functions," and to "[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act."[106] Accordingly, the Commission has statutory

[101] *See* WealthTV Aug. 4 2008 *Ex Parte* Letter (attaching Letter from U.S. Sen. Amy Klobuchar to Kevin J. Martin, Chairman, FCC (July 24, 2008) at 1 ("Independent programming providers continue to express concern that continued uncertainties and delays create a chilling effect on their willingness to bring discrimination complaints, because of their fear of potential retaliation by MVPDs while a complaint remains pending.")); HDNet Nov. 20 2007 *Ex Parte Letter* at 2 ("An MVPD could retaliate by allowing the clock to run and harmful uncertainty about the unaffiliated video programming provider to mount, or even by allowing the arrangement to expire and then removing the unaffiliated video programming provider from the platform."); *see also* NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1; Letter from David S. Turetsky, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 4, 2008) at 2.

[102] *See* Letter from Stephen A. Weiswasser, Counsel for the Hallmark Channel, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Nov. 20, 2007) at 1-2 ("Hallmark Channel Nov. 20 2007 *Ex Parte* Letter"); HDNet Nov. 20 2007 *Ex Parte* Letter at 2.

[103] *See* Hallmark Channel Nov. 20 2007 *Ex Parte* Letter at 1; HDNet Nov. 20 2007 *Ex Parte* Letter at 2; Outdoor Channel Nov. 16 2007 *Ex Parte* Letter at 1-2.

[104] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *see also AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998) (standstill order issued pursuant to 47 U.S.C. § 154(i) temporarily preventing Ameritech from enrolling additional customers in, and marketing and promoting, a "teaming" arrangement with Qwest Corporation pending a decision concerning the lawfulness of the program); *Formal Complaints Order*, 12 FCC Rcd at 22566, ¶ 159 and n.464 (1997) (stating that the Commission has authority under section 4(i) of the Act to award injunctive relief); *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016 (MB 2006) (standstill order issued pursuant to section 4(i) denying a stay and reconsideration of the Media Bureau's order requiring Time Warner temporarily to reinstate carriage of the NFL Network on systems that it recently acquired from Adelphia Communications and Comcast Corporation until the Commission could resolve on the merits the Emergency Petition for Declaratory Ruling filed by the NFL).

[105] *See 2010 Program Access Order*, 25 FCC Rcd at 794-97, ¶¶ 71-75.

[106] 47 U.S.C. §§ 154(i), 303(r). In contract to the retransmission consent context, there is no statutory provision with which the Commission-ordered standstill of a program carriage agreement would be inconsistent. *See* 47 U.S.C. § 325(b)(1)(A) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except– (A) with the express authority of the originating station"); *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727-29, ¶¶ 18-19 (2011) ("*Retransmission Consent NPRM*") (concluding that Section 325(b) prevents the Commission from ordering interim carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement, and seeking comment on this conclusion).

authority to impose a temporary standstill of an existing contract in appropriate cases pending resolution of a program carriage complaint. While a complainant could request, and the Commission or Media Bureau could issue, a standstill order in a program carriage complaint proceeding under the same standards described in this order without the new procedures adopted herein, we believe that codifying uniform procedures will help to expedite action on standstill requests and provide guidance to complainants and MVPDs.[107]

27. Pursuant to the rules we adopt herein, a program carriage complainant seeking renewal of an existing programming contract, under which programming is then being provided, may submit along with its complaint a petition for a temporary standstill of its programming contract pending resolution of the complaint.[108] We encourage complainants to file the petition and complaint sufficiently in advance of the expiration of the existing contract, and in no case later than 30 days prior to such expiration, to provide the Media Bureau with sufficient time to act prior to expiration. In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest

[107] NCTA has suggested that Section 624(f)(1) of the Communications Act, which generally prohibits any Federal agency, State, or franchising authority from imposing "requirements regarding the provision or content of cable services, except as expressly provided in this title," precludes *all* temporary standstill orders in the context of a program carriage complaint proceeding. 47 U.S.C. § 544(f)(1); *see* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (July 1, 2011) ("NCTA July 1 2011 *Ex Parte* Letter"); *see also* Comcast July 25 2011 *Ex Parte* Letter at 1-2. We disagree. Section 616(a) expressly directs the Commission to "establish regulations governing program carriage agreements and related practices." 47 U.S.C. § 536(a). Further, a temporary standstill order could be found necessary to prevent the likely occurrence of one of the practices expressly prohibited in Section 616(a). *See* 47 U.S.C. §§ 536(a)(1)-(3). Moreover, we note that Section 624(f)(1) is directed at the "provision or content of cable services" and thus by its terms does not apply to other types of MVPD services, such as direct broadcast satellite service. 47 U.S.C. § 544(f)(1). We need not, and do not, decide whether Section 624(f)(1) would bar granting temporary injunctive relief in the program carriage context in *some* circumstances. Instead, we ask for comment on that issue in the accompanying *NPRM* in MB Docket No. 11-131.

We also reject Comcast's claim that the Commission cannot rely on Section 4(i) as authority for granting a standstill because Section 616(a)(5) of the Act and Section 76.1302(g)(1) of the Commission's rules prevent the Commission from imposing remedies or penalties unless and until a violation of Section 616 has been found after an adjudication on the merits. *See* Comcast July 25 2011 *Ex Parte* Letter at 1-2 (citing 47 U.S.C. § 536(a)(5) (requiring the Commission to establish regulations "provid[ing] for appropriate penalties and remedies for violations of this subsection, including carriage"); 47 C.F.R. § 76.1302(g)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies . . . ."); *AT&T Co. v. FCC*, 487 F.2d 865, 874-76 (2d Cir. 1973)). As an initial matter, as noted above, the Commission has longstanding authority to grant injunctive relief pursuant to Section 4(i) and recently relied on that authority in adopting standstill procedures for program access cases. We do not believe that the provisions cited by Comcast preclude the Commission from imposing interim injunctive relief upon an appropriate showing. Indeed, the Commission relied on Section 4(i) in adopting a standstill procedure for program access complaints despite language in the program access provisions of the Act and the Commission's rules similar to the language cited by Comcast. *See* 47 U.S.C. § 548(e)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies . . . ."); 47 C.F.R. § 76.1003(h)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies . . . .").

[108] We note that program carriage claims involving existing contracts do not arise solely at renewal. The Media Bureau has previously found at the *prima facie* stage of review that a complainant may have a timely program carriage claim in the middle of a contract term if the basis for the claim is an allegedly discriminatory decision made by the MVPD that the contract left to the MVPD's discretion. *See Tennis Channel HDO*, 25 FCC Rcd at 14154-59, ¶¶ 11-16; *see also NFL Enterprises HDO,* 23 FCC Rcd at 14819-20, ¶¶ 69-70; *MASN II HDO*, 23 FCC Rcd at 14833-35, ¶¶ 102-105. We will consider the availability of a standstill outside of the renewal context on a case-by-case basis.

favors grant of a stay.[109] As part of a showing of irreparable harm, a complainant may discuss, among other things, the impact on subscribers and the extent to which the programming vendor's advertising and license fee revenues and its ability to compete for advertisers and programming will be adversely affected absent a standstill.[110] In order to ensure an expedited decision, the defendant will have ten calendar days after service to file an answer to the petition for a standstill order. In acting on the petition, the Media Bureau may limit the length of the standstill to a defined period or may specify that the standstill will continue until the adjudicator resolves the underlying program carriage complaint. The adjudicator may lift the temporary standstill to the extent that it finds that the stay is having a negative effect on settlement negotiations or is otherwise no longer in the public interest.

28. If the Media Bureau grants the temporary standstill, the adjudicator ruling on the merits of the complaint (*i.e.*, either the Media Bureau or an ALJ) will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement.[111] For example, if

[109] *See, e.g.*, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc*., 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted). We reject Comcast's claim that the first criterion requires a showing of a "substantial" likelihood of success on the merits. *See* Comcast July 25 2011 *Ex Parte* Letter at 3. The factors set forth above are consistent with Supreme Court precedent (*Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)) and a recent D.C. Circuit case applying *Winter*. *See Winter*, 505 U.S. at 20 ("A plaintiff seeking a preliminary injunction must establish that he is *likely to succeed* on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.") (emphasis added; citations omitted); *Sherley v. Sebelius*, 2011 WL 1599685, *4 (D.C. Cir. Apr. 29, 2011) (quoting and applying the *Winter* test). We also reject Comcast's claim that a program carriage standstill is a "mandatory injunction" subject to a heightened standard because it will not preserve the *status quo* but will instead extend the term of a contract set to expire on an agreed-upon date and form a new, government-mandated contract. *See* Comcast July 25 2011 *Ex Parte* Letter at 2. As discussed above, we require a complainant to file a standstill request at least 30 days prior to the expiration of a contract to allow the Media Bureau with sufficient time to act prior to expiration. Accordingly, despite Comcast's claims, a program carriage standstill, if granted, will preserve the *status quo* by requiring continued carriage of a network that is being carried at the time the standstill is granted.

[110] Comcast claims that a complainant is unlikely to meet the requirements for a standstill because (i) under the first factor, it is unlikely that the facts will be developed at the standstill stage to demonstrate a likelihood of success on the merits, at least with respect to program carriage complaints alleging discrimination based on circumstantial evidence; (ii) under the second factor, irreparable harm cannot be established when there is an adequate remedy at law, which Comcast claims exists through a mandatory carriage remedy after a finding of a program carriage violation; and (iii) under the third factor, forced carriage would result in substantial harm to MVPDs by violating their First Amendment rights. *See* Comcast July 25 2011 *Ex Parte* Letter at 4-5. The Media Bureau will have the opportunity to consider these arguments when assessing the facts and circumstances presented in a standstill request on a case-by-case basis. We find no basis to deny complainants the opportunity to pursue a standstill in the program carriage context simply because of the potential difficulty in satisfying the requirements for a standstill. In this regard, we note that "injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 505 U.S. at 21 (citation omitted); *see also 2010 Program Access Order*, 25 FCC Rcd at 795, ¶ 73 n.266 ("'when a party seeks injunctive relief (which is precisely what a standstill is), the law is clear that this is a request for 'extraordinary relief,' and courts therefore require such party to demonstrate, on a case-by-case basis with a sufficient evidentiary record, that it satisfies' the criteria set forth in *Virginia Petroleum Jobbers Ass'n*)") (quoting with approval Time Warner Comments at 14 n.42); *Sky Angel*, 25 FCC Rcd 3879, 3884, ¶ 10 (MB 2010) ("we are unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted").

[111] *See* 47 C.F.R. § 76.1003(l)(3); *2010 Program Access Order*, 25 FCC Rcd at 795-796, ¶ 74; *see also Applications for Authority to Transfer Control, News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee,* Memorandum Opinion and Order, 23 FCC Rcd 3265, 3347-48, Appendix B, § (continued….)

carriage of the video programming has continued uninterrupted during resolution of the complaint, and if the decision on the merits requires the defendant MVPD to pay a higher amount to the programming vendor than was required under the terms of the expired contract, the defendant MVPD will make an additional payment to the programming vendor in an amount representing the difference between the amount that is required to be paid pursuant to the decision and the amount the defendant MVPD paid under the terms of the expired contract pending resolution of the complaint.[112] Conversely, if carriage of the video programming has continued uninterrupted during resolution of the complaint, and if the decision on the merits requires the defendant MVPD to pay a lesser amount to the programming vendor than was required under the terms of the expired contract, the programming vendor will credit the defendant MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during resolution of the complaint and the amount that is required to be paid pursuant to the decision.[113]

29. We note that program carriage complaints do not entail solely price disputes. Rather, complaints may entail the issue of whether the MVPD should be required to carry a programming vendor's video programming at all or whether the MVPD should carry the video programming on a specific tier. In these cases, it may be difficult to apply the new terms to the standstill period, especially in cases where the adjudicator does not ultimately order carriage. Despite these complications, we believe that the adjudicator can address these issues on a case-by-case basis. To facilitate expeditious resolution of these issues, we propose in the *NPRM* in MB Docket No. 11-131 specific procedures to assist an adjudicator to reach a fair and just result.[114]

30. As explained in the *2010 Program Access Order*, we expect parties to deal and negotiate with one another in good faith to come to settlement while the program carriage complaint is pending at the Commission.[115] We also note that the standstill requirement imposed in connection with previous merger conditions is automatic upon notice of the MVPD's intent to arbitrate,[116] whereas the process we adopt here requires a complainant to seek Commission approval based on the four-criteria test described above.[117] Thus, the Commission will be able to take into account all relevant facts in each case. Moreover, because the new carriage terms will be applied as of the expiration date of the previous

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IV(B)(8) (2008) ("*Liberty/DIRECTV Order*"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, 8338, Appendix B, § 3(h) (2006) ("*Adelphia Order*"); *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 554, ¶ 177 (2004) ("*News/Hughes Order*").

[112] *See 2010 Program Access Order*, 25 FCC Rcd at 795-796, ¶ 74; *Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, § 3(h); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[113] *See 2010 Program Access Order*, 25 FCC Rcd at 795-796, ¶ 74; *Liberty/DIRECTV Order*, 23 FCC Rcd at 3347-48, Appendix B, § IV(B)(8); *Adelphia Order,* 21 FCC Rcd at 8338, Appendix B, § 3(h).

[114] *See NPRM* in MB Docket No. 11-131, *infra* ¶ 53.

[115] *See 2010 Program Access Order*, 25 FCC Rcd at 796-797, ¶ 75.

[116] *See Liberty/DIRECTV Order*, 23 FCC Rcd at 3346, Appendix B, § IV(A)(3); *Adelphia Order,* 21 FCC Rcd at 8337, Appendix B, § 2(c); *News/Hughes Order*, 19 FCC Rcd at 554, ¶ 177.

[117] *See supra* ¶ 27; *see also* Time Warner Cable June 1 2011 *Ex Parte* Letter at 2 ("An MVPD should remain free to exercise its contractual rights to drop or reposition a programmer who has filed a program carriage complaint unless the Commission determines that the traditional factors for granting a stay are satisfied.").

contract, we believe that complainants will not have an incentive to seek a temporary standstill solely to benefit from the *status quo* or to gain leverage.[118]

E. Constitutional Issues

31. Our efforts in this *Second Report and Order* to create an improved program carriage complaint regime are consistent with constitutional requirements. TWC argues that the constitutionality of the program carriage rules has never been tested under the First and Fifth Amendments.[119] TWC argues that, to the extent the goal of the program carriage rules is to promote diversity of speech, the rules are content-based and thus subject to strict scrutiny, which requires a "compelling" government interest and "narrow tailoring."[120] Diversity, however, is not the sole or even primary goal of the program carriage provision. Rather, through the program carriage provision, Congress also specifically intended to promote competition in both the video programming market and the video distribution market.[121] Indeed, the program carriage discrimination provision specifically requires the Commission to assess on a case-by-case basis whether conduct amounting to discrimination on the basis of affiliation has the effect of "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly."[122] By favoring its affiliated programming vendor on the basis of affiliation, an MVPD can hinder the ability of an unaffiliated programming vendor to compete in the video programming market, thereby allowing the affiliated programming vendor to charge higher license fees and reducing competition in the markets for the acquisition of advertising and programming rights.

32. The D.C. Circuit has already decided that the leased access provision of the 1992 Cable Act is not content-based.[123] The court held that the leased access provision does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator.[124] The same conclusion applies to the program carriage provision of the 1992 Cable Act, which prevents MVPDs from demanding exclusivity or financial interests from, or discriminating on the basis of affiliation with respect to, unaffiliated programming vendors and, accordingly, regulates speech

[118] Comcast claims that the possibility of a program carriage standstill presents practical and policy problems, such as affecting existing business negotiations; making it riskier for MVPDs to agree to carry new or less popular networks given the potential for a standstill request to be filed at the end of the carriage term; and making it more likely that parties will fail to reach agreement by allowing only programming vendors to request a standstill. *See* Comcast July 25 2011 *Ex Parte* Letter at 5-7. In making these claims, Comcast ignores the fact that a complainant could request, and the Commission or Media Bureau could issue, a standstill order in a program carriage complaint proceeding today under the same procedures adopted herein. Thus, all of the alleged practical and policy problems raised by Comcast exist today and are not created by these procedural rules. Moreover, the procedural rules we adopt herein will help to mitigate these alleged practical and policy problems. By setting forth the standard that will be applied to a program carriage standstill request and establishing specific deadlines for submitting and responding to such a request, we provide certainty to both complainants and MVPDs with respect to the standstill process. While Comcast claims that requiring a complainant to file a standstill request no later than 30 days prior to the expiration of a contract will chill business negotiations by placing parties in litigation before a contract ends (*see id*. at 6), the fact is that, without the procedures we adopt herein, a program carriage standstill request could be filed at any time, thereby creating greater uncertainty for MVPDs.

[119] *See* TWC Comments at 10-11.

[120] *See id*. at 12.

[121] *See supra* ¶ 4.

[122] 47 U.S.C. § 536(a)(3).

[123] *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996).

[124] *See id*.

based on affiliation with an MVPD, not based on its content.[125] The court held in *Time Warner* that the provisions of the 1992 Cable Act that regulate speech based on affiliation are subject to intermediate scrutiny and are constitutional if the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim.[126] The *Time Warner* court found that there are substantial government interests in promoting diversity and competition in the video programming market.[127] The program carriage rules, like the leased access requirements, promote diversity in video programming by promoting fair treatment of unaffiliated programming vendors and providing these vendors with an avenue to seek redress of anticompetitive carriage practices of MVPDs. Moreover, because MVPDs have an incentive to shield their affiliated programming vendors from competition with unaffiliated programming vendors for viewers, advertisers, and programming rights, the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programming vendors. Thus, like the leased access rules, the program carriage rules would be subject to, and would withstand, intermediate scrutiny.

33. TWC argues that whatever justification existed for the program carriage provisions at the time they were adopted no longer exists today.[128] Despite TWC's claim to the contrary, we find that the substantial government interests in promoting diversity and competition remain. TWC notes that the number of all national programming networks has grown since 1992;[129] the percentage of these networks affiliated with cable operators has decreased;[130] channel capacity has increased, thereby providing more room for unaffiliated programming vendors,[131] and cable operators face more competition in the distribution market today than in 1992.[132] In the program carriage discrimination provision, however, Congress directed the Commission to assess on a case-by-case basis the impact of anticompetitive conduct on an unaffiliated programming vendor's ability to compete. These nationwide figures do not undermine Congress's finding that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain

[125] *See* Hallmark Channel Reply at 24-27; NFL Enterprises Reply at 13-14.

[126] *See Time Warner Entertainment Co., L.P.*, 93 F.3d at 969.

[127] *See id*. (stating that after *Turner,* "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming" must be treated as important governmental objectives unrelated to the suppression of speech (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994))).

[128] *See* TWC Comments at 11-12; *see also* Comcast Comments at 6-12; Comcast Reply at 2-6.

[129] *See* TWC Comments at 8; Comcast Reply at 5; *compare* H.R. Rep. No. 102-628, at 41 (1992) (68 nationally delivered cable networks) *with Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 550-51, ¶ 24 (2009) ("*13th Annual Report*") (based on data from 2006, finding that there are 565 nationally delivered cable networks).

[130] *See* TWC Comments at 8; Comcast Reply at 5; *compare* H.R. Rep. No. 102-628, at 41 (1992) (stating that 57 percent of nationally delivered cable networks are affiliated with cable operators) *with 13th Annual Report*, 24 FCC Rcd at 550-51, ¶ 24 (based on data from 2006, finding that 14.9 percent of nationally delivered cable networks are affiliated with cable operators).

[131] *See* TWC Comments at 7-8.

[132] *See id.* at ii and 9-10 (stating that competition in the distribution market requires a cable operator to make programming decisions "based on business and editorial judgments as to whether particular channels meet the needs and interests of the operator's subscribers and to attempt to maximize consumer value by making the best deal possible in arm's length negotiations"); *see also* Comcast Reply at 5, 28 n.100, 30.

the ability of an unaffiliated programming vendor to compete fairly.[133] While the D.C. Circuit in vacating the Commission's horizontal ownership cap stated that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992," the court in that case was reviewing a broad prophylactic rule that would limit individual cable operators to a maximum percentage of subscribers nationwide.[134] Unlike the rule at issue in that case, the program carriage statute requires an assessment of the facts of each case and the impact on the ability of an unaffiliated programming vendor to compete fairly. In addition, we note that the number of cable-affiliated networks recently increased significantly after the merger of Comcast and NBC Universal, thereby highlighting the continued need for an effective program carriage complaint regime.[135] The Commission noted that that transaction would "result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."[136] The Commission specifically relied upon the program carriage complaint process to address these concerns.[137]

34. Moreover, the program carriage rules are no broader than necessary because the Commission will find a violation of the rules only after conducting a proceeding in which the complaining unaffiliated programming vendor or MVPD proves that an MVPD has demanded exclusivity from a programming vendor, has demanded a financial interest in a programming vendor, or has discriminated against the programming vendor on the basis of affiliation and that such discrimination has unreasonably restrained the programming vendor's ability to compete fairly. Thus, the program carriage rules burden no more speech than necessary to vindicate the government's goal of protecting competition and diversity.

35. We also reject TWC's claim that the program carriage rules infringe cable operators' rights under the Takings Clause of the Fifth Amendment.[138] Quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994), TWC argues that, "[g]iven the existence of a fiercely competitive landscape fostering the development of diverse programming sources, there is no 'essential nexus' or 'rough proportionality' that would justify the taking that occurs under the … program carriage rules."[139] TWC's reliance on *Dolan* is misplaced, as the "essential nexus" test concerns land use regulations that allegedly impose "unconstitutional conditions" and is inapplicable here.[140] None of the factors that the Supreme Court has identified as particularly significant in evaluating regulatory takings claims supports TWC's claim.[141]

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[133] *See supra* ¶ 4.

[134] *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (2009).

[135] *See Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4238, ¶ 1 and 4284-85, ¶ 116 (2011) ("*Comcast/NBCU Order*").

[136] *See id*. at 4284-85, ¶ 116; *see also id*. at 4282, ¶ 110 ("We agree that the vertical integration of Comcast's distribution network with NBCU's programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming.").

[137] *See id*. at 4288, ¶ 123 and Appendix A, Section III.4.

[138] *See* TWC Comments at 13 n.51; *see also* U.S. Const., amend. V ("nor shall private property be taken for public use, without just compensation.").

[139] *See* TWC Comments at 13 n.51.

[140] *See Dolan*, 512 U.S. at 385-86; *see also id.* at 390 (Fifth Amendment requirement of "rough proportionality" applies where government requires a landowner to dedicate private land for some future public use in exchange for a discretionary benefit such as a building permit).

[141] *See Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986) ("In all of these cases, we have eschewed development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have

(continued….)

First, the program carriage rules merely prohibit a cable operator from requiring a financial interest in a video programming vendor as a condition for carriage, from coercing a video programming vendor to provide exclusivity as a condition of carriage, or from discriminating on the basis of affiliation that unreasonably restrains the ability of unaffiliated video programming vendors to compete fairly.[142] The program carriage provision of the Act, as well as our rules implementing that provision, do not compel a cable operator to carry certain programming, nor do they specify the rates for carriage. Second, the rules, which have been in force since 1993 and were required by Congress in 1992, do not interfere with any current investment-backed expectations.[143] Third, the rules substantially advance the legitimate governmental interest in promoting competition and diversity in the video programming market, an interest that Congress has directed the Commission to vindicate and that the courts have recognized as important.[144] Finally, our examination of the record in this proceeding refutes the premise of TWC's argument that the program carriage rules serve no purpose in light of the current state of competition in the video programming market.[145] Thus, the rules do not effect a "taking" within the meaning of the Fifth Amendment.

F. Adequate Notice

36. We reject arguments that the *Program Carriage NPRM* failed to provide the specificity required under the Administrative Procedure Act ("APA") and that the Commission must issue another notice before adopting final rules.[146] Sections 553(b) and (c) of the APA require agencies to give public notice of a proposed rule making that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and to give interested parties an opportunity to submit comments on the proposal.[147] Such notice is not, however, required for rules involving agency procedure.[148] The standstill procedures and the revised procedural rules adopted herein, including extending the deadline for a defendant to file an answer to a complaint, are rules of agency procedure for

(...continued from previous page)
relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.") (citations and internal quotes omitted), quoted in *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20262, ¶ 56 (2007) ("*MDU Exclusives Order*"), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

[142] *See MDU Exclusives Order*, 22 FCC Rcd at 20262, ¶ 57.

[143] *See id.* at 20263, ¶ 58 (declining to find interference with investment-backed expectations where exclusivity clauses in MDU contracts had been under regulatory scrutiny for over a decade, and Commission had prohibited enforcement of such clauses in similar contexts).

[144] *See* 47 U.S.C. § 536; *Time Warner Entertainment Co., L.P.*, 93 F.3d at 969; *see also MDU Exclusives Order*, 22 FCC Rcd at 20263, ¶ 59.

[145] *See supra* ¶ 33.

[146] *See* Comcast Comments at 14 n.34; Comcast Reply at 39-41; *see also* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (May 17, 2011); Letter from Howard J. Symons, Counsel for Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 1, 2011).

[147] *See* 5 U.S.C. § 553(b), (c).

[148] *See* 5 U.S.C. § 553(b)(A).

which no notice is required under the APA.[149] When notice is required under the APA, the notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved."[150] In particular, the APA's notice requirements are satisfied where the final rule is a "logical outgrowth" of the actions proposed.[151] Here, the *Program Carriage NPRM* specifically sought comment on, among other questions, "whether the elements of a *prima facie* case should be clarified,"[152] "whether specific time limits on the Commission, cable operators, or others would promote a speedy and just resolution" of program carriage disputes,[153] and "whether the Commission should adopt rules to address the complaint process itself."[154] But in any event, with respect to the standstill procedures, the Commission specifically sought comment on whether to "adopt additional rules to protect programmers from potential retaliation if they file a complaint."[155] As discussed above, the standstill procedure will help to prevent retaliation while a program carriage complaint is pending, and thus is a "logical outgrowth" of this proposal.[156]

IV. NOTICE OF PROPOSED RULEMAKING

37. In this *NPRM* in MB Docket No. 11-131, we seek comment on the following additional revisions or clarifications to both our procedural and substantive program carriage rules, which are

[149] *See id*. While Comcast claims that the procedures we adopt herein for a program carriage standstill will have "substantive effects," the fact is that these procedures codify the process for requesting a standstill that a complainant could request, and the Commission or Media Bureau could issue, today without the new procedures adopted herein. *See* Comcast July 25 2011 *Ex Parte* Letter at 7; *supra* n.118. Any "substantive effects" resulting from the filing and consideration of a program carriage standstill request exist today and are not affected by the procedures we adopt herein. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (Commission's "hard look" rules were procedural because they "did not change the substantive standards by which the Commission evaluates license applications"); *Bachow Commc'ns, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001) (Commission cut-off date for certain amendments to pending applications was procedural); *Neighborhood TV Co. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984) (Commission interim processing rules were procedural); *Kessler v. FCC*, 326 F.2d 673 (1963) (same); *Ranger v. FCC*, 294 F.2d 240, 243-44 (D.C. Cir. 1961) (Commission cut-off date for filing applications was procedural). The procedures we adopt herein do not alter the existence or scope of any substantive rights, but simply codify a pre-existing procedure for obtaining equitable relief to vindicate those rights. Any alleged burden stemming from a procedural rule is not sufficient to convert the rule into a substantive one that requires notice and comment. *See, e.g., James V. Hurson Assocs, Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) ("even if the [agency's] elimination of [the procedural rule] did impose a substantial burden . . . , that burden would not convert the rule into a substantive one that triggers the APA's notice-and-comment requirement…. [A]n otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties.").

[150] *See Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotations omitted).

[151] *See Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990).

[152] *Program Carriage NPRM*, 22 FCC Rcd at 11227, ¶ 14.

[153] *Id*. at 11227, ¶ 15.

[154] *Id*. at 11227, ¶ 16.

[155] *Id*.

[156] *See supra* ¶ 25. The fact that the Commission may have been more explicit in seeking comment on a standstill process in other contexts does not undermine the fact that the program carriage standstill procedures are rules of agency procedure for which no notice is required under the APA and, in any event, are a logical outgrowth of the request for comment on rules to protect programmers from retaliation. *See* Comcast July 25 2011 *Ex Parte* Letter at 7 (citing *Retransmission Consent NPRM*, 26 FCC Rcd at 2727-29, ¶¶ 18-19 and *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17868-70, ¶¶ 136-138 (2007)).

intended to facilitate the resolution of program carriage claims.[157] We also invite commenters to suggest any other changes to our program carriage rules that would improve our procedures and promote the goals of the program carriage statute.

A. Statute of Limitations

38. The current program carriage statute of limitations set forth in Section 76.1302(f) provides that a complaint must be filed "within one year of the date on which one of the following events occurs:

> (1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or
>
> (2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or
>
> (3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section."[158]

Our concern is with Section 76.1302(f)(3), which states that a complaint is timely if filed within one year of when the complainant notified the defendant MVPD of its intention to file a complaint and contains no reference to when the alleged violation of the program carriage rules occurred.[159] In other words, the rule could be read to provide that, even if the act alleged to have violated the program carriage rules occurred many years before the filing of the complaint, the complaint is nonetheless timely if filed within one year of when the complainant notified the defendant MVPD of its intention to file. Moreover, the introductory language to 76.1302(f) provides that a complaint must be filed "within one year of the date on which one of the following events occurs,"[160] which implies that a complaint filed in compliance with Section 76.1302(f)(3) is timely even if it would be untimely under Sections 76.1302(f)(1) or (f)(2). Thus, it

[157] Unless otherwise noted, all references to comments, reply comments, or letters in this *NPRM* refer to submissions filed in response to the *Program Carriage NPRM* in MB Docket No. 07-42. *See Program Carriage NPRM,* MB Docket No. 07-42, 22 FCC Rcd 11222 (2007).

[158] 47 C.F.R. § 76.1302(f). This rule will now appear at Section 76.1302(h) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07-42 take effect. *See infra*, Appendix B.

[159] As originally adopted in the *1993 Program Carriage Order*, the rule that is now Section 76.1302(f)(3) formerly read that a complaint must be filed within one year of the date when "the complainant has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart." *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652-53, ¶ 25 and 2676, Appendix D (47 C.F.R. § 76.1302(r)(3)). In the *1994 Program Carriage Order*, the Commission eliminated without explanation the language in this rule specifying that the complainant's notice of intent would be "based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged." The Commission replaced the rule with the current language, with a minor edit adopted in the *1998 Biennial Regulatory Review Order*. *See 1994 Program Carriage Order*, 9 FCC Rcd at 4421, Appendix A (47 C.F.R. § 76.1302(r)(3)); *1998 Biennial Regulatory Review Order*, 14 FCC Rcd at 441, Appendix A (changing the word "subpart" to "section").

[160] 47 C.F.R. § 76.1302(f).

appears that Section 76.1302(f)(3) undermines the fundamental purpose of a statute of limitations "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed."[161]

39. In light of these concerns, we propose to revise our program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the program carriage rules. We seek comment on any potential ramifications of this revised statute of limitations on programming vendors and MVPDs. We recognize that the issue of when the act that allegedly violated the rules occurred is fact-specific and in some cases may be subject to differing views between the parties. For example, to the extent that the claim involves denial of carriage, an issue might arise as to whether the denial occurred when the MVPD first rejected a programming vendor's request for carriage early in the negotiation process or whether the denial occurred later after further carriage discussions. We expect that the adjudicator will be able to resolve such issues on a case-by-case basis. We believe our proposed rule revision will ensure that program carriage complaints are filed on a timely basis and will provide certainty to both MVPDs and prospective complainants. We propose that this revised statute of limitations will replace Section 76.1302(f) in its entirety, thereby providing for one broad rule covering all program carriage claims. Alternatively, we could replace only Section 76.1302(f)(3) with this revised statute of limitations and retain Sections 76.1302(f)(1) and (f)(2). Because this revised statute of limitations would appear to cover the claims referred to in Sections 76.1302(f)(1) and (f)(2), however, replacing Section 76.1302(f) in its entirety appears to be warranted. We ask parties to comment on this issue.

40. To the extent we retain Section 76.1302(f)(1), we propose to make a minor clarification. As amended in the *1998 Biennial Regulatory Review Order*, the rule currently provides that a complaint must be filed within one year of the date when a "multichannel video programming distributor enters into a contract with a video programming *distributor*" that a party alleges to violate one or more of the program carriage rules.[162] The program carriage statute and rules, however, pertain to contracts, and negotiations related thereto, between MVPDs and video programming *vendors*, not distributors.[163] Indeed, Section 616 of the Act refers to "video programming *vendors*."[164] Consistent with the statute, the previous version of this rule adopted in the *1994 Program Carriage Order* accurately stated that the contract must be entered into with a "video programming *vendor*," not a "distributor."[165] Accordingly, to the extent we retain Section 76.1302(f)(1), we propose to replace the term "video programming distributor" with "video programming vendor."

B. Discovery

41. We seek comment on whether to revise our discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery. As discussed above, if the Media Bureau finds that the complainant has established a *prima facie* case but determines that it cannot resolve the complaint based on the existing record, the Media Bureau may outline procedures for discovery before proceeding to rule on the merits of the complaint or it may refer

[161] *See Bunker Ramo Corp.*, Memorandum Opinion and Order, 31 FCC 2d 449, ¶ 12 (Review Board 1971).

[162] *See* 47 C.F.R. § 76.1302(f)(1) (emphasis added); *see also 1998 Biennial Regulatory Review Order*, 14 FCC Rcd at 441, Appendix A.

[163] *See* 47 U.S.C. § 536; 47 C.F.R. § 76.1301.

[164] *See* 47 U.S.C. § 536 (emphasis added).

[165] *See 1994 Program Carriage Order*, 9 FCC Rcd at 4421, Appendix A (47 C.F.R. § 76.1302(r)(1) (emphasis added)).

the proceeding or discrete issues raised in the proceeding for an adjudicatory hearing before an ALJ.[166] To the extent the Media Bureau proceeds to develop discovery procedures, the *1993 Program Carriage Order* provides that "[w]herever possible, to avoid discovery disputes and arguments pertaining to relevance, the staff will itself conduct discovery by issuing appropriate letters of inquiry or requiring that specific documents be produced."[167] We seek comment on revising the Media Bureau's discovery process for program carriage complaints based on the following: (i) expanded discovery procedures (also known as party-to-party discovery) similar to the procedures that exist for program access complaints; and (ii) an automatic document production process that is narrowly tailored to program carriage complaints. This discovery process would be in addition to the Media Bureau's ability to order discovery under Section 76.7(f).[168] We also seek comment on any other approaches to discovery. Our goal is to establish a discovery process that ensures the expeditious resolution of complaints while also ensuring fairness to all parties.

1. Expanded Discovery Procedures

42. We seek comment on whether to adopt expanded discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery similar to the procedures that exist for program access cases. Under the current program carriage rules, discovery is Commission-controlled, meaning that Media Bureau staff identifies the matters for which discovery is needed and then issues letters of inquiry to the parties on those matters or requires the parties to produce specific documents related to those matters.[169] Under the expanded discovery procedures applicable to program access cases, however, discovery is controlled by the parties. As an initial matter, the program access rules provide that, to the extent the defendant expressly references and relies upon a document in asserting a defense or responding to a material allegation, the document must be included as part of the answer.[170] In addition, parties to a program access complaint may serve requests for discovery directly on opposing parties rather than relying on the Media Bureau staff to seek discovery through letters of inquiry or document requests.[171] The respondent may object to any request for documents that are not in its control or relevant to the dispute.[172] The obligation to produce the disputed material is suspended until the Commission rules on the objection.[173] Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the

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[166] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21; *see also* 47 C.F.R. § 76.7(f); *1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶¶ 31-33.

[167] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id*. at 2652, ¶ 23 (providing that discovery will "not necessarily be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff"); *see also* 47 C.F.R. § 76.7(f).

[168] *See* 47 C.F.R. § 76.7(f).

[169] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id*. at 2652, ¶ 23.

[170] *See* 47 C.F.R. § 76.1003(e)(1); *2007 Program Access Order*, 22 FCC Rcd at 17851-52, ¶ 96.

[171] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852, ¶ 98.

[172] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852, ¶ 98. We note that a Petition for Reconsideration of the *2007 Program Access Order* is pending that argues that our rules should clarify that a party is able to object based on privilege in addition to objecting on the grounds of lack of control or relevance. *See* Fox Entertainment Group, Inc., Petition for Reconsideration, MB Docket No. 07-29 (Nov. 5, 2007), at 10.

[173] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852, ¶ 98.

complaint may be dismissed with prejudice.[174] We seek comment on whether these are appropriate discovery procedures for program carriage complaints decided on by the Media Bureau after discovery. Is there any basis to believe that expanded discovery procedures are appropriate for program access cases but not program carriage cases? Will expanded discovery procedures hinder the Media Bureau's ability to comply with the expedited deadline adopted in the *Second Report and Order* for the resolution of program carriage complaints?[175] Are the parties to a complaint in a better position to determine what information is needed to support their cases than Media Bureau staff, thus establishing expanded discovery procedures as fairer to all parties than Commission-controlled discovery? Should we make clear that expanded discovery procedures apply to all forms of discovery, including document production, interrogatories, and depositions?[176] We note that, as described below, to ensure that confidential information is not improperly used for competitive business purposes, we seek comment on adopting a more stringent standard protective order and declaration than is currently used in program access cases.[177]

43. One potential concern with expanded discovery procedures is that they will lead to overbroad discovery requests and extended disputes pertaining to relevance, which the Commission recognized as a concern in the *1993 Program Carriage Order* when it allowed for only Commission-controlled discovery.[178] To ensure an expeditious discovery process, should we impose a numerical limit on the number of document requests, interrogatories, and depositions a party may request? Should we establish specific deadlines for the discovery process in order to enable the Media Bureau to meet the 150-calendar-day resolution deadline? For example, although not currently specified in our program access rules, we seek comment on whether to establish deadlines by when parties must submit discovery requests, objections thereto, and replies to objections, such as 20, 25, and 30 calendar days respectively after the Media Bureau's *prima facie* determination in which it states that it will rule on the merits of the complaint after discovery.[179] We also seek comment on whether to require the parties to meet and confer to attempt to mutually resolve their discovery disputes and to submit a joint comprehensive discovery proposal to the Media Bureau within 40 calendar days after the Media Bureau's *prima facie* determination, with any remaining unresolved issues to be ruled on by the Media Bureau. We also seek input on whether to establish a firm deadline for when discovery must be completed, such as 75 calendar

[174] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852-53, ¶¶ 98-99.

[175] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21 (establishing that, in cases that the Media Bureau decides on the merits after discovery, the Media Bureau must issue a decision within 150 calendar days after its *prima facie* determination). We note that while the Commission has established aspirational goals for the resolution of program access complaints, those deadlines do not apply to cases involving complex discovery. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, 15842-43, ¶ 41 (1998) ("*1998 Program Access Order*"); *see also 2007 Program Access Order*, 22 FCC Rcd at 17857, ¶ 108 (reaffirming aspirational goals set forth in the *1998 Program Access Order*).

[176] *Compare 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 23 and 2655-56, ¶ 32 (referring to the Media Bureau's ordering of document production and interrogatories) *with* 47 C.F.R. 76.7(f)(1) (referring to the Media Bureau's ordering of depositions in addition to document production and interrogatories).

[177] *See infra* ¶ 48.

[178] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id*. at 2652, ¶ 23.

[179] As discussed above, after finding that the complainant has established a *prima facie* case, the Media Bureau could rule on the merits of a complaint based on the pleadings without discovery. *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21. The deadlines related to discovery discussed here would be triggered only if the Media Bureau's decision finding that the complainant has established a *prima facie* case states that the Media Bureau will issue a ruling on the merits of the complaint after discovery.

days after the Media Bureau's *prima facie* determination, and for the submission of post-discovery briefs and reply briefs, such as 20 calendar days and ten calendar days, respectively, after the conclusion of discovery.[180] With these deadlines, the Media Bureau would have 45 days to prepare and release a decision on the merits.

2. Automatic Document Production

44. In addition to expanded discovery procedures, we seek comment on an automatic document production process that is narrowly tailored to the issues raised in program carriage complaints. Under this approach, if the Media Bureau issues a decision finding that a complaint contains sufficient evidence to establish a *prima facie* case and stating that it will rule on the merits of the complaint after discovery, both parties would have a certain period of time to produce basic threshold documents listed in the Commission's rules that are relevant to the program carriage claim at issue. The Commission adopted a similar approach for comparative broadcast proceedings involving applications for new facilities.[181] Under those procedures, after the issuance of an HDO, applicants were required to produce documents enumerated in a standardized document production order set forth in the Commission's rules.[182] The Commission adopted this approach because it would result in "substantial time savings."[183] Should we establish a similar approach for program carriage cases? We believe that this process could work in conjunction with the expanded discovery procedures outlined above. For example, within ten calendar days after the Media Bureau issues a decision finding that the complaint contains sufficient evidence to establish a *prima facie* case and stating that it will rule on the merits of the complaint after discovery, both parties would produce the documents in the automatic document production list set forth in the Commission's rules for the specific program carriage claim at issue.[184] Is this a sufficient amount of time for production, considering that the required documents will be listed in our rules and thus parties will have advanced notice as to what documents must be produced? Based on the documents produced, the parties would then proceed to request additional discovery pursuant to the deadlines set forth above (*i.e.*, discovery requests, objections thereto, and responses to objections would be due 20, 25 and 30 calendar days respectively after the Media Bureau's *prima facie* determination). To the extent that we do not adopt automatic document production, the initial ten-day production period would not be required; thus, we also seek comment on more expeditious deadlines for submitting discovery requests, objections thereto, and responses to objections in the event we do not adopt automatic document production.

45. We seek input on whether automatic document production will result in substantial time savings and thereby more expeditious resolution of program carriage complaints. We ask commenters to consider the following ways in which automatic document production might expedite discovery. First, by establishing that certain documents are relevant for a program carriage claim, automatic document production should reduce delay resulting from debates over relevancy. Second, automatic document

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[180] *See* 47 C.F.R. § 76.7(e)(3) (stating that the Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence).

[181] *See* 47 C.F.R.§ 1.325(c)(1); *see also 1990 Comparative Hearing Order*, 5 FCC Rcd 157, ¶¶ 25-29.

[182] *See* 47 C.F.R.§ 1.325(c)(1).

[183] *See 1990 Comparative Hearing Order*, 5 FCC Rcd 157, ¶ 25; *see also id*. at ¶ 27 ("With the early provision of the information required in the standardized document production order and the uniform integration statement, we would expect that the remainder of the discovery process could be expedited.").

[184] As discussed above, after finding that the complainant has established a *prima facie* case, the Media Bureau might rule on the merits of a complaint based on the pleadings without discovery. *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21. The deadlines related to automatic document production discussed here would be triggered only if the Media Bureau's decision finding that the complainant has established a *prima facie* case states that the Media Bureau will issue a ruling on the merits of the complaint after discovery.

production should enable the parties to identify early in the discovery process any individuals they seek to depose. Third, by providing advanced notice of documents that are relevant, parties should have sufficient time to gather these documents and to produce them promptly. Fourth, automatic document production may prevent delays in obtaining any necessary third-party consent. Production of certain documents, such as programming contracts, may require third-party consent before disclosure, resulting in a delay in the production of documents. The automatic document production list should help address this concern by providing the parties with advanced notice that they may have to produce certain documents in the event of a *prima facie* finding, thus providing parties with time to secure any required third-party consents. Are there any other advantages or disadvantages with an automatic document production process?

46. To the extent we adopt an automatic document production process, we seek comment on what documents must be produced. The types of documents will necessarily vary based on whether the claim is a violation of the financial interest, exclusivity, or discrimination provision. Below we suggest some documents that might be considered sufficiently relevant to include in the automatic document production list. We seek comment on whether specific documents should be added or removed.

Financial Interest Claim

- All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant MVPD;
- All documents relating to the defendant MVPD's interest in obtaining or plan to obtain a financial interest in the complainant or the video programming at issue in the complaint; and
- All documents relating to the programming vendor's consideration of whether to provide the defendant MVPD with a financial interest in the complainant or the video programming at issue in the complaint.

Exclusivity Claim

- All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant MVPD;
- All documents relating to the defendant MVPD's interest in obtaining or plan to obtain exclusive rights to the video programming at issue in the complaint; and
- All documents relating to the programming vendor's consideration of whether to provide the defendant MVPD with exclusive rights to the video programming at issue in the complaint.

Discrimination Claim

- All documents relating to the defendant MVPD's carriage decision with respect to the complainant's video programming at issue in the complaint, including (i) the defendant MVPD's reasons for not carrying the video programming or the defendant MVPD's reasons for proposing, rejecting, or accepting specific carriage terms; and (ii) the defendant MVPD's evaluation of the video programming;
- All documents comparing, discussing the similarities or differences between, or discussing the extent of competition between the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, including in terms of genre, ratings, license fee, target audience, target advertisers, and target programming;
- All documents relating to the impact of defendant MVPD's carriage decision on the ability of the complainant, the complainant's video programming at issue in the complaint, the defendant MVPD, and the allegedly similarly situated, affiliated video programming to compete, including the impact on (i) subscribership; (ii) license fee revenues; (iii) advertising revenues; (iv) acquisition of advertisers; and (v) acquisition of programming rights;

- For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, all documents (both internal documents as well as documents received from MVPDs, but limited to the ten largest MVPDs in terms of subscribers with which the complainant or the affiliated programming vendor have engaged in carriage discussions regarding the video programming) discussing the reasons for the MVPD's carriage decisions with respect to the video programming, including (i) the MVPD's reasons for not carrying the video programming or the MVPD's reasons for proposing, rejecting, or accepting specific carriage terms; and (ii) the MVPD's evaluation of the video programming; and
- For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, current affiliation agreements with the ten largest MVPDs (including, if not otherwise covered, the defendant MVPD) carrying the video programming in terms of subscribers.

47. Should our rules limit the automatic production of documents to those generated or received after a certain date, such as within three years prior to the complaint? Should our rules require the parties to establish a privilege log describing the documents that have been withheld along with support for any claim of privilege? Should we specify in our rules that the Media Bureau has the discretion to add or remove documents from this automatic production list based on the specific facts of a case when issuing its *prima facie* decision? Rather than specifying a list of documents in our rules, should we instead require the Media Bureau when issuing a *prima facie* decision to order the production of documents based on the specific facts of the case? Will this eliminate the benefits of advanced notice discussed above?

3. Protective Orders

48. We note that one source of delay in the discovery process is the need for the parties to negotiate and obtain approval of a protective order before producing confidential information. For program access cases, we have established a standard protective order and declaration.[185] While parties to program access cases are free to negotiate their own protective order, they may also rely upon this standard protective order. We seek comment on whether the program access protective order is sufficiently stringent to ensure that confidential information is not improperly used for competitive business purposes, or whether we should adopt a more stringent standard protective order for program carriage cases. To the extent commenters have specific concerns with using the program access standard protective order and declaration for program carriage cases, we ask that they propose specific changes and an explanation of their reason for their proposed changes.[186] If parties to a program carriage complaint are unable to mutually agree to their own protective order prior to the ten-day automatic production deadline discussed above, should the parties be deemed to have agreed to the standard protective order, thereby allowing document production to proceed? To the extent that the automatic document production list or discovery in general requires production of documents, such as programming contracts, that require third-party consent before disclosure, does the standard protective order address reasonable concerns commonly expressed by third parties or should specific provisions be added to address those concerns?

[185] *See* 47 C.F.R. § 76.1003(k); *2007 Program Access Order*, 22 FCC Rcd at 17853-55, ¶¶ 100-103 and Appendix E, 17894-99. The standard protective order and declaration used in program access cases is attached hereto at Appendix E.

[186] We note that a Petition for Reconsideration of the *2007 Program Access Order* is pending that argues that the standard protective order should include a mechanism whereby a party can object to a specific individual seeking access to confidential information; should allow only outside counsel to access certain information; and should provide the parties with the right to prohibit copying of highly sensitive documents. *See* Fox Entertainment Group, Inc., Petition for Reconsideration, MB Docket No. 07-29 (Nov. 5, 2007), at 8-10.

Are there any other actions we can take to prevent third-party consent requirements from delaying the completion of discovery?

4. Use of Discovery Procedures in Program Carriage Cases Referred to an ALJ

49. We also seek comment on the extent to which any of the discovery proposals outlined above should apply to program carriage complaints referred to an ALJ. As an initial matter, we note that cases referred to an ALJ generally involve a hearing, which raises additional complexities not applicable to cases handled by the Media Bureau. Moreover, our rules set forth specific discovery procedures applicable to adjudicatory proceedings conducted before an ALJ[187] and also provide the ALJ with authority to "[r]egulate the course of the hearing."[188] Nonetheless, we seek comment as to whether and how the discovery deadlines suggested above, the automatic document production lists, or the model protective order might be used in conjunction with program carriage complaints referred to an ALJ.

C. Damages

50. We propose to adopt rules allowing for the award of damages for violations of the program carriage rules that are identical to those adopted for program access cases. Section 616(a)(5) of the Act directs the Commission to adopt regulations that "provide for appropriate penalties and remedies for violations of [Section 616], including carriage."[189] Although the program carriage statute does not explicitly direct the Commission to allow for the award of damages as a remedy for a program carriage violation, the statute does require the Commission to adopt "appropriate . . . remedies."[190] The Commission has interpreted this same term as used in the program access statute[191] as broad enough to include a remedy of damages, stating that:

> Although petitioners are correct that the statute does not expressly use the term "damages," it does expressly empower the Commission to order "appropriate remedies." Because the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy, the plain language of this part of Section 628(e) is consistent with a

[187] *See* 47 C.F.R. §§ 1.311-1.340.

[188] *See* 47 C.F.R. § 1.243(f).

[189] 47 U.S.C. § 536(a)(5).

[190] *See id*. In the *1993 Program Carriage Order*, the Commission stated that it would "determine the appropriate relief for program carriage violations on a case-by-case basis" and that available remedies and sanctions "include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission," but did not explicitly include or exclude damages. *1993 Program Carriage Order*, 9 FCC Rcd at 2653, ¶ 26.

[191] 47 U.S.C. § 548(e)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall have the power to order *appropriate remedies*, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.") (emphasis added). Although the Commission initially concluded that it did not have authority to assess damages in program access cases, it later reversed that decision. *Compare Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3392, ¶ 81 (1993) ("*1993 Program Access Order*") *with Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1910-11, ¶ 17 (1994) ("*1994 Program Access Reconsideration Order*").

finding that the Commission has authority to afford relief in the form of damages.[192]

We seek comment on whether the Commission has authority to award damages in program carriage cases under the same analysis.

51. We believe that allowing for the award of damages would be useful in deterring program carriage violations and promoting settlement of any disputes. We seek comment on this view. If we adopt rules allowing for the award of damages in program carriage cases, we propose to apply the same policies that apply in program access cases. In the program access context, the Commission has stated that damages would not promote competition or otherwise benefit the video marketplace in cases where a defendant relies upon a good faith interpretation of an ambiguous aspect of our rules for which there is no guidance.[193] Conversely, the Commission has explained that damages are appropriate when a defendant knew or should have known that its conduct would violate the rules.[194] We request comment on this approach. In addition, consistent with our program access rules, we propose to adopt rules allowing for the award of compensatory damages in program carriage cases. We do not propose to allow for awards of attorney's fees. We seek comment on whether the Commission has legal authority to make awards of punitive damages. Section 616(a)(5) of the Act directs the Commission to adopt regulations that "provide for appropriate penalties."[195] Courts have recognized that "penalties" may take various forms, including punitive damages, fines, and statutory penalties, all of which are aimed at deterring wrongful conduct.[196] We note, however, that the Commission previously declined to allow for the award of punitive damages in program access cases.[197] We seek comment on whether there is any basis for awarding punitive damages in program carriage cases but not in program access cases. To what extent would the potential award of punitive damages help to deter program carriage violations and promote settlement of any disputes?

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[192] *See 1994 Program Access Reconsideration Order*, 10 FCC Rcd at 1910-11, ¶ 17; *see also 1998 Program Access Order*, 13 FCC Rcd at 15831-32, ¶¶ 14-15 (reaffirming the Commission's statutory authority to award damages in program access cases). Although the Commission held that it had authority to award damages in program access cases, it initially elected not to exercise that authority, finding that other sanctions available to the Commission were sufficient to deter entities from violating the program access rules. *See 1994 Program Access Reconsideration Order*, 10 FCC Rcd at 1911, ¶ 18. The Commission later adopted rules allowing for the award of damages in program access cases, stating that "[r]estitution in the form of damages is an appropriate remedy to return improper gains." *1998 Program Access Order*, 13 FCC Rcd at 15833, ¶ 17. We note that the Commission has held that Section 325(b)(3)(C) of the Act pertaining to retransmission consent negotiations, which does not contain the same "appropriate remedies" language, does not authorize the award of damages. *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5480, ¶ 82 (2000) ("We can divine no intent in Section 325(b)(3)(C) to impose damages for violations thereof. . . . Commenters' reliance on the program access provisions as support for a damages remedy in this context is misplaced. The Commission's authority to impose damages for program access violations is based upon a statutory grant of authority.").

[193] *See 1998 Program Access Order*, 13 FCC Rcd at 15833, ¶ 18.

[194] *See* 47 C.F.R. § 76.1003(d)(2); *1998 Program Access Order*, 13 FCC Rcd at 15833, ¶ 18.

[195] 47 U.S.C. § 536(a)(5).

[196] *See Leister v. Dovetail, Inc.,* 546 F.3d 875, 883 (7th Cir. 2008).

[197] The Commission based its decision to decline to allow for the award of punitive damages in program access cases based on a lack of record evidence regarding the need for this type of damages. *See 1998 Program Access Order*, 13 FCC Rcd at 15834, ¶ 21.

52. We note that the Commission has also adopted specific procedures for requesting and awarding damages in program access cases.[198] We propose to apply these same procedures to the award of damages in the program carriage context. While we briefly summarize some of these procedures here, we encourage commenters to review these procedures in their entirety as set forth in Sections 76.1003(d) and 76.1003(h)(3) of the Commission's rules and the *1998 Program Access Order* to determine whether they are appropriate for program carriage cases.[199] Under the program access rules, a complainant seeking damages must provide in its complaint either (i) a detailed computation of damages (the "damages calculation"); or (ii) an explanation of the information that is not in its possession and needed to compute damages, why such information is unavailable to the complainant, the factual basis the complainant has for believing that such evidence of damages exists, and a detailed outline of the methodology that would be used to compute damages with such evidence (the "damages computation methodology").[200] The burden of proof regarding damages rests with the complainant.[201] The procedures provide for the bifurcation of the program access violation determination from the damages determination.[202] In ruling on whether there has been a program access violation, the Media Bureau is required to indicate in its decision whether damages are appropriate.[203] The Commission's aspirational deadline for resolving the program access complaint applies solely to the program access violation determination and not to the damages determination.[204] The Commission has explained that the appropriate date from which damages accrue is the date on which the violation first occurred, and that the burden is on the complainant to establish this date.[205] Moreover, based on the one-year limitations period for bringing program access complaints, the Commission has explained that it will not entertain damages claims asserting injury pre-dating the complaint by more than one year.[206] In cases in which the complainant has submitted a damages calculation and the Media Bureau approves or modifies the calculation, the defendant is required to compensate the complainant as directed in the Media Bureau's order.[207] In cases in which the complainant has submitted a damages computation methodology and the Media Bureau approves or modifies the methodology, the parties are required to negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the methodology.[208] We seek comment on the appropriateness of adopting similar rules in the program carriage context.

53. We also propose to adopt similar procedures for requesting the application of new prices, terms, and conditions in the event an adjudicator reaches a decision on the merits of a program carriage complaint after the Media Bureau issues a standstill order. In the *Second Report and Order* in MB Docket No. 07-42, we adopted specific procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a

[198] *See* 47 C.F.R. § 76.1003(d), (h)(3); *1998 Program Access Order*, 13 FCC Rcd at 15836-39, ¶¶ 27-33.

[199] *See* 47 C.F.R. § 76.1003(d), (h)(3); *1998 Program Access Order*, 13 FCC Rcd at 15836-39, ¶¶ 27-33.

[200] *See* 47 C.F.R. § 76.1003(d)(3); *1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[201] *See* 47 C.F.R. § 76.1003(h)(3)(ii); *1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[202] *See* 47 C.F.R. § 76.1003(h)(3)(i); *1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[203] *See 1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[204] *See id.* at 15836, ¶ 28 n.84 and 15842-43, ¶ 41.

[205] *See id*. at 15839, ¶ 33.

[206] *See id*. at 15836-37, ¶ 28.

[207] *See* 47 C.F.R. § 76.1003(h)(3)(iii)(A)(1); *1998 Program Access Order*, 13 FCC Rcd at 15837-38, ¶ 30.

[208] *See* 47 C.F.R. § 76.1003(h)(3)(iii)(A)(2); *1998 Program Access Order*, 13 FCC Rcd at 15837-38, ¶ 30.

program carriage complainant seeking renewal of such a contract.[209] If the Media Bureau grants the temporary standstill, the rules adopted provide that the adjudicator ruling on the merits of the complaint will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement.[210] We noted that application of new terms may be difficult in some cases, such as if carriage of the video programming has continued uninterrupted during resolution of the complaint as a result of the Media Bureau's standstill order, but the decision on the merits provides that the defendant MVPD may discontinue carriage.[211] While we believe the adjudicator can address these issues on a case-by-case basis in the absence of a new rule on this point, adoption of specific procedures addressing compensation of the parties during the standstill period, if any, may facilitate the expeditious resolution of these issues. For example, should a defendant MVPD that ultimately prevails on the merits nonetheless be required to pay for carriage during the standstill period? Should we assume that the previously negotiated carriage fees reflected in the parties' expired agreement represent reasonable compensation for the carriage of the programming during the standstill period? We propose to adopt procedures similar to those set forth above for requesting damages.[212] Specifically, in the event the Media Bureau has issued a standstill order, the adjudicator after reaching a decision on the merits may request the prevailing party to submit either (i) a detailed computation of the fees and/or compensation it believes it is owed during the standstill period based on the new prices, terms, and conditions ordered by the adjudicator (the "true-up calculation"); or (ii) a detailed outline of the methodology used to calculate the fees and/or compensation it believes it is owed during the standstill period based on the new prices, terms, and conditions ordered by the adjudicator (the "true-up computation methodology"). The burden of proof would rest with the party seeking compensation during the standstill period based on the new prices, terms, and conditions. In cases in which the adjudicator approves or modifies a prevailing party's true-up calculation, the opposing party would be required to compensate the prevailing party as directed in the adjudicator's order. In cases in which the adjudicator approves or modifies a true-up computation methodology, the parties would be required to negotiate in good faith to reach an agreement on the exact amount of compensation pursuant to the methodology. We seek comment on this approach.

D. Submission of Final Offers

54. Among the remedies an adjudicator can order for a program carriage violation is the establishment of prices, terms, and conditions for the carriage of a complainant's video programming.[213] To the extent that the adjudicator orders this remedy, we propose to adopt a rule providing that the adjudicator will have the discretion to order each party to submit their "final offer" for the rates, terms, and conditions for the video programming at issue.[214] In previous merger orders, the Commission has explained that requiring parties to a programming dispute to submit their final offer for carriage and

[209] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶¶ 25-30.

[210] *See id*. at ¶¶ 28-29.

[211] *See id*. at ¶ 29.

[212] *See supra* ¶ 52.

[213] *See* 47 C.F.R. § 76.1302(g)(1); *1993 Program Carriage Order*, 9 FCC Rcd at 2653, ¶ 26 ("Available remedies and sanctions include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission."). This rule will now appear at Section 76.1302(j)(1) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07-42 take effect. *See infra*, Appendix B.

[214] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, FCC 11-52, ¶ 79 (2011) (stating that, when considering the commercial reasonableness of the terms and conditions of a proffered data roaming arrangement, the Commission staff may, in resolving such a claim, require both parties to provide to the Commission their best and final offers that were presented during the negotiation).

requiring the adjudicator to select the offer that most closely approximates fair market value "has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected . . . .'"[215] We seek comment on the extent to which providing the adjudicator with the discretion to require the parties to submit final offers will encourage the parties to resolve their differences through settlement and will assist the adjudicator in crafting an appropriate remedy should the parties not settle their dispute.[216] We also seek comment on whether submission of final offers will enable the adjudicator to reach a more expeditious resolution of the complaint.

55. To the extent the adjudicator requests the submission of final offers, we seek comment on whether the adjudicator should be required to select one of the parties' final offers as the remedy or whether the adjudicator should have the discretion to craft a remedy that combines elements of both final offers or contains other terms that the adjudicator finds to be appropriate. While requiring the adjudicator to select one of the final offers might be more effective in encouraging the parties to submit reasonable offers and promoting a settlement, we expect that providing the adjudicator with the discretion to craft a remedy combining elements of both final offers (*e.g.*, the rate in one offer and the contract term in the other offer) or other terms that the adjudicator finds to be appropriate will provide greater flexibility, possibly resulting in a more appropriate remedy. We seek comment on the ramifications of each approach. We also seek comment on when the adjudicator should solicit final offers to the extent the adjudicator exercises the discretion to do so. As in the case of damages discussed above, should the adjudicator bifurcate the program carriage violation determination from the remedy phase to facilitate the submission of final offers, similar to the way damages are handled in program access cases?[217]

E. Mandatory Carriage Remedy

56. The program carriage rules provide that the remedy ordered by the Media Bureau or ALJ is effective upon release of the decision, except when the adjudicator orders mandatory carriage that will require the defendant MVPD to "delete existing programming from its system to accommodate carriage" of a programming vendor's video programming.[218] In such a case, if the defendant MVPD seeks Commission review of the decision, the mandatory carriage remedy does not take effect unless and until the decision is upheld by the Commission.[219] If the Commission upholds in its entirety the relief granted by the adjudicator, the defendant MVPD is required to carry the video programming at issue in the complaint for an additional time period beyond that originally ordered by the adjudicator, equal to the amount of time that elapsed between the adjudicator's decision and the Commission's final decision, on the terms ordered by the adjudicator and upheld by the Commission.[220] One potential benefit of this rule is that it ensures that consumers do not lose programming carried by their MVPD in the event a Media Bureau or ALJ decision granting carriage is ultimately overturned by the Commission.

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[215] *See News Corp-Hughes Order,* 19 FCC Rcd at 552, ¶ 174 (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264).

[216] *See* Comcast Reply at 34 n.116 (noting practical concerns with a mandatory carriage remedy).

[217] *See supra* ¶ 52 (seeking comment on procedures for awarding damages in program carriage cases).

[218] *See* 47 C.F.R. § 76.1302(g)(1); *1993 Program Carriage Order*, 9 FCC Rcd at 2656, ¶ 33 (discussing mandatory carriage remedy in cases ruled on by Media Bureau); *id*. at 2656, ¶ 34 (discussing mandatory carriage remedy in cases ruled on by ALJ). This rule will now appear at Section 76.1302(j)(1) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07-42 take effect. *See infra*, Appendix B.

[219] *See supra* n.218.

[220] *See id*.

57. As an initial matter, we seek comment on the need for this rule. We note that any party can seek a stay of a Media Bureau or ALJ decision while a review is pending before the Commission.[221] Is it necessary to have a rule specific to program carriage complaints that allows only the defendant MVPD to avoid the need to seek a stay? Should a similar rule apply if a programming vendor's video programming will be deleted from the defendant MVPD's system as a result of a Media Bureau or ALJ decision, thereby resulting in lost video programming for consumers? For example, if the Media Bureau grants a standstill for a complainant programming vendor seeking renewal of an existing contract but the adjudicator rules on the merits that the defendant MVPD's decision to delete the video programming does not violate the program carriage rules, should that ruling take effect only if the decision is upheld by the Commission?

58. To the extent that we retain Section 76.1302(g)(1), we are concerned that the rule is unclear with respect to the type of showing a defendant MVPD must make to satisfy the rule and thereby delay the effectiveness of the remedy. We propose to amend this rule to clarify that the defendant MVPD must make a sufficient evidentiary showing to the adjudicator demonstrating that it would be required to delete existing programming to accommodate the video programming at issue in the complaint. As in the case of damages and submission of final offers discussed above, should the adjudicator bifurcate the program carriage violation determination from the remedy phase to allow for the defendant MVPD's evidentiary showing on this issue?

59. We also seek comment on whether we should clarify what "deletion" of existing programming means in this context. For example, if the mandatory carriage remedy forces the defendant MVPD to move existing programming to a less-penetrated tier but does not force the defendant MVPD to remove the programming from its channel line-up entirely, should that be considered "deletion" of existing programming? While we expect that an adjudicator can resolve such issues on a case-by-case basis,[222] should we provide specific guidance in our rules as to what constitutes "deletion"? Would providing guidance on this issue avoid the need for the adjudicator to make a case-by-case determination and thereby lead to a more expeditious and consistent resolution of program carriage complaints?

F. Retaliation

60. Programming vendors have expressed concern that MVPDs will retaliate against them for filling program carriage complaints.[223] They state that the fear of retaliation is preventing programming vendors from filing legitimate program carriage complaints.[224] As an initial matter, we note that the

[221] *See Brunson Commc'ns, Inc. v. RCN Telecom. Servs. Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 (CSB 2000) (granting stay request pending action on Application for Review); *see also* 47 C.F.R. § 76.10(c)(2). To obtain a stay, a petitioner must 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 public interest favors grant of a stay. *See, e.g.*, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted).

[222] *See Tennis Channel HDO*, 25 FCC Rcd at 14163, ¶ 24 n.120 (directing the ALJ to determine whether a remedy requiring a defendant MVPD to carry the complainant programming vendor's video programming on a specific tier or to a specific number or percentage of subscribers would "require [the defendant MVPD] to delete existing programming from its system to accommodate carriage of" the complainant programming vendor's video programming).

[223] *See* BTNC Comments at 4; NAMAC Comments at 18-19; NFL Enterprises Comments at 8 n.28.

[224] *See* BTNC Comments at 4; NFL Enterprises Reply at 6.

standstill procedure we adopt in the *Second Report and Order* in MB Docket No. 07-42 will help to prevent retaliation in part while a program carriage complaint is pending.[225] If granted, the standstill will keep in place the price, terms, and other conditions of an existing programming contract during the pendency of the complaint, thus preventing the defendant MVPD from taking adverse action during this time against the programming vendor with respect to the video programming at issue in the complaint. We seek comment on whether there are any circumstances in the program carriage context in which the Commission's authority to issue temporary standstill orders is statutorily or otherwise limited.[226]

61. Programming vendors' concerns regarding retaliation, however, extend beyond the period while a complaint is pending and beyond the particular programming that is the subject of the complaint. They fear that an MVPD will seek to punish a programming vendor for availing itself of the program carriage rules after the complaint has been resolved.[227] Another potential form of retaliation could impact programming vendors owning more than one video programming network. For example, if a programming vendor owning more than one video programming network brings a program carriage complaint involving one particular video programming network, the defendant MVPD could potentially take a retaliatory adverse carriage action involving another video programming network owned by the programming vendor.

62. We seek comment on the extent to which retaliation has occurred in the past. We note that eleven program carriage complaints have been filed since the Commission adopted its program carriage rules in 1993. Have any of the complainants experienced retaliation by MVPDs? Have any other programming vendors experienced retaliation by MVPDs for merely suggesting that they might avail themselves of the program carriage rules? We note that examples of actual retaliation or threats of retaliation will assist in developing a record on whether and how to address concerns regarding retaliation.

63. We also seek comment on what measures the Commission should take to address retaliation. As an initial matter, we believe that retaliation may be addressed in some cases through a program carriage complaint alleging discrimination on the basis of affiliation. For example, if an MVPD takes an adverse carriage action against a programming vendor after the vendor files a complaint, the programming vendor may have a legitimate discrimination complaint if it can establish a *prima facie* case of discrimination on the basis of affiliation, such as by showing that the defendant MVPD treated its similarly situated, affiliated video programming differently.[228] If the case proceeds to the merits, the defendant MVPD obviously could not defend its action by claiming it was motivated by a desire to retaliate against the programming vendor.

64. Addressing retaliation through a discrimination complaint, however, is not useful in cases where the defendant MVPD takes retaliatory action with respect to video programming affiliated with the complainant programming vendor that is not similarly situated to video programming affiliated with the

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[225] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶¶ 25-30.

[226] *See* NCTA July 1 2011 *Ex Parte* Letter at 1 (*citing* 47 U.S.C. § 544(f)(1)). *But see United Video, Inc. v. FCC,* 890 F.2d 1173, 1189 (D.C. Cir. 1989) ("The House report [to section 624(f)] suggests that Congress thought a cable company's owners, not government officials, should decide what sorts of programming the company would provide. But it does not suggest a concern with regulations of cable that are not based on the content of cable programming, and do not require that particular programs or types of programs be provided.").

[227] *See* NAMAC Comments at 18-19; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1.

[228] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 14 (discussing evidence required to establish a *prima face* case of a violation of the discrimination provision). The complaint must also contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly. *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 15.

defendant MVPD. For example, a programming vendor owning an RSN may bring a complaint alleging that the defendant MVPD engaged in discrimination on the basis of affiliation by refusing to carry the RSN. The defendant MVPD could potentially retaliate by refusing to carry a news channel affiliated with the complainant programming vendor. To the extent the defendant MVPD is not affiliated with a news channel, however, the programming vendor would be unable to establish a *prima facie* case of discrimination on the basis of affiliation by showing that the defendant MVPD treated its own affiliated news channel differently. To address this concern, we seek comment on whether we should adopt a new rule prohibiting an MVPD from taking an adverse carriage action against a programming vendor because the programming vendor availed itself of the program carriage rules. The adverse carriage action could involve any video programming owned by or affiliated with the complainant programming vendor, not just the particular video programming subject to the initial complaint that triggered the retaliatory action. To the extent we adopt the automatic document production process described above,[229] we seek comment on what documents might be considered sufficiently relevant to a retaliation claim to include in the automatic document production list.

65. We seek comment on the extent of our authority to adopt an anti-retaliation provision in light of the fact that this program carriage practice is not explicitly mentioned in Section 616. We note that Section 616 contains broad language directing the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors" and then lists six specific requirements that the Commission's program carriage regulations "shall provide for," "shall contain," or "shall include."[230] While there is no specific statutory provision prohibiting MVPDs from retaliating against programming vendors for filing complaints, the statute does not preclude the Commission from adopting additional requirements beyond the six listed in the statute. Thus, we believe that we have authority to adopt a rule prohibiting retaliatory carriage practices. We seek comment on this interpretation. To the extent any new substantive program carriage requirement must be based on one of the six requirements listed in the statute, does the discrimination provision in Section 616(a)(3) provide the statutory basis for an anti-retaliation rule? For example, we foresee that only a programming vendor that is unaffiliated with the defendant MVPD would bring a program carriage complaint against that MVPD; thus, absent such non-affiliation, a complaint would not have been filed and the MVPD would have no basis to retaliate. Thus, does an MVPD's decision to take a retaliatory adverse carriage action against a programming vendor specifically because the programming vendor availed itself of the program carriage rules amount to "discrimination on the basis of affiliation or non-affiliation"?[231] To the extent our authority to address retaliation is based on the discrimination provision in Section 616(a)(3), would the complainant also need to establish that the retaliatory adverse carriage action "unreasonably restrain[ed] the ability of [the programming vendor] to compete fairly"?[232] Does this limit the practical effect of the anti-retaliation provision by authorizing MVPDs to take retaliatory actions that fall short of an unreasonable restraint on the programming vendor's ability to compete fairly?

66. We seek comment on the practical impact of an anti-retaliation provision given that acts of retaliation are unlikely to be overt. That is, while an MVPD could potentially take a retaliatory adverse carriage action against a programming vendor following the filing of a complaint, it is highly doubtful that the defendant MVPD will inform the programming vendor that its action was motivated by retaliation. We seek comment on how programming vendors could bring legitimate retaliation complaints

[229] *See supra* ¶¶ 44-47.

[230] 47 U.SC. § 536.

[231] 47 U.SC. § 536(a)(3).

[232] *Id*.

in the absence of direct evidence of retaliation. For example, should we establish as a *prima facie* violation of the anti-retaliation rule any adverse carriage action taken by a defendant MVPD against a complainant programming vendor (other than the action at issue in the initial program carriage complaint) that occurs while a program carriage complaint is pending or within two years after the complaint is resolved on the merits? We seek comment on whether two years would be the appropriate time period. In establishing this time period, we seek to capture the period during which the defendant MVPD can reasonably be expected to have an incentive to retaliate while at the same time ensuring that we do not unduly hinder the defendant MVPD's legitimate carriage decisions with respect to the complainant programming vendor.

67. As discussed above, a finding of a *prima facie* violation does not resolve the merits of the case nor does it mean that the defendant has violated the Commission's rules.[233] Rather, it means that the complainant has alleged sufficient facts that, if left unrebutted, may establish a violation of the program carriage rules and thus parties may proceed to discovery (if necessary) and a decision on the merits. We do not believe that an anti-retaliation rule should apply to the defendant MVPD's action at issue in the initial program carriage complaint. For example, if the action at issue in the initial program carriage complaint involves the defendant MVPD's decision not to renew a contract for the complainant programming vendor's RSN and a standstill has not been granted, the action of the defendant MVPD to delete the RSN while the complaint is pending would not be a *prima facie* violation of the anti-retaliation rule. If, however, the defendant MVPD proceeds to move the complainant programming vendor's news channel to a less-penetrated tier after the filing of a complaint pertaining to an RSN, this may establish a *prima facie* violation under this rule. We seek comment on the extent to which such a rule would encourage the filing of frivolous program carriage complaints by programming vendors hoping to take advantage of the anti-retaliation rule to prevent MVPDs from taking adverse carriage actions based on legitimate business concerns. As set forth above, the rule would apply to adverse carriage actions while a complaint is pending or within two years after the complaint is resolved on the merits. A frivolous complaint would likely be dismissed at the *prima facie* stage, which the Media Bureau must resolve within no more than approximately 140 days after the complaint is filed.[234] Will this limited time period, along with our existing prohibition on frivolous complaints,[235] deter the filing of frivolous complaints intended to wrongly invoke the anti-retaliation rule as a shield against legitimate MVPD business decisions?

G. Good Faith Negotiation Requirement

68. We seek comment on whether to adopt a rule requiring vertically integrated MVPDs to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD (or with another MVPD[236]). Some programming vendors claim that MVPDs do not overtly deny requests for carriage; rather, they claim that MVPDs effectively deny carriage and harm programming vendors in more subtle forms, such as failing to

[233] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 16.

[234] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 20 (requiring the Media Bureau to release a *prima facie* determination within 60 calendar days after the close of the 80-calendar-day pleading cycle on a program carriage complaint).

[235] *See* 47 C.F.R. § 76.6(c); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2657, ¶¶ 35-36.

[236] As discussed below, we seek comment on whether MVPDs favor not only their own affiliated programming vendors but also programming vendors affiliated with other MVPDs. *See infra* ¶¶ 72-77. To the extent this is the case, we seek comment below on whether a vertically integrated MVPD must negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD *or with another MVPD*. *See infra* ¶ 77.

respond to carriage requests in a timely manner, simply ignoring requests to negotiate for carriage, making knowingly inadequate counter-offers, or failing to engage in renewal negotiations until just prior to the expiration of an existing agreement.[237] We seek comment on the extent to which these concerns are legitimate and widespread and whether they would be addressed through the explicit good faith negotiation requirement described here for vertically integrated MVPDs.[238]

69. We note two important limitations on this good faith requirement. First, we are not aware of concerns regarding the negotiating tactics of non-vertically integrated MVPDs with respect to unaffiliated programming vendors. Accordingly, we believe it is appropriate to limit a good faith negotiation requirement to vertically integrated MVPDs only.[239] Second, we believe that this good faith requirement should extend only to negotiations involving video programming that is similarly situated to video programming affiliated with the MVPD (or with another MVPD). That is, to the extent that a vertically integrated MVPD is engaged in negotiations with an unaffiliated programming vendor involving video programming that is not similarly situated to video programming affiliated with the MVPD (or with another MVPD), there would appear to be no basis to assume that the MVPD would seek to favor its own video programming (or video programming affiliated with another MVPD) over the unaffiliated programming vendor's video programming on the basis of "affiliation" as opposed to legitimate business reasons. We seek comment on these views. Is this approach workable given that the concept of "similarly situated" is a subjective standard? That is, will an MVPD that does not want to carry the video programming simply claim that it does not have to negotiate because the video programming is not "similarly situated," leaving the programming vendor with claims for both discrimination and failure to negotiate in good faith, but not materially better off than if it just had the discrimination claim? Will this requirement encourage vertically integrated MVPDs to negotiate in good faith with both similarly situated and non-similarly situated video programming to avoid violating the good faith requirement? Will such a requirement unreasonably interfere with negotiations and limit the ability of vertically integrated MVPDs to pursue legitimate negotiation tactics?

70. We also seek comment on the extent of our authority to adopt this explicit good faith negotiation requirement for vertically integrated MVPDs in the program carriage context. As discussed above, we seek comment on the extent of our authority to adopt a new substantive program carriage rule, such as a good faith requirement, considering that this requirement is not explicitly mentioned in Section

[237] *See* BTNC Comments at 11-12; Outdoor Channel Nov. 16 2007 *Ex Parte* Letter at 1 (stating that MVPD-imposed negotiating delays after a prior contract has expired put programmers in the position of having to accept uncertain, month-to-month carriage arrangements that makes it difficult to invest in content); Hallmark Channel Nov. 20 *Ex Parte* Letter at 1 ("[S]ome MVPDs frequently fail to make carriage offers or respond to an independent programmer's offers until just before an existing agreement is set to expire, effectively turning post-expiration carriage into a month-to-month proposition."); *see id*. (stating that some MVPDs make "knowingly inadequate offers that give the superficial appearance of good faith negotiation but that are not intended or expected to be accepted, let alone thought responsive to the programmers' offers" and that such practices undercut the ability of the programmer to attract investors).

[238] *See* NFL Enterprises Comments at 7 (urging the Commission to impose "on MVPDs the same duty to bargain in good faith that currently applies to their retransmission consent negotiations with broadcasters").

[239] *See* Letter from American Cable Association et al. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Dec. 10, 2008) at 2 (stating that non-vertically integrated operators do not have any incentive to engage in conduct that would unreasonably restrain the ability of independent programmers to compete that would warrant changing existing rules to allow programmers to file discrimination or good faith complaints against them); Letter from John D. Goodman, Broadband Service Providers Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Dec. 9, 2008) at 2-3 (stating that non-vertically integrated operators have "no history of discriminating against independent programmers, nor have any incentive or ability to do so").

616.[240] Does the general grant of rulemaking authority under Section 616 provide a sufficient statutory basis for adopting this requirement?[241] To the extent any new substantive program carriage requirement must be based on one of the six requirements listed in the statute, does the discrimination provision in Section 616(a)(3) provide statutory authority for a good faith negotiation requirement?[242] Allegations that a vertically integrated MVPD has not negotiated in good faith could form the basis of a legitimate program carriage discrimination complaint. For example, to the extent that a vertically integrated MVPD carries affiliated video programming but refuses to engage in or needlessly delays negotiations with a programming vendor with respect to similarly situated, unaffiliated video programming, this may reflect discrimination on the basis of affiliation. To the extent that such a claim could already be addressed through a discrimination complaint, is it necessary to codify the requirement described above that vertically integrated MVPDs negotiate in good faith? Would codifying this requirement nonetheless provide guidance to programming vendors and vertically integrated MVPDs alike that action or inaction by a vertically integrated MVPD that effectively amounts to a denial of carriage is cognizable under the program carriage rules as a form of discrimination on the basis of affiliation? To the extent that our authority to adopt the good faith negotiation requirement described above would be based on the discrimination provision in Section 616(a)(3), would the complainant also need to establish that the adverse carriage action "unreasonably restrain[ed] the ability of [the programming vendor] to compete fairly"?[243] Does this limit the practical effect of a good faith negotiation requirement by authorizing vertically integrated MVPDs to engage in bad faith tactics that fall short of an unreasonable restraint on the programming vendor's ability to compete fairly? To the extent we adopt the automatic document production process described above,[244] we seek comment on what documents might be considered sufficiently relevant to a good faith claim to include in the automatic document production list.

71. To the extent we adopt the explicit good faith negotiation requirement for vertically integrated MVPDs described above, should we establish specific guidelines for assessing good faith negotiations? For example, in the retransmission consent context, the Commission has established seven objective good faith negotiation standards, the violation of which is considered a *per se* violation of the good faith negotiation obligation.[245] Should the Commission consider the same standards to determine whether a vertically integrated MVPD has negotiated in good faith in the program carriage context? Moreover, in the retransmission consent context, even if the seven standards are met, the Commission

[240] *See supra* ¶ 65.

[241] *See* 47 U.S.C. § 536(a).

[242] 47 U.S.C. § 536(a)(3).

[243] *See id*.

[244] *See supra* ¶¶ 44-47.

[245] *See* 47 C.F.R. § 76.65(b)(1) (The seven actions or practices that violate a duty to negotiate retransmission consent agreements in good faith are: "(i) Refusal by a Negotiating Entity to negotiate retransmission consent; (ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent; (iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; (iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal; (v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal; (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and (vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor."). We note that we are currently considering revisions to these rules. *See Retransmission Consent NPRM*, 26 FCC Rcd at 2729-35, ¶¶ 20-30.

may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith.[246] Should a similar policy apply to vertically integrated MVPDs in the program carriage context?

H. Scope of the Discrimination Provision

72. In the *1993 Program Carriage Order*, the Commission interpreted the discrimination provision in Section 616(a)(3) to require a complainant alleging discrimination that favors an "affiliated" programming vendor to provide evidence that the defendant MVPD has an attributable interest in the allegedly favored "affiliated" programming vendor.[247] Commenters, however, have claimed that vertically integrated MVPDs favor not only their own affiliated programming vendors but also programming vendors affiliated with other MVPDs.[248] For example, vertically integrated MVPD A might treat a news channel affiliated with MVPD B more favorably than an unaffiliated news channel in exchange for MVPD B's reciprocal favorable treatment of MVPD A's affiliated sports channel. In this case, the unaffiliated news channel would be unable to provide evidence that the defendant MVPD (MVPD A) has an attributable interest in the allegedly favored programming vendor (the news channel affiliated with MVPD B) as required under the *1993 Program Carriage Order*. We seek comment on whether we should address such situations by interpreting the discrimination provision in Section 616(a)(3) more broadly to preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD. Similar to the discussion above regarding the good faith requirement,[249] we are not aware of concerns that a non-vertically integrated MVPD would have an incentive to favor an MVPD-affiliated programming vendor over an unaffiliated programming vendor based on reasons of "affiliation" as opposed to legitimate business reasons. Accordingly, we believe it is appropriate to limit this interpretation of Section 616(a)(3) to vertically integrated MVPDs only. We seek comment on this proposed limitation.

73. We note that the Commission previously addressed a similar issue in connection with the channel occupancy limit set forth in Section 613(f)(1)(B) of the Act, which requires the Commission to establish "reasonable limits on the number of channels on a cable system that can be occupied by a video

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[246] *See* 47 C.F.R. § 76.65(b)(2) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a)."). We note that we are currently considering revisions to these rules. *See Retransmission Consent NPRM*, 26 FCC Rcd at 2735-37, ¶¶ 31-33.

[247] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29 ("For complaints alleging discriminatory treatment that favors 'affiliated' programming vendors, the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in Section 76.1300(a)."); *see also* 47 C.F.R. § 76.1300(a) ("For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities."); *Review of the Commission's Cable Attribution Rules*, Report and Order, 14 FCC Rcd 19014, 19063, ¶ 132 n.333 (1999) (amending definition of "affiliated" in the program carriage rules to be consistent with definition of this term in other cable rules).

[248] *See* Hallmark Channel Reply at 8 n.16 ("In one important respect, an MVPD's incentive to discriminate against its competitor MVPDs is reduced. Specifically, an MVPD can have an incentive to advantage the affiliated services of other vertically-integrated MVPDs, over independent services, in exchange for favorable treatment when the first MVPD seeks to obtain carriage of its own affiliated services by the second MVPD. Like an MVPD's incentive to favor its own affiliated services, this behavior has a dramatic and anticompetitive impact on independent programmers' ability to bargain for fair carriage terms."); *see id*. at 20; NAMAC Reply at 16 (referring to the "common practice of cable operators to swap programming with each other").

[249] *See supra* ¶ 69.

programmer in which a cable operator has an attributable interest."[250] The Commission explained that this language is "not entirely clear because it can also be read as applying to carriage of video programmers affiliated with the particular cable operator or to carriage of any vertically integrated cable programmer on any cable system."[251] The Commission concluded that the "most reasoned approach" was to interpret this language "to apply such limits only to video programmers that are vertically integrated with the particular cable operator in question."[252] In adopting this interpretation, the Commission also concluded that "cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO" and absent "significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming affiliated with a rival MSO."[253] In 2008, however, the Commission adopted an *FNPRM* seeking comment on this conclusion in light of subsequent empirical studies as well as technological and marketplace developments.[254] In doing so, the Commission tentatively concluded to "expand the channel occupancy limit to include video programming networks owned by or affiliated with any cable operator," noting that such an interpretation is consistent with Section 628(c)(2)(D) of the Act, which prohibits any cable operator from entering into an exclusive contract with any cable-affiliated programmer.[255]

74. We seek comment on the extent to which there are real-world examples or reliable empirical studies demonstrating that vertically integrated MVPDs tend to favor programming vendors affiliated with other MVPDs. We note that the United States Court of Appeals for the D.C. Circuit previously struck down the Commission's horizontal cable ownership cap based in part on the Commission's failure to provide support for the concept that cable operators "have incentives to agree to buy their programming from one another."[256] In adopting a new horizontal ownership cap in 2008, the Commission concluded that it "lack[ed] evidence to draw definitive conclusions regarding the likelihood that cable operators will behave in a coordinated fashion."[257] In an accompanying *FNPRM* pertaining to the Commission's channel occupancy limits, the Commission sought comment on the reliability of certain studies and criticisms thereof, including one study based on data from 1999 finding that "vertically integrated MSOs are more likely than non-vertically integrated MSOs to carry the start-up basic cable

[250] *See* 47 U.S.C. § 533(f)(1)(B).

[251] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8565, 8587, ¶ 51 (1993).

[252] *Id*. at 8587-88, ¶ 52.

[253] *Id*. at 8588, ¶ 53.

[254] *See Cable Horizontal and Vertical Ownership Limits*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2193, ¶ 137 (2008) ("*Cable Ownership Rules FNPRM*"); *see also infra* ¶ 74.

[255] *See Cable Ownership Rules FNPRM*, 23 FCC Rcd at 2195-96, ¶ 145; *see also 2007 Program Access Order*, 22 FCC Rcd at 17840-41, ¶¶ 71-72.

[256] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992,* Third Report and Order, 14 FCC Rcd 19098, 19116, ¶ 43 (1999) ("*Third Report and Order*"), *rev'd and remanded in part and aff'd in part*, *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001) ("The Commission never explains why the vertical integration of MSOs gives them 'mutual incentive to reach carriage decisions beneficial to each other,' what may be the firms' 'incentives to buy ... from one another,' or what the probabilities are that firms would engage in reciprocal buying (presumably to reduce each other's average programming costs)." (quoting *Third Report and Order*, 14 FCC Rcd at 19116, ¶ 43)).

[257] *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order, 23 FCC Rcd 2134, 2165-66, ¶¶ 63-66 (2008), *vacated*, *Comcast Corp. v. FCC*, 579 F.3d 1 (2009).

networks of other MSOs."[258] We seek comment on how these studies or any other studies, including studies based on more recent data, either support or refute the position that vertically integrated MVPDs tend to favor programming vendors affiliated with other MVPDs over unaffiliated programming vendors. Is there sufficient evidence to warrant allowing programming vendors to make a case-by-case showing through the program carriage complaint process that a vertically integrated MVPD has discriminated on the basis of a programming vendor's lack of affiliation with another MVPD?

75. We also seek comment on whether it is reasonable to interpret Section 616(a)(3) to preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD. Section 616(a)(3) requires the Commission to adopt regulations that prevent an MVPD from engaging in conduct that unreasonably restrains the ability of "an unaffiliated video programming vendor" to compete fairly by discriminating on the basis of "affiliation or non-affiliation" of programming vendors.[259] The terms "unaffiliated," "affiliation," and "non-affiliation" are not defined in Section 616. These terms could be interpreted narrowly as in the *1993 Program Carriage Order* to prohibit a vertically integrated MVPD only from discriminating on the basis of "affiliation or non-affiliation" in a manner that favors its own affiliated programming vendor, but would not prevent a vertically integrated MVPD from discriminating on the basis of "affiliation or non-affiliation" in a manner that favors a programming vendor affiliated with another MVPD. Alternatively, these terms might be interpreted more broadly to prevent a vertically integrated MVPD from discriminating on the basis of "affiliation or non-affiliation" in a manner that favors any programming vendor affiliated with any MVPD. We note that one cable operator has previously advanced a broad interpretation of Section 616(a)(3), stating that this provision precludes collusion among cable operators.[260]

76. We seek comment on which interpretation is more consistent with Congressional intent. Is the broad interpretation more consistent with Congress's goal to ensure that cable operators provide the "widest possible diversity of information sources and services to the public"[261] as well as with the program access requirements, which prohibit exclusive contracts and discriminatory conduct between a cable operator and *any* cable-affiliated programmer, not just its own affiliated programmer?[262] Is the narrow interpretation more consistent with certain language in the legislative history of the 1992 Cable Act? For example, language in the House Report states that Section 616 "was crafted to ensure that a multichannel video programming *operator* does not discriminate against an unaffiliated video

[258] *See Cable Ownership Rules FNPRM*, 23 FCC Rcd at 2194, ¶¶ 139-141 (citing Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study* ("Kang Study")); *see also id*. at 2194, ¶ 141 (seeking comment on whether "Kang's study show[s] that a more extended form of vertical foreclosure exists, based on 'reciprocal carriage' of integrated programming, in which a coalition of cable operators unfairly favor each others' affiliated programming"). We note that the Kang Study states that it is based on data from 1999. *See* Kang Study at 13.

[259] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[260] In opposing the horizontal cable ownership cap, Comcast Corporation has stated that "there are alternative, better tailored legal remedies that could be relied upon to reduce the risk of collusion, even if such a risk were shown to exist. The Commission's program carriage rules, which explicitly prohibit a cable operator from 'discriminating in video programming distribution *on the basis of affiliation or nonaffiliation*,' already proscribe collusive behavior." *See* Supplemental Comments of Comcast, MM Docket No. 92-264 (February 14, 2007), at 15 (citing 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c)) (emphasis in original).

[261] 47 U.S.C. § 521(4); *see also* 1992 Cable Act, Section 2(a)(5) (expressing concern regarding the inability of unaffiliated programming vendors to secure carriage); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2643, ¶ 2 (noting Congress's concern in passing the 1992 Cable Act that unaffiliated programming vendors could not obtain carriage on the same favorable terms as vertically integrated programming vendors).

[262] *See* 47 U.S.C. § 548(c)(2)(D).

programming vendor in which *it* does not hold a financial interest."[263] How should we interpret other language in the legislative history of the 1992 Cable Act? For example, one of the stated findings of the 1992 Cable Act is that "cable *operators* have the incentive and ability to favor *their* affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."[264] This language is unclear as to whether Congress was referring to the incentives of individual cable operators to favor their own affiliated programmers, or whether Congress was referring to the incentives of cable operators as a whole to favor cable-affiliated programmers, both their own affiliates and those affiliated with other cable operators.[265]

77. We also seek comment on the practical implications of an interpretation of Section 616(a)(3) that would preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD. For example, how should we amend the requirements for establishing a *prima facie* case of discrimination on the basis of affiliation in the absence of direct evidence?[266] Should we provide that the complaint must contain evidence that the complainant provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD *or with another MVPD*?[267] Should we also require the complainant to provide evidence that the defendant MVPD is vertically integrated?[268] We also seek comment on how this interpretation of Section 616(a)(3) will impact the proposed good faith negotiation requirement for vertically integrated MVPDs described above.[269] Should the rule provide that a vertically integrated MVPD must negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD *or with another MVPD*? We also seek comment on how this interpretation of Section 616(a)(3) will impact discovery. Should we expect that the programming vendor affiliated with the non-defendant MVPD will have relevant information, such as contracts with other MVPDs? For cases decided on the merits by the Media Bureau, should our rules specify procedures for requesting that the Media Bureau issue a subpoena pursuant to Section 409 of the Act to compel a third-party affiliated programming vendor to participate in discovery?[270]

78. In addition to the foregoing, we seek comment on whether to broaden the definition of "affiliated" and "attributable interest" in Section 76.1300 of the Commission's rules to reflect changes in the marketplace. These rules focus on the extent to which a programming vendor and an MVPD have

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[263] H.R. Rep. No. 102-628 (1992), at 110 (emphasis added); *see also* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("For example, the cable *operator* might give *its* affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers.") (emphasis added).

[264] 1992 Cable Act, Section 2(a)(5).

[265] *See* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("vertical integration gives cable *operators* the incentive and ability to favor *their* affiliated programming services") (emphasis added); *see id*. at 27, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1160 ("To ensure that cable *operators* do not favor *their* affiliated programmers over others, the legislation bars cable operators from discriminating against unaffiliated programmers.") (emphasis added).

[266] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 14.

[267] *See infra*, Appendix D (47 C.F.R. § 76.1302(d)(3)(iii)(B)(*2*)(*i*)); *see also supra* ¶ 72.

[268] *See id*. (47 C.F.R. § 76.1302(d)(3)(iii)(B)(*2*)(*ii*)).

[269] *See supra* ¶¶ 68-71.

[270] *See* 47 U.S.C. § 409. We note that the hearing rules applicable to ALJs contain procedures for requesting and issuing subpoenas. *See* 47 C.F.R. §§ 1.331-340.

common ownership or management.[271] Are there other kinds of relationships between a programming vendor and an MVPD, other than those involving common ownership or management, that should nonetheless be considered "affiliation" under our rules? For example, to the extent that a programming vendor and an MVPD have entered into a contractual relationship that requires carriage of commonly owned channels and adversely affects the ability of other programming vendors to obtain carriage, should this relationship be considered "affiliation" under the program carriage rules? In addition, we seek comment on the extent to which MVPDs are making investments in programming vendors or sports teams that were not common when the 1992 Cable Act was enacted and that may not be considered "affiliation" under our current rules but that might nonetheless provide the MVPD with an incentive to favor certain programming vendors for other than legitimate business reasons. To the extent this is a concern, how should our rules be amended to address this issue? We also seek comment on the extent to which MVPDs are affiliated with "video programming vendors" that are not necessarily programming networks. Are the protections afforded by Section 616 limited to programming networks?[272] If not, do our current rules need to be amended to address concerns that MVPDs favor affiliated content over non-affiliated content for other than legitimate business reasons? Should our rules be amended to better address discrimination against a video programming vendor that seeks to distribute its own content, such as sports, movie or other programming, in order to favor similar content associated with the MVPD?

I. Burden of Proof in Program Carriage Discrimination Cases

79. After a complainant establishes a *prima facie* case of program carriage discrimination, the case proceeds to a decision on the merits. Only two program carriage cases have been decided on the merits to date. In neither case was the Commission required to decide the issue of which party bears the burdens of production and persuasion after the complainant establishes a *prima facie* case. In *MASN v. Time Warner Cable*, an arbitrator determined that the burdens shift to the defendant after the complainant establishes a *prima facie* case.[273] Conversely, in *WealthTV*, an ALJ ruled that the burdens remain with the

[271] *See* 47 C.F.R. § 76.1300(a) ("Affiliated. For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities."); 47 C.F.R. § 76.1300(b) ("Attributable interest. The term 'attributable interest' shall be defined by reference to the criteria set forth in Notes 1 through 5 to § 76.501 provided, however, that: (1) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and (2) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.").

[272] Section 616 defines the term "video programming vendor" broadly as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b). The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). The Senate Report accompanying the 1992 Cable Act, however, appears to indicate that the term "video programmer" includes only networks, and not program suppliers. S. Rep. No. 102-92 (1991), at 73, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1206 ("The term 'video programmer' means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale. This term applies to those video programmers which enter into arrangements with cable operators for carriage of a programming service. For example, the term 'video programmer' applies to Home Box Office (HBO) but not to those persons who sell movies and other programming to HBO. It applies to a pay-per-view service but not to the supplier of the programming for this service."). We note, however, that Section 616 of the Act uses the term "video programming vendor" as stated in the House version of what became Section 616, not "video programmer" as stated in the Senate version. *See* 47 U.S.C. § 536(b); *see also* H.R. Rep. No. 102-628 (1992), at 18-19, 110, 143-44.

[273] *See MASN v. Time Warner Cable*, 25 FCC Rcd at 18101-02, ¶ 4 (citing *In the Matter of Arbitration between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable Inc., Respondent*, Case No. 71 472 E 00697 07, Decision and Award (June 2, 2008)).

complainant after the complainant establishes a *prima facie* case.[274] On review of these cases, however, the Commission found no reason to address this issue because the facts demonstrated that the defendant would prevail even assuming that the burdens shifted to the defendant.[275]

80. We propose to codify in our rules which party bears the burdens of production and persuasion in a program carriage discrimination case after the complainant has established a *prima facie* case. We seek comment on two alternative frameworks for assigning these burdens: the program access discrimination framework and the intentional discrimination framework. Under the program access discrimination framework, after a complainant establishes a *prima facie* case of discrimination based on either direct or circumstantial evidence, the burdens of production and persuasion shift to the defendant to establish legitimate and non-discriminatory reasons for its carriage decision.[276] Under the intentional discrimination framework, the shifting of burdens varies depending upon whether the complainant relies on direct or circumstantial evidence to establish a *prima facie* case of discrimination. If a complainant relies on direct evidence to establish a *prima facie* case of discrimination, the burdens of production and persuasion shift to the defendant to establish that the carriage decision would have been the same absent considerations of affiliation.[277] If a complainant relies on circumstantial evidence to establish a *prima facie* case of discrimination, the burden of production (but not the burden of persuasion) shifts to the defendant to produce evidence of legitimate and non-discriminatory reasons for its carriage decision.[278] If

[274] *See WealthTV Recommended Decision*, 24 FCC Rcd at 12995-96, ¶ 58 and 12997, ¶ 61 (reaffirming ruling of the Presiding Judge that the program carriage complainant after establishing a *prima facie* case bears the burden of proceeding with the introduction of evidence and the burden of proof). The ALJ also concluded that the allocation of the burden of proof was immaterial to the decision because "[w]hatever the allocation of burdens, the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated section 616 of the Act or section 76.1301(c) of the rules." *See id*. at 12997, ¶ 62.

[275] *See MASN v. Time Warner Cable*, 25 FCC Rcd at 18105, ¶ 11 ("We need not, and do not, address in this decision the issue of the appropriate legal framework, however, because we find that TWC would prevail under either framework. That is, even assuming that the burdens of production and persuasion shift to TWC to establish legitimate and non-discriminatory reasons for its carriage decision after MASN establishes a *prima facie* case of discrimination, we find that TWC prevails because it has established legitimate reasons for its carriage decision that are borne out by the record and are not based on the programmer's affiliation or non-affiliation."); *WealthTV Commission Order* at ¶ 18 ("[W]e need not decide here whether the ALJ properly allocated the burdens . . . . We conclude that the defendants would have prevailed even if they had been required to carry the burdens of production and proof, as WealthTV contends was proper. Accordingly, we need not consider whether the burdens were properly allocated . . . .").

[276] *See 1993 Program Access Order,* 8 FCC Rcd at 3416, ¶ 125 ("When filing a complaint, the burden is on the complainant MVPD to make a *prima facie* showing that there is a difference between the terms, conditions or rates charged (or offered) to the complainant and its competitor by a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets our attribution test."); *id*. at 3364, ¶ 15 ("When evaluating a discrimination complaint, we will initially focus on the difference in price paid by (or offered to) the complainant as compared to that paid by (or offered to) a competing distributor. The [defendant] program vendor will then have to justify the difference using the statutory factors set forth in Section 628(c)(2)(B). . . . In all cases, the [defendant] programmer will bear the burden to establish that the price differential is adequately explained by the statutory factors.").

[277] *See, e.g., Laderach v. U-Haul*, 207 F.3d 825, 829 (6th Cir. 2000).

[278] *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993) (to meet its burden of production, the defendant must clearly set forth, through the introduction of admissible evidence, reasons for the action which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the action in question).

the defendant meets this burden of production, the complainant would then have the burden of persuasion to show that these reasons are so implausible that they constitute pretexts for discrimination.[279]

81. We seek comment on whether one of these frameworks is compelled by the language of Section 616(a)(3). If not, we seek comment on whether one of these frameworks is more consistent with the statutory scheme of Section 616, its underlying policy objectives, and its legislative history.[280] We also seek comment on the potential ramifications of each framework for consumers, MVPDs, and unaffiliated programming vendors.

V. PROCEDURAL MATTERS

A. Second Report and Order in MB Docket No. 07-42

1. Final Regulatory Flexibility Analysis

82. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[281] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Second Report and Order*. The FRFA is set forth in Appendix F.

2. Final Paperwork Reduction Act Analysis

83. This document adopts new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13 (44 U.S.C. 3501-3520). The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. The Commission will publish a separate notice in the *Federal Register* inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and find that these requirements will benefit many companies with fewer than 25 employees by promoting the fair and expeditious resolution of program carriage complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix F, *infra*.

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[279] *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 143 (2000) ("And in attempting to satisfy this burden, the plaintiff -- once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision -- must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" (citations omitted)).

[280] *See, e.g,* H.R. Rep. No. 102-628 (1992), at 110 ("The Committee intends that the term 'discrimination' is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act. The Committee does not intend, however, for the Commission to create new standards for conduct in determining discrimination under this section. An extensive body of law exists addressing discrimination in normal business practices, and the Committee intends the Commission to be guided by these precedents.").

[281] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 ("CWAAA").

3. Congressional Review Act

84. The Commission will send a copy of this *Second Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

B. NPRM in MB Docket No. 11-131

1. Initial Regulatory Flexibility Act Analysis

85. As required by the RFA,[282] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") relating to this *NPRM*. The IRFA is attached to this *NPRM* as Appendix G.

2. Paperwork Reduction Act

86. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.[283] In addition, pursuant to the Small Business Paperwork Relief Act of 2002,[284] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."[285]

3. Ex Parte Rules

87. Permit-But-Disclose. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[286] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[287] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

4. Filing Requirements

88. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[288] interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System ("ECFS"), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[289]

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[282] *See* 5 U.S.C. § 603.

[283] Pub. L. No. 104-13.

[284] Pub. L. No. 107-198.

[285] 44 U.S.C. § 3506(c)(4).

[286] *See* 47 C.F.R. § 1.1206(b); *see also id.* §§ 1.1202, 1.1203.

[287] *See id.* § 1.1206(b)(2).

[288] *See id*. §§ 1.415, 1.419.

[289] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

89. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

90. Accessibility Information. To request information in accessible formats (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: http://www.fcc.gov.

91. Additional Information. For additional information on this proceeding, contact David Konczal, David.Konczal@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

A. Second Report and Order in MB Docket No. 07-42

92. **IT IS ORDERED**, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536, the *Second Report and Order* in MB Docket No. 07-42 **IS ADOPTED**.

93. **IT IS FURTHER ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix B.

94. **IT IS FURTHER ORDERED** that the rules adopted herein **WILL BECOME EFFECTIVE** 30 days after the date of publication in the *Federal Register*, except for Sections 47 C.F.R. §§ 1.221(h); 1.229(b)(3), (b)(4); 1.248(a), (b); 76.7(g)(2); and 76.1302(c)(1), (d), (e)(1), and (k) which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA) and **WILL BECOME**

EFFECTIVE after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective date.

95. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Second Report and Order* in MB Docket No. 07-42, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

96. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Second Report and Order* in MB Docket No. 07-42 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

B. NPRM in MB Docket No. 11-131

97. **IT IS ORDERED** that pursuant to the authority contained in Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536, this *Notice of Proposed Rulemaking* in MB Docket No. 11-131 **IS ADOPTED**.

98. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking* in MB Docket No. 11-131, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

Comments filed in MB Docket No. 07-42

Black Television News Channel
Bruno Goodworth Network, Inc
CaribeVision Holdings LLC
Charles Stogner
Combonate Media Group
Comcast Corporation
Community Broadcasters Association
Duane J. Polich
Engle Broadcasting
Ideal Living Media
iNFO Channel Group
Media Access Project
National Cable & Telecommunications Association
NFL Enterprises LLC
Pope Broadcasting Company, Inc
Positive Media, Inc d/b/a TV Camden
Reynolds Media Inc
SHOP NBC
StogMedia
The America Channel
Time Warner Cable Inc.

Reply Comments filed in MB Docket No. 07-42

Black Television News Channel
CaribeVision Holdings LLC
Combonate Media Group
Comcast Corporation
Crown Media Holdings, Inc/The Hallmark Channel
Engle Broadcasting
HDNet
HTV Corporation
Leased Access Programmers Association
Media Access Project
National Cable & Telecommunications Association
NFL Enterprises LLC
Pope Broadcasting Company, Inc
Positive Media, Inc d/b/a TV Camden
Reynolds Media Inc.
Time Warner Cable Inc.
Verizon
WealthTV

APPENDIX B

Final Rules

For the reasons discussed in the preamble, Parts 0 and 76 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 0 – COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.341 is amended by adding paragraph (f) to read as follows:

* * * * *

(f) (1) For program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the presiding administrative law judge shall release an initial decision in compliance with one of the following deadlines:

(i) 240 calendar days after a party informs the Chief Administrative Law Judge that it elects not to pursue alternative dispute resolution as set forth in § 76.7(g)(2) of this part; or

(ii) if the parties have mutually elected to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this part, within 240 calendar days after the parties inform the Chief Administrative Law Judge that they have failed to resolve their dispute through alternative dispute resolution.

(2) The presiding administrative law judge may toll these deadlines under the following circumstances:

(i) if the complainant and defendant jointly request that the presiding administrative law judge toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness; or

(iii) in extraordinary situations, due to a lack of adjudicatory resources available at the time in the Office of Administrative Law Judges.

3. Section 1.221 is amended by adding paragraph (h) to read as follows:

* * * * *

(h) (1) For program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, each party, in person or by attorney, shall file a written appearance within five calendar days after the party informs the Chief Administrative Law Judge that it elects not to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this part or, if the parties have mutually elected to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this part, within five calendar days after the parties inform the Chief Administrative Law Judge that they have

failed to resolve their dispute through alternative dispute resolution. The written appearance shall state that the party will appear on the date fixed for hearing and present evidence on the issues specified in the hearing designation order.

(2) If the complainant fails to file a written appearance by this deadline, or fails to file prior to the deadline either a petition to dismiss the proceeding without prejudice or a petition to accept, for good cause shown, a written appearance beyond such deadline, the Chief Administrative Law Judge shall dismiss the complaint with prejudice for failure to prosecute.

(3) If the defendant fails to file a written appearance by this deadline, or fails to file prior to this deadline a petition to accept, for good cause shown, a written appearance beyond such deadline, its opportunity to present evidence at hearing will be deemed to have been waived. If the hearing is so waived, the Chief Administrative Law Judge shall expeditiously terminate the proceeding and certify to the Commission the complaint for resolution based on the existing record.

4. Section 1.229 is amended by redesignating current paragraph (b)(3) as (b)(4), revising the first sentence of redesignated paragraph (b)(4), and adding new paragraph (b)(3) to read as follows:

* * * * * *

(b) * * *

(3) For program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, such motions shall be filed within 15 calendar days after the deadline for submitting written appearances pursuant to § 1.221(h) of this part, except that persons not named as parties to the proceeding in the designation order may file such motions with their petitions to intervene up to 30 days after publication of the full text or a summary of the designation order in the Federal Register. (See § 1.223 of this part).

(4) Any person desiring to file a motion to modify the issues after the expiration of periods specified in paragraphs (a), (b)(1), (b)(2), and (b)(3) of this section, shall set forth the reason why it was not possible to file the motion within the prescribed period. * * *

* * * * *

5. Section 1.248 is amended by revising the second sentence of paragraph (a) and the second sentence of paragraph (b)(1) to read as follows:

(a) * * * The initial prehearing conference shall be scheduled 30 days after the effective date of the order designating a case for hearing, unless good cause is shown for scheduling such conference at a later date, except that for program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the initial prehearing conference shall be held no later than 10 calendar days after the deadline for submitting written appearances pursuant to § 1.221(h) of this part or within such shorter or longer period as the Commission may allow on motion or notice consistent with the public interest.

(b) (1) * * * The initial prehearing conference shall be scheduled 30 days after the effective date of the order designating a case for hearing, unless good cause is shown for scheduling such conference at a later date, except that for program carriage complaints filed pursuant to § 76.1302 of this part that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the initial prehearing

conference shall be held no later than 10 calendar days after the deadline for submitting written appearances pursuant to § 1.221(h) of this part or within such shorter or longer period as the presiding officer may allow on motion or notice consistent with the public interest.

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

6. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

7. Section 76.7 is amended by revising the second sentence of paragraph (g)(2) to read as follows:

* * * * *

(g) * * *

(2) * * * Such election shall be submitted in writing to the Commission and the Chief Administrative Law Judge.

* * * * *

8. Section 76.1302 is amended by revising paragraph (c)(1), removing paragraph (c)(3), redesignating current paragraph (c)(4) as (c)(3), redesignating current paragraph (d) as paragraph (e) and revising paragraph (e)(1), redesignating current paragraph (e) as paragraph (f), redesignating current paragraph (f) as paragraph (h), redesignating current paragraph (g) as paragraph (j) and revising paragraph (j)(2), and adding new paragraphs (d), (g), (i), and (k) to read as follows:

* * * * *

(c) * * *

(1) Whether the complainant is a multichannel video programming distributor or video programming vendor, and, in the case of a multichannel video programming distributor, identify the type of multichannel video programming distributor, the address and telephone number of the complainant, what type of multichannel video programming distributor the defendant is, and the address and telephone number of each defendant;

* * * * *

(d) *Prima facie case*. In order to establish a *prima facie* case of a violation of § 76.1301 of this part, the complaint must contain evidence of the following:

(1) The complainant is a video programming vendor as defined in section 616(b) of the Communications Act of 1934, as amended, and § 76.1300(e) of this part or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part;

(2) The defendant is a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part; and

(3) (i) *Financial interest*. In a complaint alleging a violation of § 76.1301(a) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant's systems.

(ii) *Exclusive rights*. In a complaint alleging a violation of § 76.1301(b) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant coerced a video programming vendor to provide, or retaliated against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(iii) *Discrimination*. In a complaint alleging a violation of § 76.1301(c) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B) (*1)* Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors; or

(*2*) (*i*) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(*ii*) Evidence that the defendant multichannel video programming distributor has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(*2*)(*i*) of this section with respect to the selection, terms, or conditions for carriage.

(e) *Answer*. (1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within sixty (60) days of service of the complaint, unless otherwise directed by the Commission.

* * * * *

(g) *Prima facie determination*. (1) Within sixty (60) calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed), the Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of § 76.1301 of this part.

(2) The Chief, Media Bureau may toll the sixty (60)-calendar-day deadline under the following circumstances:

(i) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(3) A finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.

(4) If the Chief, Media Bureau finds that the complainant has not established a *prima facie* case of a violation of § 76.1301 of this part, the Chief, Media Bureau will dismiss the complaint.

* * * * *

(i) *Deadline for decision on the merits*. (1) (i) For program carriage complaints that the Chief, Media Bureau decides on the merits based on the complaint, answer, and reply without discovery, the Chief, Media Bureau shall release a decision on the merits within sixty (60) calendar days after the Chief, Media Bureau's *prima facie* determination.

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall release a decision on the merits within 150 calendar days after the Chief, Media Bureau's *prima facie* determination.

(iii) The Chief, Media Bureau may toll these deadlines under the following circumstances:

(A) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(B) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(2) For program carriage complaints that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the deadlines set forth in § 0.341(f) of this part apply.

(j) * * *

(2) *Additional sanctions*. The remedies provided in paragraph (j)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(k) *Petitions for temporary standstill*. (1) A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

(i) the complainant is likely to prevail on the merits of its complaint;

(ii) the complainant will suffer irreparable harm absent a stay;

(iii) grant of a stay will not substantially harm other interested parties; and

(iv) the public interest favors grant of a stay.

(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (*i.e.*, either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract.

APPENDIX C

Restated Section 76.1302 Showing Changes Adopted in *Second Report and Order*

For ease of review, Section 76.1302 is restated below showing the changes adopted herein in **bold/underline** (for additions) or ~~strikethrough~~ (for deletions).

§ 76.1302 Carriage agreement proceedings

(a) *Complaints*. Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) *Prefiling notice required*. Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(c) *Contents of complaint*. In addition to the requirements of § 76.7 of this part, a carriage agreement complaint shall contain:

(1) ~~The type of~~**Whether the complainant is a** multichannel video programming distributor ~~that describes complainant,~~**or video programming vendor and, in the case of a multichannel video programming distributor, identify the type of multichannel video programming distributor,** the address and telephone number of the complainant, **what type of multichannel video programming distributor the defendant is,** and the address and telephone number of each defendant;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

~~(3) For complaints alleging a violation of § 76.1301(c) of this part, evidence that supports complainant's claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly.~~

(~~4~~**3**) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (b) of this section has been made.

(d) *Prima facie case*. In order to establish a *prima facie* case of a violation of § 76.1301 of this part, the complaint must contain evidence of the following:

(1) The complainant is a video programming vendor as defined in section 616(b) of the Communications Act of 1934, as amended, and § 76.1300(e) of this part or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part;

(2) The defendant is a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part; and

(3) (i) *Financial interest*. In a complaint alleging a violation of § 76.1301(a) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant's systems.

(ii) *Exclusive rights*. In a complaint alleging a violation of § 76.1301(b) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant coerced a video programming vendor to provide, or retaliated against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(iii) *Discrimination*. In a complaint alleging a violation of § 76.1301(c) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B) (*1*) Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors; or

(*2*) (*i*) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(*ii*) Evidence that the defendant multichannel video programming distributor has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(*2*)(*i*) of this section with respect to the selection, terms, or conditions for carriage.

(~~d~~**c**) *Answer*. (1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within ~~thirty (30)~~**sixty (60)** days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall address the relief requested in the complaint, including legal and documentary support, for such response, and may include an alternative relief proposal without any prejudice to any denials or defenses raised.

(~~e~~**f**) *Reply*. Within twenty (20) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(g) *Prima facie determination*. (1) Within sixty (60) calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed), the

Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of § 76.1301 of this part.

(2) The Chief, Media Bureau may toll the sixty (60)-calendar-day deadline under the following circumstances:

(i) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(3) A finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.

(4) If the Chief, Media Bureau finds that the complainant has not established a *prima facie* case of a violation of § 76.1301 of this part, the Chief, Media Bureau will dismiss the complaint.

(~~f~~**h**) *Time limit on filing of complaints*. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or

(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or

(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

(i) *Deadline for decision on the merits*. (1) (i) For program carriage complaints that the Chief, Media Bureau decides on the merits based on the complaint, answer, and reply without discovery, the Chief, Media Bureau shall release a decision on the merits within sixty (60) calendar days after the Chief, Media Bureau's *prima facie* determination.

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall release a decision on the merits within 150 calendar days after the Chief, Media Bureau's *prima facie* determination.

(iii) The Chief, Media Bureau may toll these deadlines under the following circumstances:

(A) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(B) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(2) For program carriage complaints that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the deadlines set forth in § 0.341(f) of this part apply.

(~~g~~**i**) *Remedies for violations* -- (1) *Remedies authorized*. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) *Additional sanctions*. The remedies provided in paragraph (~~g~~**i**)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(k) *Petitions for temporary standstill.* (1) A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

(i) the complainant is likely to prevail on the merits of its complaint;

(ii) the complainant will suffer irreparable harm absent a stay;

(iii) grant of a stay will not substantially harm other interested parties; and

(iv) the public interest favors grant of a stay.

(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (*i.e.*, either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract.

APPENDIX D

Potential Amendments to the Program Carriage Rules Based on the *NPRM*

For ease of review, Sections 76.1301 and 76.1302 and new Section 76.1303 are restated below showing the potential amendments in **bold/underline** (for additions) or ~~strikethrough~~ (for deletions).

PART 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1301 is amended by new paragraphs (d) and (e) to read as follows:

§ 76.1301 Prohibited Practices

(a) *Financial interest*. No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) *Exclusive rights*. No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) *Discrimination*. No multichannel video programming distributor shall engage 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, terms, or conditions for carriage of video programming provided by such vendors.

(d) *Retaliation*. No multichannel video programming distributor shall retaliate against a video programming vendor for filing a complaint with the Commission alleging a violation of § 76.1301 of this part, if the effect of the conduct is to unreasonably restrain the ability of the video programming vendor to compete fairly.

(e) *Bad faith negotiations*. (1) No multichannel video programming distributor shall fail to negotiate in good faith with an unaffiliated video programming vendor with respect to video programming that is similarly situated to video programming affiliated (as defined in § 76.1300(a) of this part) with the multichannel video programming distributor, if the effect of such a failure to negotiate in good faith is to unreasonably restrain the ability of the unaffiliated video programming vendor to compete fairly.

(2) Video programming will be considered similarly situated based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.

(3) *Standards*. The following actions or practices violate the multichannel video programming distributor's duty to negotiate in good faith as set forth in § 76.1301(e)(1) of this part:

(i) Refusal by the multichannel video programming distributor to negotiate for carriage;

(ii) Refusal by the multichannel video programming distributor to designate a representative with authority to make binding representations on carriage;

(iii) Refusal by the multichannel video programming distributor to meet and negotiate for carriage at reasonable times and locations, or acting in a manner that unreasonably delays carriage negotiations;

(iv) Refusal by the multichannel video programming distributor to put forth more than a single, unilateral proposal;

(v) Failure of the multichannel video programming distributor to respond to a carriage proposal of the other party, including the reasons for the rejection of any such proposal;

(vi) Execution by the multichannel video programming distributor of an agreement with any party, a term or condition of which, requires that the multichannel video programming distributor not enter into a carriage agreement with an unaffiliated video programming vendor; and

(vii) Refusal by the multichannel video programming distributor to execute a written carriage agreement that sets forth the full understanding of the unaffiliated video programming vendor and the multichannel video programming distributor.

(4) *Totality of the circumstances*. In addition to the standards set forth in § 76.1301(e)(3) of this part, an unaffiliated video programming vendor may demonstrate, based on the totality of the circumstances of a particular carriage negotiation, that a multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.1301(e)(1) of this part.

3. Section 76.1302 is amended by adding paragraph (c)(4), revising paragraph (d)(3)(iii)(B)(2)(i), revising paragraph (d)(3)(iii)(B)(2)(ii), adding paragraph (d)(3)(iv), adding paragraph (d)(3)(v), adding paragraph (e)(3), revising the introductory text of paragraph (h), removing paragraphs (h)(1) through (h)(3), revising paragraph (j)(1), adding paragraph (j)(3), adding paragraph (j)(4), and adding paragraph (l) to read as follows:

§ 76.1302 Carriage agreement proceedings

(a) *Complaints*. Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) *Prefiling notice required*. Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature

of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(c) *Contents of complaint*. In addition to the requirements of § 76.7 of this part, a carriage agreement complaint shall contain:

(1) Whether the complainant is a multichannel video programming distributor or video programming vendor, and, in the case of a multichannel video programming distributor, identify the type of multichannel video programming distributor, the address and telephone number of the complainant, what type of multichannel video programming distributor the defendant is, and the address and telephone number of each defendant;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

(3) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (b) of this section has been made.

(4) *Damages requests*. (i) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of paragraph (c)(4)(iii) of this section.

(ii) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded if the complaint complies fully with the requirement of paragraph (c)(4)(iii) of this section where the defendant knew, or should have known that it was engaging in conduct violative of section 616.

(iii) In all cases in which recovery of damages is sought, the complainant shall include within, or as an attachment to, the complaint, either:

(A) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(B) An explanation of:

(*1*) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(*2*) The reason such information is unavailable to the complaining party;

(*3*) The factual basis the complainant has for believing that such evidence of damages exists; and

(*4*) A detailed outline of the methodology that would be used to create a computation of damages when such evidence is available.

(d) *Prima facie case*. In order to establish a *prima facie* case of a violation of § 76.1301 of this part, the complaint must contain evidence of the following:

(1) The complainant is a video programming vendor as defined in section 616(b) of the Communications Act of 1934, as amended, and § 76.1300(e) of this part or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part;

(2) The defendant is a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d) of this part; and

(3) (i) *Financial interest*. In a complaint alleging a violation of § 76.1301(a) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant's systems.

(ii) *Exclusive rights*. In a complaint alleging a violation of § 76.1301(b) of this part, documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant coerced a video programming vendor to provide, or retaliated against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(iii) *Discrimination*. In a complaint alleging a violation of § 76.1301(c) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B) (*1)* Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors; or

(*2*) (*i*) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor **or with another multichannel video programming distributor**, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(*ii*) Evidence that the defendant multichannel video programming distributor **is affiliated (as defined in § 76.1300(a) of this part) with any video programming vendor and** has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(*2*)(*i*) of this section with respect to the selection, terms, or conditions for carriage.

(iv) *Retaliation*. In a complaint alleging a violation of § 76.1301(d) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of the complainant to compete fairly; and

(B) (*1)* Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant retaliated against the complainant for filing a complaint with the Commission alleging a violation of § 76.1301 of this part; or

(*2*) (*i*) Evidence that the defendant multichannel video programming distributor has taken an adverse carriage action while the complainant has pending with the Commission a complaint alleging a violation of § 76.1301 of this part (the "initial complaint") or within two years after the initial complaint is resolved on the merits.

(ii) An "adverse carriage action" for purposes of paragraph (d)(3)(iv)(B)(*2*)(*i*) of this section is any action taken by the defendant multichannel video programming distributor with respect to any video programming affiliated with the complainant that adversely impacts the complainant, including, but not limited to, refusing to carry any video programming affiliated with the complainant or moving any video programming affiliated with the complainant to a less favorable channel position or tier, provided that an "adverse carriage action" does not include the action at issue in the initial complaint.

(v) *Bad faith negotiations*. In a complaint alleging a violation of § 76.1301(e) of this part:

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of the complainant to compete fairly;

(B) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a) of this part) with the defendant multichannel video programming distributor based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(C) Evidence that the defendant multichannel video programming distributor breached its duty to negotiate in good faith pursuant to § 76.1301(e) of this part.

(e) *Answer*. (1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within sixty (60) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall address the relief requested in the complaint, including legal and documentary support, for such response, and may include an alternative relief proposal without any prejudice to any denials or defenses raised.

(3) To the extent that a defendant expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

(f) *Reply*. Within twenty (20) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(g) *Prima facie determination*. (1) Within sixty (60) calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed), the Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of § 76.1301 of this part.

(2) The Chief, Media Bureau may toll the sixty (60)-calendar-day deadline under the following circumstances:

(i) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(3) A finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.

(4) If the Chief, Media Bureau finds that the complainant has not established a *prima facie* case of a violation of § 76.1301 of this part, the Chief, Media Bureau will dismiss the complaint.

(h) *Time limit on filing of complaints*. Any complaint filed pursuant to this subsection must be filed within one year of the date on which **the alleged violation of the program carriage rules occurred.** ~~one of the following events occurs:~~

~~(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or~~

~~(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or~~

~~(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.~~

(i) *Deadline for decision on the merits*. (1) (i) For program carriage complaints that the Chief, Media Bureau decides on the merits based on the complaint, answer, and reply without discovery, the Chief, Media Bureau shall release a decision on the merits within sixty (60) calendar days after the Chief, Media Bureau's *prima facie* determination.

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall release a decision on the merits within 150 calendar days after the Chief, Media Bureau's *prima facie* determination.

(iii) The Chief, Media Bureau may toll these deadlines under the following circumstances:

(A) if the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(B) if complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(2) For program carriage complaints that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the deadlines set forth in § 0.341(f) of this part apply.

(j) *Remedies for violations* -- (1) *Remedies authorized*. Upon completion of such adjudicatory proceeding, the ~~Commission~~ **adjudicator deciding the case on the merits (*i.e.*, either the Chief, Media Bureau or an administrative law judge)** shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless **the adjudicator rules that the defendant has made a sufficient evidentiary showing that demonstrates that an** ~~any~~ order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) *Additional sanctions*. The remedies provided in paragraph (j)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(3) *Submission of final offers*. To assist in ordering an appropriate remedy, the adjudicator has the discretion to order the complainant and the defendant to each submit a final offer for the prices, terms, or conditions in dispute. The adjudicator has the discretion to adopt one of the final offers or to fashion its own remedy.

(4) *Imposition of damages*. (i) *Bifurcation*. In all cases in which damages are requested, the adjudicator deciding the case on the merits (*i.e.*, either the Chief, Media Bureau or an administrative law judge) may bifurcate the program carriage violation determination from any damage adjudication.

(ii) *Burden of proof*. The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program carriage violation. Requests for damages that grossly overstate the amount of damages may result in a determination by the adjudicator that the complainant failed to satisfy its burden of proof to demonstrate with specificity the damages arising from the program carriage violation.

(iii) *Damages adjudication*. (A) The adjudicator may, in its discretion, end adjudication of damages with a written order determining the sufficiency of the damages computation submitted in accordance with paragraph (c)(4)(iii)(A) of this section or the damages computation methodology submitted in accordance with paragraph (c)(4)(iii)(B)(*4*) of this section, modifying such computation or methodology, or requiring the complainant to resubmit such computation or methodology.

(*1*) Where the adjudicator issues a written order approving or modifying a damages computation submitted in accordance with paragraph (c)(4)(iii)(A) of this section, the defendant shall recompense the complainant as directed therein.

(*2*) Where the adjudicator issues a written order approving or modifying a damages computation methodology submitted in accordance with paragraph (c)(4)(iii)(B)(*4*) of this section, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the adjudicator-mandated methodology.

(B) Within thirty (30) days of the issuance of a paragraph (c)(4)(iii)(B)(*4*) of this section damages methodology order, the parties shall submit jointly to the adjudicator either:

(*1*) A statement detailing the parties' agreement as to the amount of damages;

(*2*) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(*3*) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(C)(*1*) In cases in which the parties cannot resolve the amount of damages within a reasonable time period, the adjudicator retains the right to determine the actual amount of damages on its own, or through the procedures described in paragraph (j)(4)(iii)(C)(2) of this section.

(*2*) In cases in which the Chief, Media Bureau acts as the adjudicator, issues concerning the amount of damages may be designated by the Chief, Media Bureau for hearing before, or, if the parties agree, submitted for mediation to, an administrative law judge.

(D) Interest on the amount of damages awarded will accrue from either the date indicated in the adjudicator's written order issued pursuant to paragraph (j)(4)(iii)(A)(1) of this section or the date agreed upon by the parties as a result of their negotiations pursuant to paragraph (j)(4)(iii)(A)(2) of this section. Interest shall be computed at applicable rates published by the Internal Revenue Service for tax refunds.

(k) *Petitions for temporary standstill.* (1) A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of § 76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:

(i) the complainant is likely to prevail on the merits of its complaint;

(ii) the complainant will suffer irreparable harm absent a stay;

(iii) grant of a stay will not substantially harm other interested parties; and

(iv) the public interest favors grant of a stay.

(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (*i.e.*, either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract. **To facilitate the application of remedies as of the expiration date of the previous programming contract, the adjudicator, after deciding the case on the merits, may request the party seeking to apply the remedies as of the expiration date of the previous programming contract to submit a proposal for such application of remedies pursuant to the procedures set forth in § 76.1302(c)(4)(iii) and § 76.1302(j)(4) of this part for requesting damages. An opposition to such a proposal shall be filed within ten (10) days after the proposal is filed. A reply to an opposition shall be filed within five (5) days after the opposition is filed.**

(l) *Protective Orders*. In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of program carriage complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.

4. Section 76.1303 is added to read as follows:

§ 76.1303 Discovery

(a) In addition to the general pleading and discovery rules contained in § 76.7 of this part, the following procedures apply to complaints alleging a violation of § 76.1301 of this part in which the Chief, Media Bureau acts as the adjudicator.

(b) *Automatic document production*. Within ten (10) calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery, each party must provide the following documents to the opposing party:

(1) In a complaint alleging a violation of § 76.1301(a) of this part:

(i) All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant multichannel video programming distributor;

(ii) All documents relating to the defendant multichannel video programming distributor's interest in obtaining or plan to obtain a financial interest in the complainant or the video programming at issue in the complaint; and

(iii) All documents relating to the programming vendor's consideration of whether to provide the defendant multichannel video programming distributor with a financial interest in the complainant or the video programming at issue in the complaint.

(2) In a complaint alleging a violation of § 76.1301(b) of this part:

(i) All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant multichannel video programming distributor;

(ii) All documents relating to the defendant multichannel video programming distributor's interest in obtaining or plan to obtain exclusive rights to the video programming at issue in the complaint; and

(iii) All documents relating to the programming vendor's consideration of whether to provide the defendant multichannel video programming distributor with exclusive rights to the video programming at issue in the complaint.

(3) In a complaint alleging a violation of § 76.1301(c) of this part:

(i) All documents relating to the defendant multichannel video programming distributor's carriage decision with respect to the complainant's video programming at issue in the complaint, including the defendant multichannel video programming distributor's reasons for not carrying the video programming or the defendant multichannel video programming distributor's reasons for proposing, rejecting, or accepting specific carriage terms; and the defendant multichannel video programming distributor's evaluation of the video programming;

(ii) All documents comparing, discussing the similarities or differences between, or discussing the extent of competition between the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, including in terms of genre, ratings, license fee, target audience, target advertisers, and target programming;

(iii) All documents relating to the impact of defendant multichannel video programming distributor's carriage decision on the ability of the complainant, the complainant's video programming at issue in the complaint, the defendant multichannel video programming distributor, and the allegedly similarly situated, affiliated video programming to compete, including the impact on subscribership; license fee revenues; advertising revenues; acquisition of advertisers; and acquisition of programming rights;

(iv) For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, all documents (both internal documents as well as documents received from multichannel video programming distributors, but limited to the ten largest multichannel video programming distributors in terms of subscribers with which the complainant or the affiliated programming vendor have engaged in carriage discussions regarding the video programming) discussing the reasons for the multichannel video programming distributor's carriage decisions with respect to the video programming, including the multichannel video programming distributor's reasons for not carrying the video programming or the multichannel video programming distributor's reasons for proposing, rejecting, or accepting specific carriage terms; and the multichannel video programming distributor's evaluation of the video programming; and

(v) For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, current affiliation agreements with the ten largest multichannel video programming distributors (including, if not otherwise covered, the defendant

multichannel video programming distributor) carrying the video programming in terms of subscribers.

(c) *Party-to-party discovery*. (1) Within twenty (20) calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery, each party to the complaint may serve requests for discovery directly on the opposing party, and file a copy of the request with the Commission.

(2) Within five (5) calendar days after being served with a discovery request, the respondent may serve directly on the party requesting discovery an objection to any request for discovery that is not in the respondent's control or relevant to the dispute, and file a copy of the objection with the Commission.

(3) Within five (5) calendar days after being served with an objection to a discovery request, the party requesting discovery may serve a reply to the objection directly on the respondent, and file a copy of the reply with the Commission.

(4) To the extent that a party has objected to a discovery request, the parties shall meet and confer to resolve the dispute. Within forty (40) calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery, the parties shall file with the Commission a joint proposal for discovery as well as a list of issues pertaining to discovery that have not been resolved.

(5) Until any objection to a discovery request is resolved either by the parties or by the Chief, Media Bureau, the obligation to produce the disputed discovery is suspended.

(6) Unless the parties agree to extend the 150-calendar-day deadline for a decision on the merits by the Chief, Media Bureau set forth in § 76.1302(i)(1)(ii) of this part, discovery must conclude within 75 calendar days after the Chief, Media Bureau releases a decision finding that the complainant has established a *prima facie* case of a violation of § 76.1301 of this part and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery.

(7) Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

(8) Unless the parties agree to extend the 150-calendar-day deadline for a decision on the merits by the Chief, Media Bureau set forth in § 76.1302(i)(1)(ii) of this part, the parties must submit post-discovery briefs and reply briefs within twenty (20) calendar days and ten (10) calendar days, respectively, after the conclusion of discovery. Such briefs shall summarize the facts and issues presented in the pleadings and other record evidence, including the information exchanged during discovery.

APPENDIX E

Standard Protective Order and Declaration Used in Section 628 Program Access Proceedings

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

In the Matter of	)	
	)	CSR No. _____
[Name of Proceeding]	)	

PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 8.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

3. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

4. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

5. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. Disclosure. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 6 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 8 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

8. Authorized Representatives shall be limited to:

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

10. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

11. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

12. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 10 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

17. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed

necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

19. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

Attachment A to Standard Protective Order

DECLARATION

In the Matter of)

[Name of Proceeding]) Docket No._____

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) _____

(printed name) _____

(representing) _____

(title) _____

(employer) _____

(address) _____

(phone) _____

(date) _____

APPENDIX F

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* in MB Docket No. 07-42 (hereinafter referred to as the *Program Carriage NPRM*).[2] The Commission sought written public comment on the proposals in the *Program Carriage NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. In 1993, the Commission adopted rules implementing a provision of the 1992 Cable Act[4] pertaining to carriage of video programming vendors by multichannel video programming distributors ("MVPDs") intended to benefit consumers by promoting competition and diversity in the video programming and video distribution markets (the "program carriage" rules).[5] As required by Congress, these rules allow for the filing of complaints with the Commission alleging that an MVPD has (i) required a financial interest in a video programming vendor's program service as a condition for carriage (the "financial interest" provision);[6] (ii) coerced a video programming vendor to provide, or retaliated against a vendor for failing to provide, exclusive rights as a condition of carriage (the "exclusivity" provision);[7] or (iii) unreasonably restrained the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage (the "discrimination" provision).[8] Congress specifically directed the Commission to provide for "expedited review" of these complaints and to provide for appropriate penalties and remedies for any violations.[9] Programming vendors have complained that the Commission's procedures for addressing program carriage complaints have hindered the filing of legitimate complaints and have failed to provide for the expedited review envisioned by

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage,* MB Docket No. 07-42, Notice of Proposed Rule Making, 22 FCC Rcd 11222, 11231-40, Appendix (2007) ("*Program Carriage NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); *see also* 47 U.S.C. § 536.

[5] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, *Second Report and Order*, 9 FCC Rcd 2642 (1993) ("*1993 Program Carriage Order*"); *see also Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994) ("*1994 Program Carriage Order*"). The Commission's program carriage rules are set forth at 47 C.F.R. §§ 76.1300 - 76.1302.

[6] *See* 47 C.F.R. § 76.1301(a); *see also* 47 U.S.C. § 536(a)(1).

[7] *See* 47 C.F.R. § 76.1301(b); *see also* 47 U.S.C. § 536(a)(2).

[8] *See* 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C. § 536(a)(3).

[9] *See* 47 U.S.C. § 536(a)(4).

Congress. In the *Second Report and Order* in MB Docket No. 07-42, the Commission takes the following initial steps to improve its procedures for addressing program carriage complaints.

3. First, in response to concerns that programming vendors are uncertain as to what evidence must be provided in a complaint to establish a *prima facie* case of a program carriage violation, the Commission codifies in its rules the evidence required to establish a *prima facie* case.[10] A *prima facie* finding means that the complainant has provided sufficient evidence in its complaint, without the Media Bureau having considered any evidence to the contrary, to proceed to a ruling on the merits.[11] The *Second Report and Order* in MB Docket No. 07-42 explains that, in complaints alleging a violation of the exclusivity or financial interest provisions, the complaint must contain direct evidence (either documentary or testimonial) supporting the facts underlying the claim.[12] For complaints alleging a violation of the discrimination provision, however, direct evidence supporting a claim that the defendant MVPD discriminated "on the basis of affiliation or non-affiliation" is sufficient to establish this element of a *prima facie* case but is not required.[13] Because it is unlikely that direct evidence of a discriminatory motive will be available to potential complainants, the *Second Report and Order* in MB Docket No. 07-42 clarifies that a complainant can establish this element of a *prima facie* case of a violation of the program carriage discrimination provision by providing the following circumstantial evidence of discrimination "on the basis of affiliation or non-affiliation": (i) the complainant programming vendor must provide evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and (ii) the complaint must contain evidence that the defendant MVPD has treated the video programming provided by the complainant programming vendor differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage.[14] In addition, regardless of whether the complainant relies on direct or circumstantial evidence of discrimination "on the basis of affiliation or non-affiliation," the complaint must also contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly.[15]

4. Second, having established specific evidentiary requirements for what the complainant must provide in its complaint to establish a *prima facie* case of a program carriage violation, the *Second Report and Order* provides the defendant with additional time to answer the complaint in order to develop a full, case-specific response, with supporting evidence, to the evidence put forth by the complainant.[16] Specifically, while the Commission's current rule provides that an MVPD served with a program carriage complaint shall answer the complaint within 30 days of service, the *Second Report and Order* amends this rule to provide an MVPD with 60 days to answer the complaint.[17]

[10] *See Second Report and Order* in MB Docket No. 07-42 at ¶¶ 9-17.

[11] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 16.

[12] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 12.

[13] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 13.

[14] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 14.

[15] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 15.

[16] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 18.

[17] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 18.

5. Third, in response to concerns that the unpredictable and sometimes lengthy time frames for Commission action on program carriage complaints have discouraged programming vendors from filing legitimate complaints, the Commission establishes deadlines for action by the Media Bureau and Administrative Law Judges ("ALJ") when acting on program carriage complaints.[18] Action on program carriage complaints entails a two-step process: the initial *prima facie* determination by the Media Bureau, followed (if necessary) by a decision on the merits by an adjudicator (*i.e*., either the Media Bureau or an ALJ).[19] For the first step, the Commission in the *Second Report and Order* in MB Docket No. 07-42 directs the Media Bureau to release a decision determining whether the complainant has established a *prima facie* case within 60 calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed).[20] For the second step, the Commission imposes different deadlines for a ruling on the merits of the complaint depending upon whether the adjudicator is the Media Bureau or the ALJ.[21] After the Media Bureau concludes that the complaint contains sufficient evidence to establish a *prima facie* case, the Media Bureau has three options for addressing the merits of the complaint: (i) the Media Bureau can rule on the merits of the complaint based on the pleadings without discovery; (ii) if the Media Bureau determines that the record is not sufficient to resolve the complaint, the Media Bureau may outline procedures for discovery before proceeding to rule on the merits of the complaint; or (iii) 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 in the proceeding for an adjudicatory hearing before an ALJ.[22] The Commission in the *Second Report and Order* in MB Docket No. 07-42 establishes the following deadlines for the adjudicator's decision on the merits. For complaints that the Media Bureau decides on the merits based on the pleadings without discovery, the Media Bureau must release a decision within 60 calendar days after its *prima facie* determination.[23] For complaints that the Media Bureau decides on the merits after discovery, the Media Bureau must release a decision within 150 calendar days after its *prima facie* determination.[24] For complaints referred to an ALJ for a decision on the merits, the ALJ must release an initial decision within 240 calendar days after one of the parties informs the Chief ALJ that it elects not to pursue Alternative Dispute Resolution ("ADR") or, if the parties have mutually elected to pursue ADR, within 240 calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR.[25] In adopting this deadline for program carriage complaints referred to an ALJ, the *Second Report and Order* in MB Docket No. 07-42 also adopts revised procedural deadlines applicable to adjudicatory hearings involving program carriage complaints.[26] The deadlines for the Media Bureau or an ALJ to reach a decision may be tolled only under the following circumstances: (i) if the parties jointly request tolling in order to pursue settlement discussions or ADR or for any other reason that the parties mutually agree justifies tolling; or (ii) if complying with the deadline would violate the due process rights

[18] *See Second Report and Order* in MB Docket No. 07-42 at ¶¶ 19-24.

[19] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 20.

[20] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 20.

[21] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

[22] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

[23] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

[24] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

[25] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 21.

[26] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 22.

of a party or would be inconsistent with fundamental fairness.[27] In addition, in extraordinary situations, the ALJ may toll the deadline for reaching a decision due to a lack of adjudicatory resources available at the time in the Office of Administrative Law Judges.[28]

6. Fourth, in response to concerns that MVPDs have the ability to retaliate against a programming vendor that files a program carriage complaint by ceasing carriage of the programming vendor's video programming, the Commission in the *Second Report and Order* in MB Docket No. 07-42 establishes procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.[29] Pursuant to these procedures, a program carriage complainant seeking renewal of an existing programming contract may submit along with its complaint a petition for a temporary standstill of its programming contract pending resolution of the complaint.[30] The Commission encourages complainants to file the petition and complaint sufficiently in advance of the expiration of the existing contract, and in no case later than 30 days prior to such expiration, to provide the Media Bureau with sufficient time to act prior to expiration.[31] In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay.[32] The defendant will have ten calendar days after service to file an answer to the petition for a standstill order.[33] If the Media Bureau grants the temporary standstill, the adjudicator ruling on the merits of the complaint (*i.e*., either the Media Bureau or an ALJ) will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement.[34]

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

7. There were no comments filed specifically in response to the IRFA.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

8. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[35] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[36] In addition, the term "small business" has the

[27] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 23.

[28] *See id.*

[29] *See Second Report and Order* in MB Docket No. 07-42 at ¶¶ 25-30.

[30] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

[31] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

[32] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

[33] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 27.

[34] *See Second Report and Order* in MB Docket No. 07-42 at ¶¶ 28-29.

[35] 5 U.S.C. § 603(b)(3).

[36] 5 U.S.C. § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[37] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[38] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

9. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[39] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[40] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[41] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[42]

10. *Cable Television Distribution Services*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[43] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000

[37] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[38] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[39] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[40] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[41] *See id.*

[42] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[43] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[44]

11. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[45] Industry data indicate that all but ten cable operators nationwide are small under this size standard.[46] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[47] Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000-19,999 subscribers.[48] Thus, under this standard, most cable systems are small.

12. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[49] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[50] Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.[51] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[52] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

13. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic

[44] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[45] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[46] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[47] 47 C.F.R. § 76.901(c).

[48] *See* TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

[49] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[50] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[51] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[52] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

census category, "Wired Telecommunications Carriers,"[53] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[54] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[55] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[56] Each currently offers subscription services. DIRECTV[57] and EchoStar[58] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

14. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[59] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[60] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[61]

15. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses

[53] *See* 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 8, above.

[54] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[55] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[56] S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) ("*13th Annual Report*"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

[57] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

[58] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id*.

[59] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[60] *See id*.

[61] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[62] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[63] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[64]

16. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[65] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[66] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[67] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[68] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not

[62] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[63] *See id*.

[64] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[65] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

[66] 47 C.F.R. § 21.961(b)(1).

[67] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[68] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[69] Auction 86 concluded in 2009 with the sale of 61 licenses.[70] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

17. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[71] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[72] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[73] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[74]

18. *Fixed Microwave Services.* Microwave services include common carrier,[75] private-operational fixed,[76] and broadcast auxiliary radio services.[77] They also include the Local Multipoint Distribution Service (LMDS),[78] the Digital Electronic Message Service (DEMS),[79] and the 24 GHz

[69] *Id.* at 8296.

[70] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[71] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

[72] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[73] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[74] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[75] *See* 47 C.F.R. Part 101, Subparts C and I.

[76] *See* 47 C.F.R. Part 101, Subparts C and H.

[77] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[78] *See* 47 C.F.R. Part 101, Subpart L.

Service,[80] where licensees can choose between common carrier and non-common carrier status.[81] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[82] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[83] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[84] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

19. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[85] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[86] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[87] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[88] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[89] In addition, we note that the

(...continued from previous page)

[79] *See* 47 C.F.R. Part 101, Subpart G.

[80] *See id.*

[81] *See* 47 C.F.R. §§ 101.533, 101.1017.

[82] 13 C.F.R. § 121.201, 2007 NAICS code 517210.

[83] *See id*. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[84] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

[85] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[86] *See* 47 U.S.C. § 573.

[87] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[88] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[89] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

Commission has certified some OVS operators, with some now providing service.[90] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[91] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

20. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[92] The SBA has developed a small business size standard for this category, which is: all such firms having $15 million dollars or less in annual revenues.[93] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year.[94] Of that number, 325 operated with annual revenues of $ 9,999,999 million dollars or less.[95] Seventy-one (71) operated with annual revenues of between $10 million and $100 million or more.[96] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

21. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[97] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[98] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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[90] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[91] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[92] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[93] 13 C.F.R. § 121.201, 2007 NAICS code 515210.

[94] http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=700&-ds_name=EC0751SSSZ4&-_lang=en

[95] *Id*.

[96] *Id*.

[97] 15 U.S.C. § 632.

[98] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

22. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[99] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[100]

23. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[101] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[102] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

24. *Television Broadcasting*. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[103] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[104] The Commission has estimated the number of licensed commercial television stations to be 1,390.[105] According to Commission staff review of the BIA/Kelsey, MAPro Television Database ("BIA") as of

[99] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[100] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[101] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[102] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[103] *See* 13 C.F.R. § 121.201, 2007 NAICS Code 515120.

[104] U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting"; http://www.census.gov/naics/2007/def/ND515120.HTM. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[105] *See* News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.

April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations[106] (or about 74 percent) have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 391.[107] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[108] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

25. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

26. *Motion Picture and Video Production*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."[109] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[110] To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.[111] Of these, 8995 had annual receipts of $24,999,999 or less, and 100 has annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[112] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

27. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and

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[106] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 105; however, we are using BIA's estimate for purposes of this revenue comparison.

[107] *See Broadcast Station Totals*, *supra*, note 105.

[108] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[109] U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[110] 13 C.F.R. § 121.201, 2007 NAICS code 512110.

[111] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=200&-ds_name=EC0751SSSZ5&-_lang=en

[112] *Id.*

distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[113] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[114] To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.[115] Of these, 434 had annual receipts of $24,999,999 or less, and 16 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[116] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

28. The rules adopted in the *Second Report and Order* in MB Docket No. 07-42 will impose additional reporting, recordkeeping, and compliance requirements on video programming vendors and MVPDs. First, the *Second Report and Order* in MB Docket No. 07-42 clarifies what evidence a complainant must provide in its program carriage complaint in order to establish a *prima facie* case of a program carriage violation.[117] Second, to enable the defendant to develop a full, case-specific response to the evidence put forth by the complainant, with supporting evidence, the *Second Report and Order* in MB Docket No. 07-42 provides the defendant with 60 days (rather than the current 30 days) to answer the complaint.[118] Third, in adopting a deadline for an ALJ to issue a decision on the merits of a program carriage complaint referred by Media Bureau, the *Second Report and Order* in MB Docket No. 07-42 adopts revised procedural deadlines applicable to adjudicatory hearings involving program carriage complaints.[119] Fourth, the *Second Report and Order* in MB Docket No. 07-42 establishes procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program carriage complainant seeking renewal of such a contract.[120]

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

29. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account

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[113] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[114] 13 C.F.R. § 121.201, 2007 NAICS code 512120.

[115] http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=200&-ds_name=EC0751SSSZ4&-_lang=en

[116] *Id.*

[117] *See Second Report and Order* in MB Docket No. 07-42 at ¶¶ 9-17.

[118] *See Second Report and Order* in MB Docket No. 07-42 at ¶ 18.

[119] *See Second Report and Order* in MB Docket No. 07-42 at ¶¶ 19-24.

[120] *See Second Report and Order* in MB Docket No. 07-42 at ¶¶ 25-30.

the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[121] The *Program Carriage NPRM* invited comment on issues that had the potential to have significant economic impact on some small entities.[122]

30. As discussed in Section A, the *Second Report and Order* in MB Docket No. 07-42 is intended to improve the Commission's procedures for addressing program carriage complaints. By clarifying the evidence a complainant must provide in its complaint to establish a *prima facie* case of a program carriage violation, providing defendants with additional time to answer a complaint, establishing deadlines for action on program carriage complaints, and establishing procedures for requesting a standstill of an existing programming contract, the decision confers benefits upon both video programming vendors and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Thus, the decision benefits smaller entities as well as larger entities. For this reason, an analysis of alternatives to the proposed rules is unnecessary.

F. Report to Congress

31. The Commission will send a copy of the *Second Report and Order* in MB Docket No. 07-42, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[123] In addition, the Commission will send a copy of the *Second Report and Order* in MB Docket No. 07-42, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Second Report and Order* in MB Docket No. 07-42 and FRFA (or summaries thereof) will also be published in the *Federal Register*.[124]

[121] 5 U.S.C. § 603(c)(1)-(c)(4)

[122] *See Program Carriage NPRM*, 22 FCC Rcd at 11231-11240, Appendix.

[123] *See* 5 U.S.C. § 801(a)(1)(A).

[124] *See* 5 U.S.C. § 604(b).

APPENDIX G

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking in MB Docket No. 11-131 ("*NPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *NPRM*. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. In 1993, the Commission adopted rules implementing a provision of the 1992 Cable Act[4] pertaining to carriage of video programming vendors by multichannel video programming distributors ("MVPDs"). These rules are intended to benefit consumers by promoting competition and diversity in the video programming and video distribution markets (the "program carriage" rules).[5] As required by Congress, these rules allow for the filing of complaints with the Commission alleging that an MVPD has (i) required a financial interest in a video programming vendor's program service as a condition for carriage (the "financial interest" provision);[6] (ii) coerced a video programming vendor to provide, or retaliated against a vendor for failing to provide, exclusive rights as a condition of carriage (the "exclusivity" provision); [7] or (iii) unreasonably restrained the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage (the "discrimination" provision).[8] Congress specifically directed the Commission to provide for "expedited review" of these complaints and to provide for appropriate penalties and remedies for any violations.[9] Programming vendors have complained that the Commission's procedures for addressing program

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

[4] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); *see also* 47 U.S.C. § 536.

[5] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, *Second Report and Order*, 9 FCC Rcd 2642 (1993) ("*1993 Program Carriage Order*"); *see also Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994) ("*1994 Program Carriage Order*"). The Commission's program carriage rules are set forth at 47 C.F.R. §§ 76.1300 - 76.1302.

[6] *See* 47 C.F.R. § 76.1301(a); *see also* 47 U.S.C. § 536(a)(1).

[7] *See* 47 C.F.R. § 76.1301(b); *see also* 47 U.S.C. § 536(a)(2).

[8] *See* 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C. § 536(a)(3).

[9] *See* 47 U.S.C. § 536(a)(4).

carriage complaints have hindered the filing of legitimate complaints and have failed to provide for the expedited review envisioned by Congress.

3. The *NPRM* seeks comment on a series of proposals to revise or clarify the Commission's program carriage rules intended to improve the Commission's procedures for handling program carriage complaints and to further the goals of the program carriage statute. The *NPRM* seeks comment on the following:

- Modifying the program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the rules;[10]
- Revising discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery is conducted, including expanded discovery procedures (also known as party-to-party discovery) and an automatic document production process, to ensure fairness to all parties while also ensuring compliance with the expedited resolution deadlines adopted in the *Second Report and Order* in MB Docket No. 07-42;[11]
- Permitting the award of damages in program carriage cases;[12]
- Providing the Media Bureau or ALJ with the discretion to order parties to submit their best "final offer" for the rates, terms, and conditions for the programming at issue in a complaint proceeding to assist in crafting a remedy;[13]
- Clarifying the rule that delays the effectiveness of a mandatory carriage remedy until it is upheld by the Commission on review, including codifying a requirement that the defendant MVPD must make an evidentiary showing to the Media Bureau or an ALJ as to whether a mandatory carriage remedy would result in deletion of other programming;[14]
- Codifying in our rules that retaliation by an MVPD against a programming vendor for filing a program carriage complaint is actionable as a potential form of discrimination on the basis of affiliation and adopting other measures to address retaliation;[15]
- Adopting a rule that requires a vertically integrated MVPD to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD;[16]
- Clarifying that the discrimination provision precludes a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD;[17] and

[10] *See NPRM* at ¶¶ 38-40.

[11] *See id*. at ¶¶ 41-49.

[12] *See id*. at ¶¶ 50-53.

[13] *See id*. at ¶¶ 54-55.

[14] *See id*. at ¶¶ 56-59.

[15] *See id*. at ¶¶ 60-67.

[16] *See id*. at ¶¶ 68-71.

[17] *See id*. at ¶¶ 72-78.

- Codifying in our rules which party bears the burden of proof in program carriage discrimination cases after the complainant has established a *prima facie* case.[18]

The *NPRM* also invites commenters to suggest any other changes to the program carriage rules that would improve the Commission's procedures and promote the goals of the program carriage statute.[19]

B. Legal Basis

4. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303(r), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 536.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[20] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[21] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[22] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[23] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[24] The SBA has developed a small

[18] *See id*. at ¶¶ 79-81.

[19] *See id*. at ¶ 37.

[20] 5 U.S.C. § 603(b)(3).

[21] 5 U.S.C. § 601(6).

[22] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[23] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[24] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[25] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[26] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[27]

7. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[28] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[29]

8. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[30] Industry data indicate that all but ten cable operators nationwide are small under this size standard.[31] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[32] Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000-19,999 subscribers.[33] Thus, under this standard, most cable systems are small.

9. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[34] The Commission has determined that an operator serving fewer than 677,000

[25] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[26] *See id.*

[27] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[28] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[29] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[30] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[31] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[32] 47 C.F.R. § 76.901(c).

[33] *See* TELEVISION & CABLE FACTBOOK 2009 at F-2 (2009) (data current as of Oct. 2008). The data do not include 957 systems for which classifying data were not available.

[34] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[35] Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.[36] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[37] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

10. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[38] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[39] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[40] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[41] Each currently offers subscription services. DIRECTV[42] and EchoStar[43] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and

[35] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[36] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[37] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[38] *See* 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 6, above.

[39] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[40] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[41] S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) ("*13th Annual Report*"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

[42] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

[43] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id*.

distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[44] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[45] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[46]

12. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[47] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[48] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[49]

13. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[50] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[51] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67

[44] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[45] *See id*.

[46] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[47] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[48] *See id*.

[49] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[50] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

[51] 47 C.F.R. § 21.961(b)(1).

auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[52] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[53] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[54] Auction 86 concluded in 2009 with the sale of 61 licenses.[55] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

14. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[56] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[57] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[58] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for

[52] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[53] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[54] *Id.* at 8296.

[55] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[56] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

[57] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[58] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[59]

15. *Fixed Microwave Services.* Microwave services include common carrier,[60] private-operational fixed,[61] and broadcast auxiliary radio services.[62] They also include the Local Multipoint Distribution Service (LMDS),[63] the Digital Electronic Message Service (DEMS),[64] and the 24 GHz Service,[65] where licensees can choose between common carrier and non-common carrier status.[66] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[67] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[68] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[69] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

16. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services

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[59] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[60] *See* 47 C.F.R. Part 101, Subparts C and I.

[61] *See* 47 C.F.R. Part 101, Subparts C and H.

[62] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[63] *See* 47 C.F.R. Part 101, Subpart L.

[64] *See* 47 C.F.R. Part 101, Subpart G.

[65] *See id.*

[66] *See* 47 C.F.R. §§ 101.533, 101.1017.

[67] 13 C.F.R. § 121.201, 2007 NAICS code 517210.

[68] *See id*. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[69] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

by local exchange carriers.[70] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[71] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[72] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[73] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[74] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[75] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[76] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

17. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[77] The SBA has developed a small business size standard for this category, which is: all such firms having $15 million dollars or less in annual revenues.[78] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year.[79] Of that number, 325 operated with annual revenues of $ 9,999,999 million dollars or less.[80] Seventy-one (71) operated with annual revenues of between $10 million and $100 million or

[70] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[71] *See* 47 U.S.C. § 573.

[72] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[73] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[74] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[75] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[76] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[77] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[78] 13 C.F.R. § 121.201, 2007 NAICS code 515210.

[79] http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=700&-ds_name=EC0751SSSZ4&-_lang=en

[80] *Id*.

more.[81] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

18. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[82] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[83] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

19. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[84] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[85]

20. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[86] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[87] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

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[81] *Id*.

[82] 15 U.S.C. § 632.

[83] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[84] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[85] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[86] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[87] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

21. *Television Broadcasting*. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[88] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[89] The Commission has estimated the number of licensed commercial television stations to be 1,390.[90] According to Commission staff review of the BIA/Kelsey, MAPro Television Database ("BIA") as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations[91] (or about 74 percent) have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 391.[92] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[93] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

22. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

23. *Motion Picture and Video Production*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and

[88] *See* 13 C.F.R. § 121.201, 2007 NAICS Code 515120.

[89] U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting"; http://www.census.gov/naics/2007/def/ND515120.HTM. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[90] *See* News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.

[91] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 90; however, we are using BIA's estimate for purposes of this revenue comparison.

[92] *See Broadcast Station Totals*, *supra*, note 90.

[93] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

distributing motion pictures, videos, television programs, or television commercials."[94] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[95] To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.[96] Of these, 8995 had annual receipts of $24,999,999 or less, and 100 has annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[97] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

24. *Motion Picture and Video Distribution*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[98] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[99] To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.[100] Of these, 434 had annual receipts of $24,999,999 or less, and 16 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[101] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

25. Certain proposed rule changes discussed in the *NPRM* would affect reporting, recordkeeping, or other compliance requirements. These proposed changes would primarily impact video programming vendors and MVPDs, and would only apply in the event a program carriage complaint is filed. First, the *NPRM* proposes revised discovery procedures for program carriage complaint

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[94] U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[95] 13 C.F.R. § 121.201, 2007 NAICS code 512110.

[96] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=200&-ds_name=EC0751SSSZ4&-_lang=en

[97] *Id.*

[98] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[99] 13 C.F.R. § 121.201, 2007 NAICS code 512120.

[100] http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=200&-ds_name=EC0751SSSZ4&-_lang=en

[101] *Id.*

proceedings in which the Media Bureau rules on the merits of the complaint after discovery.[102] The revised discovery procedures would require parties to a complaint to produce certain documents to the other party within defined time periods.[103] Under the expanded discovery process, a party to a program carriage complaint can request discovery directly from the other party, which that party may oppose, with the obligation to produce the disputed material suspended until the Commission rules on the objection.[104] Under automatic document production, a party to a program carriage complaint would be required to provide certain documents set forth in the Commission's rules to the other party within ten days after the Media Bureau's determination that the complainant has established a *prima facie* case.[105] Second, the *NPRM* proposes adopting procedures allowing for the award of damages in program carriage cases.[106] These procedures would require a program carriage complainant to provide either a detailed computation of damages or a detailed outline of the methodology that would be used to create a computation of damages.[107] To the extent the Commission approves a damages computation methodology, the rules would require the parties to file with the Commission a statement regarding their efforts to agree upon a final amount of damages pursuant to the approved methodology.[108] The *NPRM* proposes similar procedures for the application of new rates, terms, and conditions as of the expiration date of the previous contract in cases where the Media Bureau issues a standstill order in a program carriage complaint proceeding.[109] Third, the *NPRM* proposes to adopt a rule providing that the Media Bureau or an ALJ may order parties to a program carriage complaint to submit their best "final offer" for the rates, terms, and conditions for the programming at issue in a complaint to assist in crafting a remedy.[110] Fourth, the *NPRM* proposes to codify a requirement that the defendant MVPD in a program carriage complaint proceeding must make an evidentiary showing to the Media Bureau or an ALJ as to whether a mandatory carriage remedy would result in deletion of other programming on the MVPD's system.[111] Fifth, the *NPRM* proposes to adopt a rule prohibiting an MVPD from retaliating against a video programming vendor for filing a program carriage complaint.[112] If adopted, this rule would enable a video programming vendor to file a program carriage complaint alleging retaliation, and would require the defendant MVPD to defend its actions. Sixth, the *NPRM* proposes to adopt a rule requiring a vertically integrated MVPD to negotiate in good faith with an unaffiliated programming video programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD.[113] If adopted, this rule would enable a video programming vendor to file a program carriage complaint alleging that a vertically integrated MVPD failed to negotiate in good faith, and would require the defendant MVPD to defend its actions. In addition, the rule would list objective good faith

[102] *See NPRM* at ¶¶ 41-49.

[103] *See NPRM* at ¶¶ 43-44.

[104] *See NPRM* at ¶ 42.

[105] *See NPRM* at ¶ 44.

[106] *See NPRM* at ¶¶ 51-52.

[107] *See NPRM* at ¶ 52.

[108] *See NPRM* at ¶ 52.

[109] *See NPRM* at ¶ 53.

[110] *See NPRM* at ¶¶ 54-55.

[111] *See NPRM* at ¶ 58.

[112] *See NPRM* at ¶¶ 60-67.

[113] *See NPRM* at ¶¶ 68-71.

negotiation standards, the violation of which would be considered a *per se* violation of the good faith negotiation obligation.[114] Seventh, the *NPRM* proposes to clarify that the program carriage discrimination provision precludes a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD.[115] If adopted, this rule would enable a video programming vendor to file a program carriage complaint alleging that a vertically integrated MVPD discriminated on the basis of a programming vendor's lack of affiliation with another MVPD, and would require the defendant MVPD to defend its actions.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

26. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[116]

27. As discussed in the *NPRM*, our goal in this proceeding is to further improve our procedures for addressing program carriage complaints and to advance the goals of the program carriage statute. The specific changes on which we seek comment, set forth in Paragraph 3 above, are intended to achieve these goals. By improving and clarifying the Commission's procedures for addressing program carriage complaints, the proposals would benefit both video programming vendors and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Thus, the proposed rules would benefit smaller entities as well as larger entities. For this reason, an analysis of alternatives to the proposed rules is unnecessary. Further, we note that in the discussion of whether to require MVPDs to negotiate in good faith with unaffiliated video programming vendors[117] and whether to clarify that the discrimination provision precludes an MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD, [118] the Commission in the *NPRM* specifically proposes to apply these rules to only vertically integrated MVPDs. Because small entities are unlikely to be vertically integrated MVPDs, this proposed limitation would provide particular benefit to small entities.

28. We invite comment on whether there are any alternatives we should consider that would minimize any adverse impact on small businesses, but which maintain the benefits of our proposals.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

29. None.

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[114] *See NPRM* at ¶ 71.

[115] *See NPRM* at ¶¶ 72-77.

[116] 5 U.S.C. § 603(c)(1)-(c)(4)

[117] *See NPRM* at ¶ 69.

[118] *See NPRM* at ¶ 72.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage; Revision of the Commission's Program Carriage Rules, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*

The objective of our program carriage rules remains the same as it was in 1993 when the Commission enacted the initial rules. While the telecommunications landscape has dramatically changed in that time, the ongoing need is to provide a venue for the airing of grievances concerning discrimination and to expect fair and equitable outcomes to disputes.

Video distributors are now more likely to be producers themselves, often with far greater leverage and new incentives to favor their own content over that of independent producers. Modernizing these rules is essential to ensure that consumers have the ability to view a variety of diverse programming at the lowest possible cost and hopefully to foster more independent production.

I am pleased that we are taking steps helpful to the accomplishment of the statutory goals of competition and consumer protection. These revised rules will improve and clarify the program carriage complaint procedure by setting deadlines for FCC action while still allowing the parties adequate time to respond fully. These deadlines are important to ensure we continue to meet Congress' mandate of "expedited review" and to reduce unpredictable delays in resolving these complaints. Furthermore, in response to programming vendors' concerns of retaliatory action by an MVPD against a complainant, we have clarified our standstill procedure.

As we prepare for implementation of these new rules—and quite possibly an increased caseload at the FCC—we must also address a possible shortfall in the number of ALJs to hear and resolve these disputes. I believe this order provides the first step toward a resolution of that issue.

I look forward to hearing meaningful public discourse from all the interested stakeholders as we clarify and expedite Commission procedure to enhance the effectiveness of our program carriage rules.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, DISSENTING IN PART

Re: *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage; Revision of the Commission's Program Carriage Rules, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*

Today, we take steps to improve our procedures for handling program carriage complaints. By setting forth the requirements to establish a *prima facie* case, along with timelines for filings and decisions, we increase the likelihood that frivolous complaints will be summarily dismissed and legitimate cases will be investigated expeditiously as mandated by Congress.[1] I support these actions.

Regrettably, the majority has adopted rules requiring multichannel video programming distributors ("MVPDs") to continue to carry programming on pre-existing terms and conditions, also known as "standstill" arrangements. Pursuant to these rules, an agreement will be extended until a program carriage dispute is resolved. The Commission, however, did not provide adequate notice and opportunity for comment under the Administrative Procedure Act ("APA"). An analysis of a possible standstill framework would benefit significantly from further debate. Accordingly, I respectfully dissent from this portion of the *Order*.

The APA requires that a notice contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[2] Here, as evidence of notice, the majority points to one sentence in a 2007 notice requesting comment on whether to adopt rules "to protect programmers from potential retaliation if they file a complaint."[3] The majority asserts that the standstill rules are a "logical outgrowth" of this proposal. I disagree.

In interpreting the "logical outgrowth" standard, courts have stated that "notice must be sufficient to fairly apprise interested parties of the issues involved, but it need not specify every precise proposal which [the agency] may ultimately adopt as a rule."[4] On the other hand, notice can also be "too general to be adequate."[5] Without reasonable notice regarding the specific ideas and alternatives being considered,

[1] 47 U.S.C. § 536(a)(4).

[2] 5 U.S.C. § 553(b)(3).

[3] Leased Commercial Access and Development of Competition; Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Notice of Proposed Rulemaking*, 22 FCC Rcd 11222, 11227 ¶ 16 (2007).

[4] *See* Nuvio Corp. v. FCC, 473 F.3d 302, 310 (D.C.Cir. 2006) (citing Action for Children's Television v. FCC, 564 F. 2d 458, 470 (D.C.Cir. 1977)). Courts have asserted that fair notice to the affected parties is of paramount importance. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) ("The Courts of Appeals have generally interpreted [the APA notice requirement] to mean that the final rule the agency adopts must be 'a logical outgrowth of the rule proposed. The object, in short, is one of fair notice.'" (internal citations omitted)); *see also* Council Tree Commc'ns, Inc. v. FCC, 619 F. 3d 235, 250 (3d Cir. 2010) (citing Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C.Cir. 2005)).

[5] Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 209 (D.C.Cir. 2007); Small Refinery Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C.Cir. 1983). *See also* Prometheus Radio Project v. FCC, No. 08-3078, slip op. at 30 (3d Cir. July 7, 2011) (stating that the language in the NPRM was "simply too general and open-ended to have fairly apprised the public.").

"interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking."[6]

Although it may be difficult to identify precisely how much notice is sufficient under the "logical outgrowth" standard, the relationship between retaliation and standstill arrangements, which is tenuous at best, makes the rule adopted today vulnerable to a court remand.[7] In this instance, standstill arrangements were not discussed in the 2007 notice, so interested parties were not aware that comments should be filed on the subject during the notice-and-comment period.[8] In fact, the idea of a standstill provision was not raised by any parties submitting initial comments. Instead, the matter was advanced after the close of the comment period.[9] Thus, all interested parties may not have had an opportunity to opine on the inclusion of a standstill arrangement as part of the program carriage complaint process.[10]

I am also disappointed that the majority has failed to consider the recent media ownership decision, *Prometheus II*, in which the U.S. Court of Appeals for the Third Circuit held that two sentences in a notice of proposed rulemaking that indicated the Commission's intention to revise the cross-ownership rule was too general and open-ended to have fairly notified the public of the new approach to cross ownership.[11] Here, the majority adopts rules based on far less specificity provided to the public for its analysis and comment. The 2007 notice does not explicitly, or even implicitly, contemplate standstill arrangements. Furthermore, it does not suggest the proposed extension of program carriage agreements or the continuation of programming during the complaint process, even in the most general of terms.

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[6] *Small Refinery Lead Phase-Down Task Force*, 705 F.2d at 549; United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, 839 (D.D.C. 1985). *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.").

[7] It is arguable, under the interpretation of some courts, that the "logical outgrowth" doctrine would not even apply in this instance, because the notice did not suggest the possibility of standstill arrangements and "[s]omething is not a logical outgrowth of nothing." *Council Tree Commc'ns*, 619 F.3d at 250*; Int'l Union, United Mine Workers of Am.*, 407 F.3d at 1259; Kooritzky v. Wright, 17 F.3d 1509, 1513 (D.C.Cir. 1994).

[8] *See, e.g.,* CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80 (D.C. Cir. 2009); Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C.Cir. 2004).

[9] *See Order* at 19 n.101 (citing *ex parte* letters discussing standstill arrangements with the earliest being filed in November 2007); Media Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rule Making Regarding Leased Commercial Access and the Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Public Notice*, 22 FCC Rcd 13190 (2007) (announcing the deadlines for comments and reply comments as September 4, 2007 and September 21, 2007, respectively); Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Order Granting Extension of Time for Filing Comments and Reply Comments*, 22 FCC Rcd 16103 (2007) (extending the deadlines for comments and reply comments to September 11, 2007 and October 12, 2007, respectively).

[10] *See* Nat'l Exch. Carrier Ass'n, Inc. v. FCC, 253 F.3d 1, 4 (D.C.Cir. 2001) (stating that "the logical outgrowth test normally is applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule."); *Small Refinery Lead Phase-Down Task Force*, 705 F.2d at 549 (stating that an agency "must *itself* provide notice of a regulatory proposal [and], having failed to do so, it cannot bootstrap notice from a comment.").

[11] *Prometheus Radio Project*, No. 08-3078, slip op. at 30.

Furthermore, I am not convinced by the majority's argument that the regulations codifying standstill arrangements are solely rules of agency procedure for which no notice is required under the APA.[12] These rules confer substantive rights by authorizing the Media Bureau, upon the filing of a petition by a complainant, to grant a temporary standstill of the price, terms, and other conditions of the existing contract. A rule that extends a contractual arrangement and determines the amount of compensation parties will receive after the program carriage dispute is resolved is outside the scope of Commission procedure.[13]

Moreover, I am not persuaded by the majority's position that these rules are procedural based on our previous use of standstills as a form of injunctive relief under section 4(i) of the Communications Act.[14] Although I recognize that standstills in program carriage disputes have been implemented on a case-by-case basis, these arrangements have not been reviewed by the Commission or a court for consistency with Section 616 of the Communications Act, which allows for penalties and remedies, such as ordering program carriage, only upon the finding of a violation, or Section 624, which prohibits the Commission from imposing requirements on the provision or content of cable services beyond those provided by statute.[15] While the majority asserts that there are parallels to the program access regime where Section 4(i) was relied upon in adopting standstill rules, there are significant statutory and regulatory differences between program access – where a programmer is under an obligation not to withhold the network from the MVPD[16] – and program carriage – where the carriage of programming is

[12] 5 U.S.C § 553(b)(A). The cases cited by the majority state that actions, such as application freezes, and rules regarding the filing and processing of applications and amendments are agency procedure and practice. *See Order* at 27-28 n.149. Here, we are not only setting forth procedural rules, such as what petition to file and when, but also taking actions that "alter the rights or interests of the parties." *See, e.g.,* James V. Hurson Assocs, Inc. v. Glickman, 229 F.3d 277, 280 (D.C.Cir. 2000); JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320, 326 (D.C.Cir. 1994).

[13] *See, e.g.,* Sprint Corp. v. FCC, 315 F.3d 369, 375 (D.C.Cir. 2003) (holding that rule changes regarding payment obligations require notice under the APA); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C.Cir. 1987) ("Substantive rules are ones which 'grant rights, impose obligations, or produce other significant effects on private interests' or which 'effect a change in existing law or policy.'"). "[T]he APA's procedural rule exception is to be construed very narrowly, and it does not apply where the agency 'encodes a substantive value judgment.'" *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C.Cir. 1989) (citing *Am. Hosp. Ass'n*, 834 F.2d at 1047).

[14] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[15] 47 U.S.C. § 536(a)(5) (providing for "appropriate penalties and remedies for violations of [regulations governing program carriage agreements], including carriage"); 47 U.S.C. § 544(f)(1) (prohibiting any Federal agency, State, or franchising authority from "impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in this subchapter."); 47 C.F.R. 76.1302(g)(1) ("*Upon completion of* [a program carriage] *proceeding*, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system.") (emphasis added); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, *Notice of Proposed Rule Making*, 8 FCC Rcd. 194, 206 ¶ 58 (seeking comment about implementing Section 616(a)(5) of the Cable Act of 1992, including what procedures should be established for mandatory carriage and how long should such carriage last). *Compare* United States v. Sw. Cable Co., 392 U.S. 157, 181 (1968) (finding that the FCC, in the absence of a statue, did not exceed or abuse its authority under the Communications Act by regulating the community antenna television industry under Section 4(i)), *with* Am. Tel. & Tel. Co. v. FCC, 487 F.2d 865, 875-76 (2d Cir. 1973) (holding that Section 4(i) cannot be used to circumvent "statutorily prescribed procedures with consequent frustration of the statutory purpose.").

[16] *Compare* 47 U.S.C. § 536(a)(3), *and* 47 C.F.R. § 76.1301(c), *with* 47 U.S.C. § 548(c)(2)(B), *and* 47 C.F.R. § 76.1002(b) (showing that the program carriage rules make discrimination unlawful only insofar as it is "on the basis

(continued….)

not assured and the statute and rules explicitly state that carriage is a remedy that can only be imposed upon a finding of a violation of the rules.[17] Ironically, despite the alleged similarities between program access and program carriage frameworks raised by the majority, we determined that specific comment regarding standstill arrangements and procedures was necessary only in the program access proceeding.[18]

The majority's insistence in keeping the standstill provisions in the *Order* is even more perplexing when today's *Order* is accompanied by a *Notice* seeking comment on possible revisions to the Commission's program carriage rules. Curiously, the rules adopting the standstill arrangements appear in the *Order*, but we then seek comment on several aspects of their actual implementation in the *Notice*.[19] With an available vehicle at our disposal, clarity and transparency would be served, with limited delay, by seeking comment on the entirety of the standstill rules and procedures, as opposed to the current approach of dividing the matter between the *Order* and *Notice*.[20]

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of affiliation," whereas the program access rules make discrimination unlawful across the board. Further, the program carriage rules prohibit MVPDs from discriminating in the "*selection*, terms or conditions of carriage", whereas the program access rules prohibit discrimination in the "prices, terms or conditions" of sale, making it clear that the carriage of the particular network is presumptive in the program access context but not in the program carriage context (emphasis added)).

[17] *Compare* 47 U.S.C. § 548(e)(1) ("Upon completion of [a program access] adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor"), *and* 47 C.F.R. 76.1003(h)(1) ("Upon completion of [a program access] adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the imposition of damages, and/or the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor."), *with* 47 U.S.C. § 536(a)(5) (stating explicitly that remedies, including *carriage*, can be ordered upon the finding of a violation or the program carriage rules), *and* 47 C.F.R. 76.1302(g)(1) (stating that *mandatory carriage* can be ordered upon completion of a program carriage proceeding).

[18] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket Nos. 07-29 and 07-198, *Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, 17868-70 ¶¶ 135-137 (2007). We also requested comment regarding the Commission's authority provide for mandatory interim carriage during retransmission consent disputes. *See* Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, *Notice of Proposed Rulemaking*, 26 FCC Rcd 2718, 2727-29 ¶¶ 18-19.

[19] For example, the right to seek a standstill arrangement for all program carriage complaints is adopted in the *Order*, but we then seek comment on whether there are circumstances in which the Commission's authority to issue temporary standstills is statutorily or otherwise limited. Similarly, the majority reasons that we have provided ample notice for implementing the standstill rules based on comment as to whether we should adopt retaliation rules, but, curiously, we seek comment in the *Notice* regarding the extent of our authority to adopt any anti-retaliation provisions. Furthermore, the *Order* adopts rules to determine how the parties will be compensated (the "true up") after resolution of the program carriage complaint. However, we seek comment regarding how the true up will be determined in more complex program carriage disputes, such as when the programming is discontinued or the programming tier is challenged. Thus, certain standstill arrangements may be implemented while we are still considering the best methodology for making the parties whole after the complaint process concludes making the adopted standstill regime almost literally "half baked." The Commission is capable of providing a much better work product than this.

[20] Moreover, as a policy matter, I am concerned about the unintended consequences of these standstill rules. For instance, will standstill arrangements, generally, and the requirement to submit a petition for a standstill 30 days before expiration of a programming agreement negatively affect the negotiation process by prematurely ending the
(continued….)

As we move ahead, I look forward to engaging with my colleagues and interested parties on the myriad program carriage issues, and I thank the Media Bureau for its work on this matter.

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discussions between parties? Could these rules enhance the bargaining power of vendors with the most popular programming resulting in price increases that will be passed along to consumers? What is the appropriate standard that the complainant has to meet to obtain a government-mandated extension of the terms and conditions of a privately-negotiated contract? Will MVPDs be reluctant to add new, unproven programming to their packages knowing that existing carriage agreements could be extended if they try to renegotiate terms or discontinue programming, even if it is not popular with subscribers? What are the First Amendment implications of implementing standstill arrangements in program carriage disputes? These important questions, along with whether we have statutory authority to implement standstills, could have been illuminated by requesting further comment. However, I am encouraged to see that the majority recognizes that standstill relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" and that the Media Bureau will consider, when determining whether to grant a standstill, the First Amendment rights of the MVPD, whether irreparable harm has been established, and the circumstantial nature of the evidence in program carriage complaints. *See Order* at 22 n.110 (citing Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 21 (2008)).

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage; Revision of the Commission's Program Carriage Rules, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*

I am pleased that the Commission is moving forward with improvements to our program carriage rules. We have heard, from Members of Congress and independent programmers, that clarity is needed for a more transparent process, and I hope that the issues we raise in our NPRM and the decisions we reach in our Order are productive steps in that direction.

Our complaint process has been called slow, impractical, and unfair, and the deadlines we establish for the FCC's Media Bureau and Administrative Law Judges when acting on program carriage complaints will offer a greater element of predictability to programmers and operators awaiting a decision. Further, in solidifying what a complaining party must demonstrate when claiming a carriage violation has occurred, the Commission is seeking to make our evidentiary process clearer and more cogent.

I look forward to the feedback that will result from the language in our NPRM, as the issues we raise regarding potential damages, retaliation, and the timing for the filing of a program carriage complaint are of paramount importance in laying out a roadmap for independent programmers and their expectations via our framework. Greater certainty and broad clarification has been needed for some time, and I am glad that we are on our way to providing it.