FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 11–131; FCC 11–119]

Revision of the Commission's Program Carriage Rules

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In 1993, the Federal Communications Commission (FCC) adopted rules pertaining to carriage of video programming vendors by multichannel video programming distributors (''MVPDs''), known as the ''program carriage rules.'' The rules are intended to benefit consumers by promoting competition and diversity in the video programming and video distribution markets. In this document, the FCC seeks comment on proposed revisions to or clarifications of the program carriage rules, which are intended to further improve the Commission's procedures and to advance the goals of the program carriage statute.

DATES: Submit comments on or before November 28, 2011, and submit reply comments on or before December 28, 2011. See **SUPPLEMENTARY INFORMATION** section for additional comment dates.

ADDRESSES: You may submit comments, identified by MB Docket No. 11–131, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act proposed information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact David Konczal, *David.Konczal@fcc.gov,* of the Media Bureau, Policy Division, 202–418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at 202–418–2918. To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR as show in the **SUPPLEMENTARY INFORMATION** section below (3060–0649) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (*NPRM*), MB Docket No. 11–131, FCC No. 11–119, adopted on July 29, 2011 and released on August 1, 2011. The full text of the *NPRM* is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; the contractor's Web site, *http://www.bcpiweb.com;* or by calling 800–378–3160, facsimile 202–488–5563, or e-mail *FCC@BCPIWEB.com.* Copies of the *NPRM* also may be obtained via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number, MB Docket No. 11–131. Additionally, the complete item is available on the Federal Communications Commission's Web site at *http://www.fcc.gov.*

This document contains proposed 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, Public Law 104–13. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before November 28, 2011.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

OMB Control Number: 3060–0888.

Title: Section 76.7, Petition Procedures; § 76.9, Confidentiality of Proprietary Information; § 76.61, Dispute Concerning Carriage; § 76.914, Revocation of Certification; § 76.1001, Unfair Practices; § 76.1003, Program Access Proceedings; § 76.1302, Carriage Agreement Proceedings; § 76.1303, Discovery; § 76.1513, Open Video Dispute Resolution.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Businesses or other for-profit.

Number of Respondents and Responses: 648.

Estimated Time per Response: 5.2 to 78 hours.

Frequency of Response: On occasion reporting requirement; third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in contained in sections 4(i), 303(r), and 616 of the Communications Act of 1934, as amended.

Total Annual Burden: 26,957 hours.

Total Annual Cost: $1,749,600.

Privacy Act Impact Assessment: No impact.

Nature and Extent of Confidentiality: A party that wishes to have confidentiality for proprietary information with respect to a submission it is making to the Commission must file a petition pursuant to the pleading requirements in § 76.7 and use the method described in §§ 0.459 and 76.9 to demonstrate that confidentiality is warranted.

Needs and Uses: On August 1, 2011, the Commission adopted a Notice of Proposed Rulemaking (''*NPRM*''), Revision of the Commission's Program Carriage Rules, MB Docket No. 11–131, FCC 11–119. The Commission seeks comment on revisions to or clarifications of the program carriage rules, which are intended to further improve the Commission's procedures and to advance the goals of the program carriage statute.

The *NPRM* proposes to add or revise the following rules sections: 47 CFR 76.1302(c)(4), 47 CFR 76.1302(d)(3)(iii), 47 CFR 76.1302(d)(3)(iv), 47 CFR 76.1302(d)(3)(v), 47 CFR 76.1302(e)(3), 47 CFR 76.1302(h), 47 CFR 76.1302(j)(1), 47 CFR 76.1302(j)(3), 47 CFR 76.1302(j)(4), 47 CFR 76.1302(k)(3), and 47 CFR 76.1303.

If adopted, 47 CFR 76.1302(c)(4) would provide that, 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, and lists the information that must be included in the complaint when requesting damages.

47 CFR 76.1302(d)(3)(iii) sets forth the evidence that a program carriage complaint filed pursuant to § 76.1302 must contain in order to establish a *prima facie* case of discrimination in violation of § 76.1301, and, if the revision in the *NPRM* is adopted, would also apply to new claims alleging that a vertically integrated MVPD has discriminated on the basis of a programming vendor's lack of affiliation with another MVPD.

If adopted, 47 CFR 76.1302(d)(3)(iv) would set forth the evidence that a program carriage complaint filed pursuant to § 76.1302 must contain in order to establish a *prima facie* case of retaliation in violation of § 76.1301.

If adopted, 47 CFR 76.1302(d)(3)(v) would set forth the evidence that a program carriage complaint filed pursuant to § 76.1302 must contain in order to establish a *prima facie* case of bad faith negotiations in violation of § 76.1301.

If adopted, 47 CFR 76.1302(e)(3) would require a multichannel video programming distributor that expressly references and relies upon a document or documents in asserting a defense to a program carriage complaint or in responding to a material allegation in a program carriage complaint, to include such document or documents as part of the answer.

If the revision in the *NPRM* is adopted, 47 CFR 76.1302(h) would state that 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.

If the revision in the *NPRM* is adopted, 47 CFR 76.1302(j)(1) would state that upon completion of an adjudicatory proceeding, the 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 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 adopted, 47 CFR 76.1302(j)(3) would provide that, 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.

If adopted, 47 CFR 76.1302(j)(4) would provide that the (i) adjudicator may require the complainant to resubmit a damages computation or damages methodology filed pursuant to § 76.1302(c)(4); and (ii) where the adjudicator issues a written order approving or modifying a damages methodology, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the adjudicator-mandated methodology and within thirty (30) days of the issuance of a 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.

If the revision in the *NPRM* is adopted, 47 CFR 76.1302(k)(3) would provide that, in cases where a standstill petition is granted, the adjudicator, in order to facilitate the application of remedies as of the expiration date of the previous programming contract, may request after deciding the case on the merits that 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 for requesting damages set forth in § 76.1302(c)(4) and § 76.1302(j)(4). 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.

If adopted, 47 CFR 76.1303 would provide for discovery procedures in complaint proceedings alleging a violation of § 76.1301 in which the Chief, Media Bureau acts as the adjudicator. With respect to 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 and stating that the Chief, Media Bureau will issue a ruling on the merits of the complaint after discovery, each party must provide certain documents listed in the Commission's rules to the opposing party. With respect to party-to-party discovery, 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 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. 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. 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. 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 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.

All other remaining existing information collection requirements would stay as they are, and the various burden estimates would be revised to reflect the new and revised rules noted above.

Summary of the Notice of Proposed Rulemaking

I. Notice of Proposed Rulemaking

1. 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 intended to facilitate the resolution of program carriage claims.[1] 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

2. The current program carriage statute of limitations set forth in § 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.''[2]

Our concern is with § 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.[3] 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,'' which implies that a complaint filed in compliance with § 76.1302(f)(3) is timely even if it would be untimely under §§ 76.1302(f)(1) or (f)(2). Thus, it appears that § 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.''

3. 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 § 76.1302(f) in its entirety, thereby providing for one broad rule covering all program carriage claims. Alternatively, we could replace only § 76.1302(f)(3) with this revised statute of limitations and retain § 76.1302(f)(1) and (f)(2). Because this revised statute of limitations would appear to cover the claims referred to in § 76.1302(f)(1) and (f)(2), however, replacing § 76.1302(f) in its entirety appears to be warranted. We ask parties to comment on this issue.

4. To the extent we retain § 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

[1] 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).

[2] 47 CFR 76.1302(f). This rule will now appear at § 76.1302(h) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07–42 take effect.

[3] As originally adopted in the *1993 Program Carriage Order,* the rule that is now § 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, para. 25 and 2676, Appendix D (47 CFR 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 CFR 76.1302(r)(3)); *1998 Biennial Regulatory Review Order,* 14 FCC Rcd at 441, Appendix A (changing the word ''subpart'' to ''section'').

violate one or more of the program carriage rules. The program carriage statute and rules, however, pertain to contracts, and negotiations related thereto, between MVPDs and video programming *vendors,* not distributors. Indeed, section 616 of the Act refers to ''video programming *vendors.''* 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.'' Accordingly, to the extent we retain § 76.1302(f)(1), we propose to replace the term ''video programming distributor'' with ''video programming vendor.''

B. Discovery

5. 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 the proceeding or discrete issues raised in the proceeding for an adjudicatory hearing before an ALJ. 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.'' [4] 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 § 76.7(f). 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

6. 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. 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. 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. The respondent may object to any request for documents that are not in its control or relevant to the dispute.[5] The obligation to produce the disputed material is suspended until the Commission rules on the objection. 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 complaint may be dismissed with prejudice. 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? [6] 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? [7] 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.

7. 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. 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

[4] *See 1993 Program Carriage Order,* 9 FCC Rcd at 2655–56, para. 32; *see also id.* at 2652, para. 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 CFR 76.7(f).

[5] *See* 47 CFR 76.1003(j); *2007 Program Access Order,* 22 FCC Rcd at 17852, para. 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.

[6] *See Second Report and Order* in MB Docket No. 07–42, para. 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, para. 41 (1998) (''*1998 Program Access Order*''); *see also 2007 Program Access Order,* 22 FCC Rcd at 17857, para. 108 (reaffirming aspirational goals set forth in the *1998 Program Access Order*).

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

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.[8] 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 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.[9] With these deadlines, the Media Bureau would have 45 days to prepare and release a decision on the merits.

2. Automatic Document Production

8. 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. 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. The Commission adopted this approach because it would result in ''substantial time savings.''[10] 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.[11] 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.

9. 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 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?

10. 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;

[8] 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, para. 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.

[9] *See* 47 CFR 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).

[10] *See 1990 Comparative Hearing Order,* 5 FCC Rcd 157, para. 25; *see also id.* at para. 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.'').

[11] 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, para. 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.

• 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.

11. 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

12. 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.[12] 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.[13] 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? 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

13. 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 and also provide the ALJ with authority to ''[r]egulate the course of the hearing.'' 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

14. 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.'' 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.''[14] The

[12] *See* 47 CFR 76.1003(k); *2007 Program Access Order,* 22 FCC Rcd at 17853–55, paras. 100–103 and Appendix E, 17894–99.

[13] 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.

[14] In the *1993 Program Carriage Order,* the Commission stated that it would ''determine the appropriate relief for program carriage violations on

Commission has interpreted this same term as used in the program access statute [15] 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 finding that the Commission has authority to afford relief in the form of damages.[16]

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

15. 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. Conversely, the Commission has explained that damages are appropriate when a defendant knew or should have known that its conduct would violate the rules. 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.'' 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. We note, however, that the Commission previously declined to allow for the award of punitive damages in program access cases.[17] 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?

16. We note that the Commission has also adopted specific procedures for requesting and awarding damages in program access cases. 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 § 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. 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''). The burden of proof regarding damages rests with the complainant. The procedures provide for the bifurcation of the program access violation determination from the damages determination. 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. 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. 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. 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. 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. 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. We seek comment on the appropriateness of adopting similar rules in the program carriage context.

17. We also propose to adopt similar procedures for requesting the application of new prices, terms, and conditions in the event an adjudicator

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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, para. 26.

[15] 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, para. 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, para. 17 (1994) (''*1994 Program Access Reconsideration Order''*).

[16] *See 1994 Program Access Reconsideration Order,* 10 FCC Rcd at 1910–11, para. 17; *see also 1998 Program Access Order,* 13 FCC Rcd at 15831–32, paras. 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, para. 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, para. 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, para. 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.'').

[17] 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, para. 21.

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 program carriage complainant seeking renewal of such a contract. 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. 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. 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. 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

18. 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.[18] 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.[19] In previous merger orders, the Commission has explained that requiring parties to a programming dispute to submit their final offer for carriage and 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 * * *.' '' 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.[20] We also seek comment on whether submission of final offers will enable the adjudicator to reach a more expeditious resolution of the complaint.

19. 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?

E. Mandatory Carriage Remedy

20. 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.[21] 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. 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

[18] *See* 47 CFR 76.1302(g)(1); *1993 Program Carriage Order,* 9 FCC Rcd at 2653, para. 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 § 76.1302(j)(1) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07–42 take effect.

[19] *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, para. 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).

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

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

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. 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.

21. 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.[22] 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?

22. To the extent that we retain § 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?

23. 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,[23] 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

24. Programming vendors have expressed concern that MVPDs will retaliate against them for filling program carriage complaints. They state that the fear of retaliation is preventing programming vendors from filing legitimate program carriage complaints. As an initial matter, we note that the 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. 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.[24]

25. 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. 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.

26. 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.

27. 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.[25] If the case proceeds to the

[22] *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 CFR 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 (DC Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours,* 559 F.2d 841 (DC 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, para. 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted).

[23] *See Tennis Channel HDO,* 25 FCC Rcd at 14163, para. 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).

[24] *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 (DC 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.'').

[25] *See Second Report and Order* in MB Docket No. 07–42, para. 14 (discussing evidence required to establish a *prima face* case of a violation of the

Continued

merits, the defendant MVPD obviously could not defend its action by claiming it was motivated by a desire to retaliate against the programming vendor.

28. 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 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, we seek comment on what documents might be considered sufficiently relevant to a retaliation claim to include in the automatic document production list.

29. 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.'' 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''? 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''? 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?

30. 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 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.

31. 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. 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.[26] Will this limited

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, para. 15.

[26] *See Second Report and Order* in MB Docket No. 07–42, para. 20 (requiring the Media Bureau to release a *prima facie* determination within 60

time period, along with our existing prohibition on frivolous complaints, 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

32. 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 [27]). 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 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.[28] 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.[29]

33. 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.[30] 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?

34. 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 616. Does the general grant of rulemaking authority under section 616 provide a sufficient statutory basis for adopting this requirement? 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? 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''? 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, we seek comment on what documents might be considered sufficiently relevant to a good faith claim to include

calendar days after the close of the 80-calendar-day pleading cycle on a program carriage complaint).

[27] 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* paras. 36–42. 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* para. 41.

[28] *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).

[29] *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'').

[30] *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'').

in the automatic document production list.

35. 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.[31] 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 may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith.[32] Should a similar policy apply to vertically integrated MVPDs in the program carriage context?

H. Scope of the Discrimination Provision

36. 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.[33] Commenters, however, have claimed that vertically integrated MVPDs favor not only their own affiliated programming vendors but also programming vendors affiliated with other MVPDs.[34] 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, 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.

37. 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 programmer in which a cable operator has an attributable interest.'' 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.'' 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.'' 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.'' 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. 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.

38. 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 DC 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

[31] *See* 47 CFR 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, paras. 20–30.

[32] *See* 47 CFR 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, paras. 31–33.

[33] *See 1993 Program Carriage Order,* 9 FCC Rcd at 2654, para. 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 § 76.1300(a).''); *see also* 47 CFR 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, para. 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).

[34] *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'').

programming from one another.'' [35] 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.'' 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 networks of other MSOs.'' [36] 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?

39. 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. 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.[37]

40. 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'' [38] 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? 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 programming vendor in which *it* does not hold a financial interest.'' [39] 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.'' 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.[40]

41. 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? 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? Should we also require the complainant to provide evidence that the defendant MVPD is vertically integrated? 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. 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

[35] *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, para. 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 (DC 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, para. 43)).

[36] *See Cable Ownership Rules FNPRM,* 23 FCC Rcd at 2194, paras. 139–141 (citing Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study* (''Kang Study'')); *see also id.* at 2194, para. 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.

[37] 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 CFR 76.1301(c)) (emphasis in original).

[38] 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, para. 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).

[39] 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).

[40] *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).

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? [41]

42. In addition to the foregoing, we seek comment on whether to broaden the definition of ''affiliated'' and ''attributable interest'' in § 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 common ownership or management.[42] 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? [43] 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

43. 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. Conversely, in *WealthTV,* an ALJ ruled that the burdens remain with the complainant after the complainant establishes a *prima facie* case.[44] 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.[45]

44. 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.[46] Under the intentional discrimination framework, the shifting of burdens

[41] *See* 47 U.S.C. 409. We note that the hearing rules applicable to ALJs contain procedures for requesting and issuing subpoenas. *See* 47 CFR 1.331–340.

[42] *See* 47 CFR 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 CFR 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.'').

[43] 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.

[44] *See WealthTV Recommended Decision,* 24 FCC Rcd at 12995–96, para. 58 and 12997, para. 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 § 76.1301(c) of the rules.'' *See id.* at 12997, para. 62.

[45] *See MASN* v. *Time Warner Cable,* 25 FCC Rcd at 18105, para. 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 para. 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. * * *'').

[46] *See 1993 Program Access Order,* 8 FCC Rcd at 3416, para. 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, para. 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.'').

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. 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.[47] If 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.[48]

45. 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.[49] We also seek comment on the potential ramifications of each framework for consumers, MVPDs, and unaffiliated programming vendors.

II. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

46. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA'') [50] 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'').[51] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register.**[52]

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

47. In 1993, the Commission adopted rules implementing a provision of the 1992 Cable Act [53] 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).[54] 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); [55] (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); [56] 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).[57] Congress specifically directed the Commission to provide for ''expedited review'' of these complaints and to provide for appropriate penalties and remedies for any violations.[58] 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.

48. 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; [59]
- 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; [60]
- Permitting the award of damages in program carriage cases; [61]
- 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; [62]
- Clarifying the rule that delays the effectiveness of a mandatory carriage

[47] *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).

[48] *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)).

[49] *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.'').

[50] *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), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[51] *See* 5 U.S.C. 603(a).

[52] *See id.*

[53] *See* Cable Television Consumer Protection and Competition Act of 1992, Public Law 102–385, 106 Stat. 1460 (1992) (''1992 Cable Act''); *see also* 47 U.S.C. 536.

[54] *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 CFR 76.1300–76.1302.

[55] *See* 47 CFR 76.1301(a); *see also* 47 U.S.C. 536(a)(1).

[56] *See* 47 CFR 76.1301(b); *see also* 47 U.S.C. 536(a)(2).

[57] *See* 47 CFR 76.1301(c); *see also* 47 U.S.C. 536(a)(3).

[58] *See* 47 U.S.C. 536(a)(4).

[59] *See NPRM* in MB Docket No. 11–131 at paras. 38–40.

[60] *See id.* at paras. 41–49.

[61] *See id.* at paras. 50–53.

[62] *See id.* at paras. 54–55.

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; [63]

- 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; [64]
- 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; [65]
- 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; [66] and
- 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.[67]

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.[68]

C. Legal Basis

49. 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.

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

50. 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.[69] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [70] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[71] 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.[72] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

51. *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.'' [73] The SBA has developed a small business size standard for wireline firms within the broad economic census category, ''Wired Telecommunications Carriers.'' [74] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[75] 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.[76]

52. *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.[77] 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.[78]

53. *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.[79] Industry data indicate that all but ten cable operators nationwide are small under this size standard.[80] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[81] 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.[82] Thus, under this standard, most cable systems are small.

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[63] *See id.* at paras. 56–59.

[64] *See id.* at paras. 60–67.

[65] *See id.* at paras. 68–71.

[66] *See id.* at paras. 72–78.

[67] *See id.* at paras. 79–81.

[68] *See id.* at para. 37.

[69] 5 U.S.C. 603(b)(3).

[70] 5 U.S.C. 601(6).

[71] 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).

[72] 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.

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

[74] 13 CFR 121.201, 2007 NAICS code 517110.

[75] *See id.*

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

[77] 13 CFR 121.201, 2007 NAICS code 517110.

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

[79] 47 CFR 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).

[80] *See* Broadcasting & Cable Yearbook 2010 at C–2 (2009) (data current as of Dec. 2008).

[81] 47 CFR 76.901(c).

[82] *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.

54. *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.'' [83] 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.[84] Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.[85] 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,[86] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

55. *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,'' [87] 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.[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] 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).[90] Each currently offers subscription services. DIRECTV [91] and EchoStar [92] 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.

56. *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,'' [93] 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.[94] 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.[95]

57. *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.[96] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[97] 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.[98]

58. *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)).[99] In connection with the 1996

[83] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[84] 47 CFR 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).

[85] *See* Broadcasting & Cable Yearbook 2010 at C–2 (2009) (data current as of Dec. 2008).

[86] 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 CFR 76.901(f).

[87] *See* 13 CFR 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of ''Wired Telecommunications Carriers'' is in paragraph 6, above.

[88] 13 CFR 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.*

[90] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 FCC Rcd 542, 580, para. 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).

[91] 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.

[92] 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.*

[93] 13 CFR 121.201, 2007 NAICS code 517110.

[94] *See id.*

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

[96] 13 CFR 121.201, 2007 NAICS code 517110.

[97] *See id.*

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

[99] *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

Continued

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.[100] 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.[101] 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.[102] 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.[103] Auction 86 concluded in 2009 with the sale of 61 licenses.[104] 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.

59. 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.[105] 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.'' [106] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[107] 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.[108]

60. *Fixed Microwave Services.* Microwave services include common carrier,[109] private-operational fixed,[110] and broadcast auxiliary radio services.[111] They also include the Local Multipoint Distribution Service (LMDS),[112] the Digital Electronic Message Service (DEMS),[113] and the 24 GHz Service,[114] where licensees can choose between common carrier and non-common carrier status.[115] 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.[116] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[117] 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.[118] 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.

61. *Open Video Systems.* The open video system (''OVS'') framework was established in 1996, and is one of four

Docket No. 94–131, PP Docket No. 93–253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[100] 47 CFR 21.961(b)(1).

[101] 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.

[102] *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).

[103] *Id.* at 8296.

[104] *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).

[105] 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.

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

[107] 13 CFR 121.201, 2007 NAICS code 517110.

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

[109] *See* 47 CFR part 101, subparts C and I.

[110] *See* 47 CFR part 101, subparts C and H.

[111] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR 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.

[112] *See* 47 CFR part 101, subpart L.

[113] *See* 47 CFR part 101, subpart G.

[114] *See id.*

[115] *See* 47 CFR 101.533, 101.1017.

[116] 13 CFR 121.201, 2007 NAICS code 517210.

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

[118] 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.*

statutorily recognized options for the provision of video programming services by local exchange carriers.[119] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[120] OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' [121] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.[122] 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.[123] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[124] Broadband service providers (''BSPs'') are currently the only significant holders of OVS certifications or local OVS franchises.[125] 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.

62. *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.'' [126] 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.[127] 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.[128] Of that number, 325 operated with annual revenues of $9,999,999 dollars or less.[129] Seventy-one (71) operated with annual revenues of between $10 million and $100 million or more.[130] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

63. *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.'' [131] 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.[132] 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.

64. *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.[133] 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.[134]

65. *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.[135] 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.[136] 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.

66. *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.[137] Business concerns included in this industry are those ''primarily engaged in broadcasting images together

[119] 47 U.S.C. 571(a)(3)–(4). *See 13th Annual Report,* 24 FCC Rcd at 606, para. 135.

[120] *See* 47 U.S.C. 573.

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

[122] 13 CFR 121.201, 2007 NAICS code 517110.

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

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

[125] *See 13th Annual Report,* 24 FCC Rcd at 606–07, para. 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.

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

[127] 13 CFR 121.201, 2007 NAICS code 515210.

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

[129] *Id.*

[130] *Id.*

[131] 15 U.S.C. 632.

[132] 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 CFR 121.102(b).

[133] 13 CFR 121.201, 2007 NAICS code 517110.

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

[135] 13 CFR 121.201, 2007 NAICS code 517110.

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

[137] *See* 13 CFR 121.201, 2007 NAICS Code 515120.

with sound.'' [138] The Commission has estimated the number of licensed commercial television stations to be 1,390.[139] 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 [140] (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.[141] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [142] 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.

67. 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.

68. *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.'' [143] 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.[144] 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.[145] Of these, 8,995 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.[146] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

69. *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.'' [147] 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.[148] 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.[149] 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.[150] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

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

70. 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 proceedings in which the Media Bureau rules on the merits of the complaint after discovery.[151] The revised discovery procedures would require parties to a complaint to produce certain documents to the other party within defined time periods.[152] 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.[153] Under automatic document production, a party to a program carriage complaint

[138] 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.

[139] *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.*

[140] We recognize that this total differs slightly from that contained in *Broadcast Station Totals, supra,* note 139; however, we are using BIA's estimate for purposes of this revenue comparison.

[141] *See Broadcast Station Totals, supra,* note 139.

[142] ''[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 CFR 121.103(a)(1).

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

[144] 13 CFR 121.201, 2007 NAICS code 512110.

[145] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=200&-ds_name=EC0751SSSZ4&-_lang=en.*

[146] *Id.*

[147] *See* U.S. Census Bureau, 2007 NAICS Definitions, ''51212 Motion Picture and Video Distribution''; *http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.*

[148] 13 CFR 121.201, 2007 NAICS code 512120.

[149] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=200&-ds_name=EC0751SSSZ4&-_lang=en.*

[150] *Id.*

[151] *See NPRM* in MB Docket No. 11–131 at paras. 41–49.

[152] *See NPRM* at paras. 43–44.

[153] *See NPRM* at para. 42.

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.[154] Second, the *NPRM* proposes adopting procedures allowing for the award of damages in program carriage cases.[155] 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.[156] 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.[157] 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.[158] 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.[159] 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.[160] Fifth, the *NPRM* proposes to adopt a rule prohibiting an MVPD from retaliating against a video programming vendor for filing a program carriage complaint.[161] 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.[162] 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 negotiation standards, the violation of which would be considered a *per se* violation of the good faith negotiation obligation.[163] 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.[164] 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.

F. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

71. 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.[165]

72. 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 [166] 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,[167] 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.

73. 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.

G. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

74. None.

III. Ordering Clauses

75. Accordingly, *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.*

76. *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.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, and Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 76 as follows:

[154] *See NPRM* at para. 44.

[155] *See NPRM* at paras. 51–52.

[156] *See NPRM* at para. 52.

[157] *See NPRM* at para. 52.

[158] *See NPRM* at para. 53.

[159] *See NPRM* at paras. 54–55.

[160] *See NPRM* at para. 58.

[161] *See NPRM* at paras. 60–67.

[162] *See NPRM* at paras. 68–71.

[163] *See NPRM* at para. 71.

[164] *See NPRM* at paras. 72–77.

[165] 5 U.S.C. 603(c)(1)–(c)(4).

[166] *See NPRM* in MB Docket No. 11–131 at para. 69.

[167] *See NPRM* at para. 72.

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 adding paragraphs (d) and (e) to read as follows:

§ 76.1301 Prohibited practices.

* * * * *

(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, 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)) 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) 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):

(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) In addition to the standards set forth in § 76.1301(e)(3), 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).

3. Section 76.1302 is amended by revising paragraphs (c) through (g) and by adding paragraphs (h) through (l) to read as follows:

§ 76.1302 Carriage agreement proceedings.

* * * * *

(c) *Contents of complaint.* In addition to the requirements of § 76.7, 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)(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, 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) or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d);

(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); and

(3) (i) *Financial interest.* In a complaint alleging a violation of § 76.1301(a), 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), 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):

(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)) 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)) 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):

(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; 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 (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):

(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)) 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).

(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.

(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 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, 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.

(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 chapter apply.

(j) *Remedies for violations.* (1) *Remedies authorized.* Upon completion of such adjudicatory proceeding, the 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 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, 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) 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 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) *Procedures.* In addition to the general pleading and discovery rules contained in § 76.7, the following procedures apply to complaints alleging a violation of § 76.1301 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 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):

(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):

(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):

(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 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 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), 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 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), 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.

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