

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

In the Matter of)	
)	
Liberman Broadcasting, Inc. and LBI Media, Inc.)	MB Docket No. 16-121
v.)	File No. CSR-8922-P
Comcast Corporation and Comcast Cable)	
Communications, LLC)	

ORDER

Adopted: October 31, 2019

Released: October 31, 2019

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (Bureau) has before it a Petition for Reconsideration filed by Liberman Broadcasting, Inc. and LBI Media, Inc. (LBI) of the Bureau’s order dismissing, without prejudice, LBI’s program carriage complaint against Comcast Corporation and Comcast Cable Communications, LLC (Comcast).¹ The Bureau dismissed LBI’s complaint on the basis that LBI failed to put forth evidence sufficient to establish a *prima facie* case of program carriage violations.² In particular, the Bureau found that LBI, the licensee of several broadcast television stations, lacked standing to bring a program carriage complaint because it failed to show that it is a “video programming vendor” with respect to its request for carriage of certain full-power television broadcast signals under section 616 of the Communications Act of 1934, as amended (Act), its implementing rules, the Commission’s order approving Comcast’s acquisition of NBCUniversal (NBCU),³ and the Comcast-NBCU conditions.⁴ For the reasons discussed below, we dismiss LBI’s Petition.⁵

II. BACKGROUND

2. Section 616 of the Act governs “program carriage agreements and related practices between [multichannel video programming distributors (MVPDs)] and video programming vendors.”⁶

¹ Liberman Broadcasting and LBI Media Petition for Reconsideration, MB Docket No. 16-121, File No. CSR-8922-P (filed Sept. 26, 2016) (Petition).

² *Liberman Broadcasting, Inc. and LBI Media, Inc. v. Comcast Corp. and Comcast Cable Communications, LLC*, Memorandum Opinion and Order, MB Docket No. 16-121, File No. CSR-8922-P, 31 FCC Rcd 9551 (MB 2016) (*Bureau Order*).

³ *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4355 & App. A (2011) (*Comcast-NBCU Order*).

⁴ *See Bureau Order*.

⁵ LBI has requested that we convert the *ex parte* status of its Petition to “permit but disclose.” Petition at 18. Because we find that LBI has not met its burden of showing that “the public interest so requires,” we decline to grant LBI’s request. *See* Comcast Opposition to Petition for Reconsideration, MB Docket No. 16-121, File No. CSR-8922-P, at 20-22 (Oct. 6, 2016), *citing* 47 CFR § 1.1200(a); *id.* § 1.1208 note 2.

⁶ 47 U.S.C. § 536(a). A more extensive discussion of the relevant regulatory frameworks and factual background is set forth in the *Bureau Order* and thus is not reiterated at length here. *See Bureau Order*, 31 FCC Rcd at 9552-9555, paras. 3-8.

Under section 616(a) and the Commission's rules, MVPDs are prohibited from: (i) requiring a financial interest in a program service as a condition for carriage on their systems;⁷ and (ii) engaging in conduct "the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming."⁸ The Commission's rules permit "[a]ny video programming vendor . . . aggrieved by conduct that it believes constitute a violation of the [program carriage provisions]" to bring a program carriage complaint to the Commission and establish specific procedures for review.⁹

3. Other provisions of the Act, sections 614 and 325, set forth the mandatory carriage (must carry) and retransmission consent rights of television broadcast stations, respectively. Under these provisions, a television broadcast station must elect every three years whether to pursue cable carriage of its broadcast signal under the retransmission consent requirements of section 325 of the Act, or the must carry requirements of section 614.¹⁰ A broadcast station that elects must carry is guaranteed carriage on cable systems in its market; however, it is entitled to no compensation from a cable operator for that carriage.¹¹ A broadcast station that elects retransmission consent, by contrast, may negotiate with a cable operator (or satellite provider) for compensation.¹² The Act and the Commission's rules prohibit MVPDs and television broadcast stations from failing to negotiate retransmission consent in good faith.¹³

4. LBI is a television broadcast station licensee whose Spanish language television network, Estrella TV, is distributed on both LBI-owned and non-owned television station affiliates and MVPD systems in various markets nationwide.¹⁴ Comcast is the largest cable-only MVPD in the U.S.¹⁵ Comcast has an ownership interest in several programming networks, including the two Spanish language networks relevant to this proceeding, Telemundo and NBC Universo. Comcast distributes Telemundo and NBC Universo on its own systems as well as those of other MVPDs.¹⁶

5. Prior to 2015, Comcast distributed Estrella TV in the Houston, Denver, and Salt Lake City markets, which are the core markets at issue in LBI's program carriage complaint, pursuant to "must carry."¹⁷ In the autumn of 2014, LBI elected retransmission consent rather than must-carry for all of its owned and operated stations, including those in the three markets noted above, for the election cycle that

⁷ 47 U.S.C. § 536(a)(1); 47 CFR § 76.1301(a).

⁸ 47 U.S.C. § 536(a)(3); 47 CFR § 76.1301(c).

⁹ 47 CFR § 76.1302(a). The Commission in 2011 imposed separate but similar program carriage requirements on Comcast as a condition of approving of Comcast's acquisition of NBC Universal. *Bureau Order*, 31 FCC Rcd at 9553, para. 5. Complaints alleging a violation of those program carriage conditions were required to be brought pursuant to the Commission's program carriage complaint procedures. *Id.*, citing *Comcast-NBCU Order*, 26 FCC Rcd at 4359. The conditions imposed in the *Comcast-NBCU Order* expired in January 2018. *Comcast-NBCU Order*, 26 FCC Rcd at 4381.

¹⁰ 47 U.S.C. §§ 325(b), 534. The must carry requirements in section 614 apply to cable operators. Carriage of local broadcast signals by satellite carriers is governed by section 338 of the Act and its implementing rules. *Id.* § 338; 47 CFR § 76.66.

¹¹ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2992, para. 111 (1993); 47 U.S.C. § 534(b)(10).

¹² *See* 47 U.S.C. § 325(b)(3).

¹³ *See id.* § 325(b)(3)(C)(ii)-(iii); 47 CFR § 76.64, 76.65.

¹⁴ *Bureau Order*, 31 FCC Rcd at 9553-56, para. 6.

¹⁵ *Id.* at 9554, para. 7.

¹⁶ *Id.*

¹⁷ *Id.* at 9554-55, para. 8.

commenced in January 2015.¹⁸ The parties subsequently engaged in retransmission consent negotiations, but Comcast declined to expand its carriage of Estrella TV or to compensate LBI for that carriage.¹⁹ According to Comcast, this decision was based on its assessment that Estrella TV “was not a particularly popular network among Hispanic audiences.”²⁰ In February 2015, Comcast ceased carrying Estrella TV in the Houston, Denver, and Salt Lake City markets.²¹

6. LBI filed its program carriage complaint in April 2016, only after the foregoing retransmission consent negotiations had failed to generate carriage.²² In its complaint, LBI alleged that Comcast discriminated against it in the selection, terms, and conditions of carriage of Estrella TV on the basis of affiliation, in violation of section 616(a)(3) of the Act, section 76.1301(c) of the Commission’s rules, the *Comcast-NBCU Order*, and the conditions set forth therein.²³ LBI also alleged that Comcast violated section 616(a)(1) of the Act and section 76.1301(a) of the Commission’s rules by requiring it to provide Comcast with a financial interest in Estrella TV’s digital rights as a condition of carriage.²⁴ As relief, LBI principally sought a Commission order directing Comcast “to distribute and compensate Estrella TV on terms comparable to the terms on which Comcast distributes Telemundo.”²⁵

7. The Media Bureau dismissed LBI’s complaint, without prejudice, on the basis that LBI failed to put forth evidence sufficient to establish a *prima facie* case of program carriage violations.²⁶ The Bureau found that LBI failed to demonstrate in its complaint that it has standing to bring a program carriage complaint because, as a broadcast licensee, LBI’s owned and operated television broadcast stations do not constitute “video programming vendors” within the meaning of section 616 of the Act²⁷ and section 76.1301²⁸ of the Commission’s rules.²⁹ For substantially the same reasons, the Bureau found that LBI failed to establish that it has standing to bring a program carriage complaint with respect to its television broadcast stations under the *Comcast-NBCU Order* and conditions.³⁰ The Bureau also noted that LBI could bring either a good faith complaint under section 325 of the Act if it believes that Comcast has failed to negotiate retransmission consent in good faith for carriage of its broadcast signals, or a

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* In September 2017, LBI elected must carry status for its television broadcast signals in the Houston, Denver, and Salt Lake City markets at issue. Letter from Michael D. Hurwitz, Counsel to Comcast, to Marlene H. Dortch, FCC, File No. CSR-8922-P, MB Docket No. 16-121 (Oct. 10, 2017). Comcast stated that it would resume carriage of those signals pursuant to must carry at the start of the must carry/retransmission consent election cycle that commenced on January 1, 2018. *Id.* at 1.

²² Program Carriage Complaint of Liberman Broadcasting, Inc. and LBI Media, Inc., MB Docket No. 16-121, File No. CSR-8922-P (filed Apr. 8, 2016).

²³ *Bureau Order*, 31 FCC Rcd at 9551, para. 1.

²⁴ *Id.*

²⁵ *Id.*, n.5.

²⁶ *Id.* at 9551-52, para. 2.

²⁷ 47 U.S.C. § 536.

²⁸ 47 CFR § 76.1301(a), (c).

²⁹ *Bureau Order*, 31 FCC Rcd at 9551-52, 9556-57, paras. 2, 12 (“LBI . . . is in fact negotiating compensation for the retransmission of its television broadcast ‘signal’ rather than carriage of the ‘video programming’ contained within that signal.”).

³⁰ The Bureau’s finding that LBI lacked standing to bring a program carriage complaint applied only to LBI’s claims regarding carriage of its television broadcast signals in the Houston, Denver, and Salt Lake City markets. *Id.* at 9552, 9560, paras. 2, 19.

program carriage complaint under section 616 with respect to carriage of Estrella TV in non-broadcast markets (including potentially the satellite feed that LBI offers to MVPDs for distribution in “white areas,” areas where LBI has neither an owned and operated station nor an affiliate).³¹

8. LBI then filed the instant Petition. LBI asserts that reconsideration is justified because the Bureau’s finding that LBI, in its capacity as a television broadcast licensee, is not a “video programming vendor” and thus lacks standing to bring a program carriage complaint, is contrary to the Act, Commission precedent, and the factual record.³² LBI asserts, moreover, that the Bureau erred in declining to consider its case in white area markets where Estrella TV is not broadcasted but is carried by an MVPD.³³ LBI asks that the Bureau vacate the *Bureau Order*, find that LBI has made a *prima facie* case under section 616 both in markets where Estrella TV is delivered via broadcast signals and those where it is not, and designate the matter for hearing before an Administrative Law Judge.³⁴

III. DISCUSSION

9. We dismiss LBI’s Petition. Section 1.106(p) of the Commission’s rules permits the Bureau to dismiss or deny “[p]etitions for reconsideration . . . that . . . do not warrant consideration”³⁵ Such petitions include those that “fail to identify any material error, omission, or reason warranting reconsideration” or that rely on “arguments that have been fully considered and rejected by the Commission within the same proceeding.”³⁶ LBI principally argues in its Petition that the term “video programming vendor” in section 616(b) of the Act encompasses television broadcast stations -- an argument that the Bureau specifically considered and rejected in dismissing LBI’s program carriage complaint.³⁷ In particular, the Bureau considered and rejected arguments that LBI’s proffered interpretation of that term is compelled by the language, structure, and intent of the Act,³⁸ Commission precedent,³⁹ and the factual record.⁴⁰ We conclude that LBI has failed to demonstrate any material error,

³¹ *Id.* The Bureau stated that it would not opine on the likely success of a program carriage complaint relating to distribution of LBI’s satellite feed in “white areas.” *Id.* at 9560, para. 19, n.77. We note that LBI, to date, has filed no such complaints with the Commission, and that Comcast presently is carrying Estrella TV in the Houston, Denver, and Salt Lake City markets pursuant to must carry. *Supra* note 21.

³² Petition at 4-13 (discussing its standing to bring a complaint under section 616 and the Commission’s program carriage rules); *id.* at 13-14 (discussing its standing to bring a complaint under the *Comcast-NBCU Order* and conditions).

³³ *Id.* at 14-15. LBI asserts that its counts for relief “were broadly worded and referred to illegal action against Estrella TV generally . . . not just with regard to its provision of video programming in a broadcast capacity,” and that the Bureau thus erred in failing to consider its program carriage complaint in white areas. *Id.* Although LBI in its complaint stated that it had sought from Comcast carriage and compensation in white areas, the Bureau concluded that “the focus of LBI’s pleadings is on carriage of its broadcast stations, particularly in the Houston, Denver, and Salt Lake City markets at issue.” *Bureau Order*, 31 FCC Rcd at 9554, para. 6, n.23. LBI’s complaint, therefore, did not raise squarely the issue of whether LBI has standing to bring a program carriage complaint by virtue of its provision of a satellite feed to Comcast for distribution of Estrella TV in white areas.

³⁴ Petition at 15-18.

³⁵ 47 CFR § 1.106(p). See *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1606, para. 27 (2011) (delegating to the relevant bureaus or offices the authority to dismiss or deny petitions for reconsideration of staff level decisions that are procedurally defective or that merely repeat arguments that have been previously considered and rejected).

³⁶ 47 CFR § 1.106(p)(1), (3).

³⁷ *Bureau Order*, 31 FCC Rcd at 9556-9561, paras. 11-22.

³⁸ *Id.* at 9556-59, paras. 12-16.

³⁹ *Id.* at 9558-59, para. 17.

omission, or reason warranting reconsideration and the mere fact that LBI disagrees with the Bureau's findings provides no valid basis for reconsideration.⁴¹

10. Moreover, insofar as LBI in its Petition has introduced new facts or arguments not previously brought to the Bureau, we find that these facts and arguments could have been presented earlier but were not.⁴² For example, although LBI in its Petition contends that it meets each of the elements needed to establish a *prima facie* case of program carriage violations in both its broadcast and white area markets,⁴³ neither the facts nor arguments presented in its complaint focused on the white area markets.⁴⁴ If LBI wanted the Bureau to consider these markets separately from the broadcast markets, it could and should have made that clear in its complaint. Although section 1.106(c)(2) allows the Bureau to consider such facts or arguments if it determines that doing so is required in the public interest, LBI does not provide any reason for its failure to submit such facts or arguments earlier or claim that the public interest requires consideration of these facts or arguments here rather than in connection with a subsequent complaint pertaining to white area markets.⁴⁵ Therefore, these facts and arguments are subject

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⁴⁰ *Id.* at 9556-57, para. 12.

⁴¹ See Comcast Opposition at 4. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) (finding that reconsideration will not be granted for the purpose of debating matters on which the Commission has deliberated and spoken).

⁴² Section 1.106(c) of the rules states that a petition for reconsideration that relies on new facts or arguments may be granted only if those facts or arguments relate to events that have occurred, or circumstances that have changed, since the last opportunity to present such matters, or when the petition relies on facts or arguments unknown to the petitioner until after his last opportunity to present those facts or arguments. 47 CFR § 1.106(c)(1) (referencing 47 CFR § 1.106(b)(2)).

LBI in its Petition argues for the first time that the Commission in Reports to Congress pertaining to section 26 of 1992 Cable Act held that a "video programming vendor" includes a "broadcast network." Petition at 8-9. See also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 26, 106 Stat. 1460, 1502-03 (1992) ("1992 Cable Act"); *Implementation of Section 26*, Interim Report, 8 FCC Rcd 4875, 4889, para. 74 (1993) (*Interim Report*); *Implementation of Section 26*, Final Report, 9 FCC Rcd 3440, 3442, para. 3 (1993) (*Final Report*). Because LBI failed to demonstrate why it could not have presented this argument earlier, we dismiss this claim. 47 CFR § 1.106(c). On an alternative and independent basis, we deny LBI's claim on the merits. In these Reports, the Commission explained that the undefined term "video programming vendor" as used in section 26 should be read to refer to any provider of video programming, including a broadcast network, because this broad interpretation was consistent with the Congressionally mandated analysis in section 26. See *Interim Report*, 8 FCC Rcd at 4889, para. 74. In these Reports, however, the Commission was not interpreting the term "video programming vendor" as used in section 616, which, unlike section 26 of 1992 Cable Act, contains a specific definition to be used for purposes of section 616. See 47 U.S.C. § 536(b) ("As used in this section, the term 'video programming vendor' means a person engaged in the production, creation, or wholesale distribution of video programming for sale.").

⁴³ See, e.g., Petition at 15-17 (arguing, among other things, that it has made a *prima facie* case of program carriage discrimination with respect to its request for carriage of Estrella TV in "white areas").

⁴⁴ Although LBI in its complaint stated that it sought carriage of Estrella TV in white areas, LBI did not appear to advance any theory other than that television broadcast stations (its own or its affiliates) are "video programming vendors," a theory that is not applicable to white areas. LBI's theory that it constitutes a "video programming vendor" in white areas was advanced clearly for the first time only in the Petition.

⁴⁵ With respect to its request for carriage of broadcast signals in the Houston, Denver, and Salt Lake City markets at issue, LBI remains free to file a complaint pursuant to the Commission's retransmission consent rules if it believes that Comcast has failed to negotiate in good faith. In addition, LBI may file a program carriage complaint with respect to its request for carriage of Estrella TV in markets where such programming is not delivered via a full power television broadcast station, possibly including white areas. We note that the parties have executed an agreement that tolls the statute of limitations applicable to "any claims" set forth in additional complaints brought

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to dismissal under section 1.106(c) of the Commission's rules.⁴⁶ We, therefore, dismiss the Petition to the extent that it relies upon such facts and arguments.

IV. ORDERING CLAUSE

11. Accordingly, **IT IS ORDERED**, that pursuant to sections 4(i), 4(j) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 405(a), and section 1.106 of the Commission's Rules, 47 CFR § 1.106, LBI's Petition for Reconsideration is **DISMISSED**. This action is taken pursuant to the authority delegated in section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

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against Comcast in connection with the facts underlying this proceeding. Letter from Michael D. Hurwitz, Counsel to Comcast, to Marlene H. Dortch, FCC, File No. CSR-8922-P, MB Docket No. 16-121 (Jan. 5, 2018).

⁴⁶ 47 CFR § 1.106(c).