11-4138 (L)

(CONSOLIDATED WITH NO. 11-5152)

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

TIME WARNER CABLE INC. AND NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

JOSEPH F. WAYLAND
ACTING ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SEAN A. LEV
ACTING GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1762

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE DECISIONS

STATUTES AND REGULATIONS

OTHER MATERIALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 11-4138 (CONSOLIDATED WITH NO. 11-5152)

TIME WARNER CABLE INC. AND NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTION

The order on review—*Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd 11494 (2011) (JA____) ("*Order*")—was published in the Federal Register on September 29, 2011. 76 Fed. Reg. 60,652 (2011). Time Warner Cable Inc. ("TWC") filed a timely petition for review in this Court on October 11, 2011. The National Cable & Telecommunications Association ("NCTA") filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit on

November 7, 2011. That case was subsequently transferred to this Court, which has jurisdiction to review the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

INTRODUCTION AND STATEMENT OF ISSUES PRESENTED

In the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act"), Congress enacted a series of inter-related provisions designed to promote competition and diversity among programming networks in the pay-TV market. One of those provisions, Section 616 of the Communications Act of 1934, 47 U.S.C. § 536, requires the Federal Communications Commission ("FCC" or "Commission") to promulgate rules designed to prevent a "multichannel video programming distributor" or "MVPD"—for example, a cable operator (like Comcast) or direct broadcast satellite provider (like DIRECTV)—from engaging in certain anticompetitive acts concerning the MVPD's carriage of video programming.

As relevant here, Section 616 specifies that the FCC's rules must prevent MVPDs from discriminating against "programming vendors" (*i.e.*, programming networks) "in the selection, terms, or conditions for carriage" of programming "on the basis of" the programming vendor's "affiliation or nonaffiliation" with the MVPD if such discrimination would "unreasonably

restrain the ability" of an unaffiliated programming vendor "to compete fairly." 47 U.S.C. § 536(a)(3).

As directed by Congress, the FCC adopted rules implementing Section 616. Those rules allow a programming network that is unaffiliated with an MVPD (*e.g.*, the NFL Network) to file with the agency a complaint alleging that an MVPD has engaged in affiliation-based discrimination against the network. For example, the unaffiliated network may allege that a cable operator refused to carry the network on its cable systems (while carrying a competing affiliated network) or that the cable operator granted preferential treatment to its affiliated network and carried the complainant network on less favorable terms.

This case presents the following issues for review:

(1) Whether the FCC's program carriage rules, which provide for case-by-case adjudication of complaints under Section 616, regulate MVPDs' conduct in a manner consistent with the First Amendment.

(2) Whether the Commission permissibly concluded that it has authority to issue "standstill" orders requiring a cable operator to continue carrying a vendor's programming under the terms of an existing contract while the Commission considers the vendor's program carriage complaint.

(3) Whether the Commission complied with the Administrative Procedure Act ("APA") when it codified its procedure for considering requests for program carriage standstill orders.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT OF THE CASE

More than a decade after adopting its program carriage rules, the FCC concluded that the rules were not effectively achieving the statute's competition-enhancing objectives. Consequently, in 2011, the Commission revised its rules by, *inter alia*, (a) clarifying the evidentiary requirements for establishing a *prima facie* case of program carriage discrimination, and (b) codifying the agency's procedure for granting a program carriage complainant an interim stay (or "standstill") preserving the status quo while a complaint is pending before the agency. *Order* ¶¶ 9-30 (JA____-____).

Petitioners ask the Court to invalidate the FCC's program carriage rules—and, "if necessary" (TW Br. 24 n.10), the underlying statute—on constitutional, statutory, and administrative-law grounds.

COUNTERSTATEMENT OF FACTS

A. The Program Carriage Statute

By the early 1990s, the cable television industry had grown "highly concentrated." 1992 Cable Act, § 2(a)(4). Congress became concerned that "such concentration" could reduce "the number of media voices available to consumers" by creating "barriers to entry for new programmers." *Id.*

This threat to competition in the video programming and distribution markets was "exacerbated by the increased vertical integration" (*i.e.*, common ownership) of producers and distributors of cable programming. S. Rep. No. 102-92, at 24 (1991) ("Senate Report"). Congress found that vertical integration gives cable operators "the incentive and ability to favor their affiliated programmers" and "[to] make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act, § 2(a)(5). For example, a vertically integrated cable operator "might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers." Senate Report at 25. By engaging in this sort of discrimination, a cable operator could give its affiliated programmer an unfair advantage over competing unaffiliated programmers in terms of attracting viewers and advertising revenues.

To guard against the potentially anticompetitive effects of vertical integration, Congress added Section 616 to the Communications Act when it adopted the 1992 Cable Act. *See* 47 U.S.C. § 536.[1] Section 616 directs the FCC to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors." *Id.* § 536(a). The statute requires the Commission to adopt rules "designed to prevent" or "prohibit" any MVPD from: (1) "requiring a financial interest" in a program service as a condition of carriage; (2) "coercing" a programming vendor to provide "exclusive rights" against other MVPDs as a condition of carriage (or "retaliating against" a vendor for failing to do so); and (3) "discriminating" in the selection, terms, or conditions of carriage "on the basis of affiliation or nonaffiliation" of programming vendors if the effect of such discrimination is "to unreasonably restrain" the ability of an unaffiliated vendor "to compete fairly." *Id.* § 536(a)(1)-(3).

[1] The 1992 Cable Act contained companion provisions that likewise promote competition and diversity in the video distribution market, including "must-carry" provisions that require most cable operators to carry local commercial broadcast television stations, *see* 47 U.S.C. § 534; "program access" provisions designed to limit the ability of vertically integrated cable operators to withhold programming from their competitors in the MVPD market, *see id.* § 548; and "leased access" provisions that require cable operators to lease channel space to unaffiliated networks at regulated rates, *see id.* § 532.

The discrimination provision, which is the principal focus of this case, may, for example, address the situation where an unaffiliated network complains that an MVPD rejected its request for carriage in an effort to shield the MVPD's own affiliated networks from competition (out of concern that the affiliates' advertising revenues may suffer if viewers instead decide to watch the unaffiliated network). That conduct would violate the statute if (a) the MVPD is found to have refused carriage because of the network's unaffiliated status, and (b) the discriminatory refusal to carry had the effect of unreasonably restraining the unaffiliated network's ability to compete fairly.

The statute requires the Commission to "provide for expedited review of any complaints made by a video programming vendor" under Section 616. 47 U.S.C. § 536(a)(4). The Commission also must "provide for appropriate penalties and remedies for violations" of the statute, "including carriage." *Id.* § 536(a)(5).

B. The FCC's Original Program Carriage Rules

The Commission first adopted rules to implement Section 616 in 1993. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 (1993) ("*1993 Order*").

In adopting those rules, the agency emphasized that it would evaluate each individual program carriage complaint on the basis of "the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred." *1993 Order*, 9 FCC Rcd at 2648 ¶ 14. The Commission explained that by "focus[ing] on the specific facts" of each negotiation, it could remedy violations of Section 616 "without unduly interfering with legitimate negotiating practices between [MVPDs] and programming vendors." *Id.* at 2643 ¶ 1.

The Commission also adopted procedural rules to govern program carriage complaints. Under those rules, a programming vendor that files a complaint with the agency bears the burden of proof "to establish a *prima facie* showing that the defendant [MVPD] has engaged in behavior that is prohibited" by Section 616. *1993 Order*, 9 FCC Rcd at 2654 ¶ 29. The complainant may not rely on bare allegations; the complaint "must be supported by documentary evidence" (including, for example, affidavits). *Id.* If the FCC's Media Bureau concludes that the complainant has not made a *prima facie* showing based on the complaint (and any supporting documentation), the complaint will be dismissed. *Id.* at 2655 ¶ 31. In this

respect, the *prima facie* case requirement performs a screening function akin to a pre-trial dispositive motion in federal court.

If the Media Bureau finds that the complainant has made a *prima facie* case, it must determine whether it can grant relief on the basis of the existing record (*i.e.*, the complaint and any supporting documents, the defendant's answer, and the complainant's reply). If the Bureau concludes that the record is insufficient to resolve the complaint, it can either outline procedures for discovery or refer the matter to an administrative law judge ("ALJ") for a hearing. *1993 Order*, 9 FCC Rcd at 2655 ¶ 31.

The Commission underscored that it would "determine the appropriate relief for program carriage violations on a case-by-case basis." *1993 Order*, 9 FCC Rcd at 2653 ¶ 26. "Available remedies and sanctions include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission." *Id.*

C. The *Order* On Review

Almost twenty years after the FCC promulgated its program carriage rules, very few parties had filed complaints. As of August 2011 (when the Commission released the order on review), only "[e]leven program carriage complaints [had] been filed in the approximately two decades since Congress passed Section 616." *Order* n.27 (JA____). This paucity of complaints did

not simply reflect an absence of affiliation-based discrimination. Programming vendors complained that "the Commission's procedures for addressing program carriage complaints [had] hindered the filing of legitimate complaints and [had] failed to provide for the expedited review envisioned by Congress." *Order* ¶ 1 (JA____).

To address these problems, the Commission issued a notice of proposed rulemaking in June 2007, seeking comment on "whether and how [the FCC's] processes for resolving carriage disputes should be modified." *Leased Commercial Access*, 22 FCC Rcd 11222, 11227 ¶ 14 (2007) (JA____, ____) ("*NPRM*"). After reviewing comments from various interested parties, including both cable operators and unaffiliated programming vendors (*see Order*, Appx. A (JA____)), the Commission concluded that its current program carriage procedures were "in need of reform." *Order* ¶ 8 (JA____). Accordingly, in 2011, the agency took several "initial steps to improve" its procedures. *Id.* (JA____).[2]

Among other things, the Commission clarified the evidentiary requirements for establishing a *prima facie* case of a program carriage

[2] The Commission simultaneously commenced a new rulemaking proceeding in which it proposed further revisions to its program carriage rules. *Order* ¶¶ 3, 37-81 (JA____-____, ____-____). That proceeding remains pending.

violation. *Order* ¶¶ 10-17 (JA____-____); 47 C.F.R. § 76.1302(d). It also imposed deadlines on FCC staff to expedite the resolution of carriage complaints. *Order* ¶¶ 19-24 (JA____-____).

In addition, the agency codified its procedure "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." *Order* ¶ 25 (JA____). While noting that program carriage complainants already could seek and obtain standstill orders (*i.e.*, an interim stay pending administrative review) under existing FCC practice, the Commission explained that "codifying uniform procedures will help to expedite action on standstill requests and provide guidance to complainants and MVPDs." *Order* ¶ 26 (JA____).

The Commission observed that a standstill, if granted, would "preserve the *status quo* by requiring continued carriage of a network" that the defendant MVPD has already chosen to carry "at the time the standstill is granted." *Order* n.109 (JA____). Applying the same standard that courts use to grant preliminary injunctive relief, the agency specified that an applicant for a standstill order must show that: (i) it is likely to prevail on the merits of its complaint; (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. *Order* ¶ 27 (JA____-____). The Commission emphasized that "injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Order* n.110 (JA____) (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008)).

Where the Media Bureau determines that a temporary standstill is justified, it "may limit the length of the standstill to a defined period or may specify that the standstill will continue until the adjudicator"—*i.e.*, either the Media Bureau or an ALJ—"resolves the underlying program carriage complaint." *Order* ¶ 27 (JA____). "The adjudicator may lift the temporary standstill to the extent that it finds that the stay is having a negative effect on settlement negotiations or is otherwise no longer in the public interest." *Id.* Once the adjudicator rules on the merits of the complaint, it "will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement." *Order* ¶ 28 (JA____).

The Commission rejected the cable industry's claims that the program carriage rules violate the First Amendment. *Order* ¶ 31 (JA____). First, the agency found that the rules are "subject to intermediate scrutiny" because they regulate economic activity "based on affiliation with an MVPD, not based on … content." *Order* ¶ 32 (JA____-____) (citing *Time Warner*

Entm't Co. v. FCC, 93 F.3d 957, 969 (D.C. Cir. 1996)). Second, the agency concluded that the rules satisfy intermediate scrutiny because they advance two substantial government interests—"promoting diversity and competition in the video programming market" (*Order* ¶ 32 (JA___))—and "burden no more speech than necessary" to prevent the conduct that Section 616 proscribes. *Id.* ¶ 34 (JA____).

TWC contended that Congress's justification for the program carriage rules "no longer exists today." *Order* ¶ 33 (JA____). It based that claim on national data documenting a decrease in vertical integration and an increase in programming networks, channel capacity, and competition among MVPDs since Congress passed the 1992 Cable Act. TWC Comments at 7-10 (JA___-___). But the Commission explained that the "nationwide figures" cited by TWC "do not undermine Congress's finding that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in *individual cases*, with the potential to unreasonably restrain the ability of an unaffiliated programming vendor to compete fairly." *Order* ¶ 33 (JA____-____) (emphasis added). The agency specifically noted that "the number of cable-affiliated networks recently increased significantly" after the merger between Comcast (the largest MVPD in the nation) and NBC

Universal. This "highlight[ed] the continued need for an effective program carriage complaint regime." *Id.* (JA____).

In addition, the Commission rejected the suggestion that Section 624(f)(1) of the Communications Act, 47 U.S.C. § 544(f)(1), precludes the agency from issuing interim standstill orders. *Order* n.107 (JA____). The agency acknowledged that Section 624(f)(1) bars the Commission from imposing "requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Act]." *Id.* (quoting 47 U.S.C. § 544(f)(1)). The Commission explained, however, that standstill orders fall within the exception to this prohibition. "Section 616(a) expressly directs the Commission to 'establish regulations governing program carriage agreements and related practices.'" *Id.* (quoting 47 U.S.C. § 536(a)).

Finally, the Commission rejected the argument that the APA required the agency to issue another rulemaking notice before it could codify its procedure for obtaining standstill relief. *See Order* ¶ 36 & n.146 (JA____). The Commission noted that the APA expressly exempts "rules of agency procedure" from its notice requirements. *Order* ¶ 36 (JA____ -____) (citing 5 U.S.C. § 553(b)(A)). It reasoned that this exemption applied to the standstill rule, which merely codified existing agency procedure. The Commission further determined that the public received adequate notice of

the standstill rule in any event. *Order* ¶ 36 (JA____) (citing *NPRM* ¶ 16 (JA____)).

SUMMARY OF ARGUMENT

In enacting legislation to protect competition and promote diversity of voices in the video distribution and programming markets, Congress found that the common ownership of cable systems and programming networks gives cable operators "the incentive and ability to favor their affiliated programmers" and to "make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act, § 2(a)(5). As directed by Congress, the FCC has established rules to ensure that vertically integrated MVPDs do not act on their incentive and ability to discriminate "on the basis of affiliation or nonaffiliation" in a manner that "unreasonably restrain[s]" an unaffiliated programming vendor's ability to "compete fairly." 47 C.F.R. § 76.1301(c); 47 U.S.C. § 536(a)(3). In this proceeding, the Commission properly determined that concerns about competition persist and that the agency's program carriage rules comport with the First Amendment. It also correctly concluded that its standstill procedure is authorized by statute and complies with the APA.

I. The challenged rules are subject to intermediate (not strict) First Amendment scrutiny because they are content-neutral. The rules do not

regulate speech "because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("*Turner I*") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Rather, they "regulat[e] cable programmers and operators on the basis of the 'economics of ownership,' a characteristic unrelated to the content of speech." *Time Warner*, 93 F.3d at 977.

Under intermediate scrutiny, a content-neutral regulation must be upheld if it: (1) "advances important governmental interests unrelated to the suppression of free speech"; and (2) "does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"). The program carriage rules satisfy both parts of that test.

The rules advance two important government interests: promoting competition and "assuring that the public has access to a multiplicity of information sources." *Turner I*, 512 U.S. at 663. Petitioners maintain that the rules are obsolete because cable operators no longer hold a "bottleneck" monopoly. But Congress's concerns in enacting the 1992 Cable Act were not limited to addressing such "bottleneck" market power. Rather, Congress was also concerned that vertically integrated MVPDs have the "incentive and ability" to favor affiliated over unaffiliated networks. 1992 Cable Act,

§ 2(a)(5). In any event, petitioners are wrong in suggesting that cable operators no longer have significant market power. As the D.C. Circuit recently recognized, the "clustering and consolidation" of cable systems have "bolster[ed] the market power of cable operators," and some local markets remain "'highly susceptible to near-monopoly control by a cable company.'" *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 712 (D.C. Cir. 2011) (citation omitted).

The program carriage rules do not burden substantially more speech than necessary to promote the government's interests. The Commission ordinarily will not require an MVPD to carry programming unless a complainant proves that the MVPD has violated Section 616. While the Commission may issue a standstill order temporarily requiring an MVPD to continue carrying a network it already has chosen to carry (during the pendency of the program carriage dispute), such an order is issued only in extraordinary circumstances and only upon proof of, *inter alia*, likelihood of success on the merits and irreparable harm to the complainant. Thus, the standstill procedure, like the underlying carriage discrimination provision, is narrowly tailored to address only affiliation-based discrimination that "unreasonably restrain[s] the ability of an unaffiliated video programming vendor to compete fairly." 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C.

§ 536(a)(3). These rules "specifically target" anticompetitive activities "where the government interest is greatest." *Cablevision*, 649 F.3d at 712.

II. The Commission also correctly concluded that it has authority to issue program carriage standstill orders. Section 616 expressly directs the FCC to establish rules "designed to prevent" or "prohibit" MVPDs—including cable operators—from adopting specified practices that adversely affect competition. *See* 47 U.S.C. § 536(a)(1)-(3). The standstill rule falls within that express grant of rulemaking authority. Program carriage standstill orders are designed to prevent MVPDs from taking actions that violate Section 616.

III. Finally, the Commission complied with the APA when it codified the standards for granting interim standstill relief. Petitioners' contrary claims lack merit.

Petitioners claim that the standstill rule is arbitrary and capricious because its costs purportedly outweigh its benefits. The Commission reasonably found otherwise. In applying the standstill rule, the Commission follows the same approach used by courts when considering stay requests. Among other things, the Commission considers whether "grant of a stay will … substantially harm other interested parties" and whether "the public interest favors grant of a stay." *Order* ¶ 27 (JA___). Thus, the costs of

granting standstill relief in any particular case will be fully considered and weighed against the benefits in case-by-case adjudication.

The Commission also acted consistently with the APA's procedural requirements. The standstill rule did not alter existing rights or obligations; it merely codified the FCC's existing practices. Therefore, as a rule of agency procedure, it was exempt from the APA's notice requirements. 5 U.S.C. § 553(b)(A). Furthermore, even assuming that the APA required public notice of the standstill rule, the Commission provided sufficient notice. The rulemaking notice that commenced this proceeding specifically sought comment on a proposal for "additional rules to protect programmers from potential retaliation if they file a complaint." *NPRM* ¶ 16 (JA____). The standstill rule was a logical outgrowth of that proposal.

STANDARD OF REVIEW

The Court "review[s] an agency's disposition of constitutional issues *de novo*." *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 91 (2d Cir. 2009). Here, petitioners mount a broadside First Amendment attack on the program carriage statute itself, as well as the FCC's implementing rules. *See* TWC Br. 24 n.10. To prevail on this facial challenge, petitioners must show at a minimum that "a substantial number" of the rules' applications "are unconstitutional, judged in relation to the [rules'] plainly legitimate sweep."

Adams v. Zenas Zelotes, Esq., 606 F.3d 34, 38 (2d Cir. 2010) (citation omitted); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) ("a facial challenge must fail where the statute has a 'plainly legitimate sweep"') (citation omitted).

In assessing petitioners' claim that the statute and implementing rules are "facially invalid" under the First Amendment, the Court "must be careful not to go beyond the [rules'] facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 552 U.S. at 449-50.

Petitioners' challenge to the FCC's statutory authority to adopt the standstill rule is governed by *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). If a statutory provision is ambiguous and the implementing agency's reading of that provision is reasonable, *Chevron* requires the Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). In particular, the FCC's "reasonable interpretation[ ] of the scope of [its] authority" under the Communications Act is "entitled to deference under *Chevron*." *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 321-22 (2d Cir. 2000).

With respect to petitioners' APA claims, the Court "may reverse" the *Order* "only if [the FCC's decision] was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89 (2d Cir. 2000) (quoting 5 U.S.C. § 706(2)(A)). That standard of review is "highly deferential." *Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 849 (2d Cir. 1996) (quoting *Fulani v. FCC*, 49 F.3d 904, 908 (2d Cir. 1995)). The Court may not "substitute [its] judgment for that of the agency." *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 63 (2d Cir. 1982).

ARGUMENT

I. THE PROGRAM CARRIAGE RULES ARE CONSISTENT WITH THE FIRST AMENDMENT

The FCC has yet to apply its revised program carriage rules to any particular case. Nonetheless, petitioners contend that those rules violate the First Amendment "by supplanting MVPDs' considered editorial judgments about what programming to carry." TWC Br. 21. To succeed in such a challenge, petitioners must establish that the rules are unconstitutional on their face. This sort of facial challenge is "generally disfavored" and seldom granted. *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010); *see also Washington State Grange*, 552 U.S. at 450. Indeed, courts have repeatedly rejected the cable industry's facial First Amendment challenges to related

provisions of the 1992 Cable Act and the FCC's implementing rules.[3] Petitioners' facial challenge in this case should fare no better.

Like the underlying program carriage statute, the FCC's implementing rules—including its case-by-case procedure for granting standstill relief—are not content-based and therefore are subject to intermediate First Amendment scrutiny. The rules "regulat[e] cable programmers and operators on the basis of the 'economics of ownership,' a characteristic unrelated to the content of speech." *Time Warner*, 93 F.3d at 977. Designed "to promote speech, not to restrict it," *id.*, the program carriage rules satisfy intermediate scrutiny because they are justified by the same substantial governmental interests that undergird related provisions of the 1992 Act: promoting "fair competition"

---

[3] *See, e.g.*, *Turner II*, 520 U.S. 180 (rejecting First Amendment challenge to must-carry statute); *Cablevision*, 649 F.3d 695 (rejecting First Amendment challenge to FCC's program access rules); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1312 (D.C. Cir. 2010) (petitioners' First Amendment challenges to the statutory ban on exclusive contracts between cable operators and cable-affiliated programmers were indistinguishable "from the [arguments the court] already rejected in the facial challenge" in the 1996 *Time Warner* case); *Time Warner Entm't Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) (rejecting First Amendment challenges to statutory provisions limiting number of cable operator's subscribers and number of channels on its cable system devoted to programming in which the operator has a financial interest); *Time Warner*, 93 F.3d 957 (rejecting First Amendment challenges to multiple provisions of the 1992 Cable Act, including leased access and program access provisions); *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 178-86 (D.C. Cir. 1995) (rejecting First Amendment challenge to FCC's cable rate regulations).

and "the widespread dissemination of information from a multiplicity of sources," *Turner I*, 512 U.S. at 662. Further, the rules do not burden substantially more speech than necessary to advance those interests. They are therefore constitutional.

A. The Rules Are Subject To Intermediate Scrutiny.

The level of First Amendment scrutiny in this case depends on whether the challenged rules are "content based or content neutral." *Cablevision*, 570 F.3d at 96. Courts apply "strict scrutiny" to regulations that discriminate "on the basis of content" and "a more lenient analysis to content-neutral regulations." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

The "most exacting" First Amendment scrutiny is reserved for "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" and "[l]aws that compel speakers to utter or distribute speech bearing a particular message." *Turner I*, 512 U.S. at 642. "In contrast, a less stringent test"—intermediate scrutiny—applies to "regulations of expressive activity that are not based on content." *Hobbs v. County of Westchester*, 397 F.3d 133, 149 (2d Cir. 2005).

"Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Hobbs*, 397 F.3d at 149 (quoting *Ward*, 491 U.S. at 791). "The government's

purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 450 (2d Cir. 2001) (quoting *Ward*, 491 U.S. at 791).

The Commission correctly found that the regulations at issue here are content-neutral. The program carriage rules do not regulate speech "because of [agreement or] disagreement with the message it conveys." *Turner I*, 512 U.S. at 642 (quoting *Ward*, 491 U.S. at 791). Rather, they serve "purposes unrelated to the content of expression." *Hobbs*, 397 F.3d at 150 (quoting *Ward*, 491 U.S. at 791). The rules are designed to prevent MVPDs from engaging in anticompetitive practices with respect to programming vendors.

Petitioners' challenge "focuses on" the rule barring affiliation-based carriage discrimination. TWC Br. 3 n.1; *see also* NCTA Br. 47 n.10. That rule prohibits MVPDs from "discriminating … on the basis of affiliation or nonaffiliation of [video programming] vendors in the selection, terms, or conditions for carriage of video programming" if the effect of such discrimination "is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." 47 C.F.R. § 76.1301(c); *see also* 47

U.S.C. § 536(a)(3). As the Commission explained, the rule regulates speech "based on affiliation with an MVPD, not based on … content." *Order* ¶ 32 (JA____).

In that respect, the discrimination rule closely resembles the leased access statute, which requires cable operators to make channels available for lease by unaffiliated programmers. 47 U.S.C. § 532. The "objective" of both leased access and program carriage regulation is "framed in terms of the sources of information rather than the substance of the information." *Time Warner*, 93 F.3d at 969. In each case, the rationale for regulation is not related to "the content of [programmers'] speech," but to the programmers' "lack of affiliation with" an MVPD. *Id.* In rejecting a First Amendment challenge to the leased access statute, the D.C. Circuit applied intermediate scrutiny. *Id.* at 967-71. The same standard of review applies here.

Petitioners argue that the carriage discrimination rule and the derivative standstill rule are "content-based" because, in some cases, their application depends on a finding that unaffiliated programming is "similarly situated" to affiliated programming. TWC Br. 24-28; NCTA Br. 53-55. That contention misapprehends both the concept of a "content-based" regulation of speech and the nature of the FCC's "similarly situated" analysis.

The "principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner I*, 512 U.S. at 642 (citation omitted). Here, "there is simply no hint" that the government has done so. *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998). In those situations where the Commission considers the content of programming to determine whether the defendant MVPD discriminated "on the basis of affiliation or nonaffiliation," it is solely for purposes of comparing the complainant's programming with programming that the defendant's affiliated network has chosen to carry—*whatever the content may be*. *Cf. Turner I*, 512 U.S. at 655 (must-carry rules "confer benefits upon all full-power, local broadcasters, whatever the content of their programming"). The *particular* content of the programming at issue is irrelevant; the same comparative analysis applies regardless of the specific type of programming involved. Thus, the program carriage rules are not "structured in a manner that raise[s] suspicions that [their] objective was, in fact, the suppression of certain ideas." *Time Warner*, 93 F.3d at 978 (quoting *Turner I*, 512 U.S. at 660).[4]

[4] Pointing to a footnote in *Turner I*, petitioners note that one provision of the must-carry statute "appears to single out certain low-power broadcasters for special benefits on the basis of content." TWC Br. 30-31 (citing *Turner I*, 512 U.S. at 643 n.6). That footnote does not advance petitioners' argument.

In any event, petitioners exaggerate the role of content in the agency's analysis. *See, e.g.*, TWC Br. 30. The FCC examines whether programming is "similarly situated" simply to ascertain whether the complainant has made a circumstantial case of discrimination— which logically entails a comparison of the defendant MVPD's treatment of its own affiliates with its treatment of nonaffiliates. *See Order* ¶ 14 (JA____-____); 47 C.F.R. § 76.1302(d)(3)(iii)(B)(*2*)(*i*). When an unaffiliated network relies on circumstantial evidence to support its claim that the defendant afforded preferential treatment to its own affiliated networks, it makes sense to inquire

---

First, unlike the low-power provision in *Turner I*, which expressly focused on whether programming "would address local news and informational needs," the program carriage provision at issue here does not even arguably "single out" any entities "on the basis of content." 512 U.S. at 643 n.6. Second, the Court in *Turner I* expressly declined to resolve whether the low-power provision was content-based. *Id.*

whether the programming carried on the networks is similar. That inquiry does not reflect a preference for particular programming content.[5]

Moreover, the Commission does not focus exclusively (or even primarily) on content when undertaking its "similarly situated" analysis. Rather, it considers an array of factors, including "genre, ratings, license fee, target audience, target advertisers, [and] target programming." *Order* ¶ 14 (JA____). Many of those factors (such as ratings and license fees) have nothing to do with programming content. As the Commission explained, "no single factor is necessarily dispositive": the "more factors that are found to be similar, the more likely" the complainant's programming "will be considered similarly situated" to MVPD-affiliated programming. *Id.* (JA____).

This Court has recognized that a regulation may be content-neutral even if its implementation entails some analysis of content, so long as "the

[5] Admitting evidence of disparate treatment of similarly situated parties as circumstantial evidence supporting a showing of intentional discrimination is a hallmark of discrimination law. *See, e.g.*, *Ruiz v. County of Rockland*, 609 F.3d 486, 493-94 (2d Cir. 2010); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 189 (2009). That the FCC adopted a similar approach in implementing the program carriage statute's discrimination provision does not imply any illicit attempt to regulate the content of speech. Indeed, the House Committee Report on the statute notes that "[a]n extensive body of law exists addressing discrimination in normal business practices, and the Committee intends the Commission to be guided by these precedents." H.R. Rep. No. 102-628, at 110 (1992) ("House Report").

specific content of the speech" is "irrelevant" to the regulatory "goal." *Hobbs*, 397 F.3d at 152. In *Hobbs*, a street performer challenged a Westchester County policy that barred any person convicted of a sexual offense against a minor from obtaining a permit to perform using props on County property if the performance would entice a child to congregate around that person. *Id.* at 143-44. The Court held that the County's policy was a permissible content-neutral regulation of speech because it "focuses on the safety of children" and "is not concerned with the content of the message." *Id.* at 152. The Court explained that although County officials examine "the content of the applicant's proposed presentation" to determine "whether [it] is likely to attract a crowd of children," the County's analysis of content did not trigger strict scrutiny because "the specific content of the speech" was "irrelevant to the governmental goal" of protecting children. *Id.* at 152-53.

Here, as in *Hobbs*, "there is absolutely no evidence, nor even any serious suggestion, that the Commission" issued the substantive program carriage rule (or codified the standard for obtaining derivative standstill relief) "to [favor or] disfavor certain messages or ideas." *Cablevision*, 649 F.3d at 717. The agency adopted those provisions because of "[the] programming's economic characteristics, not … its communicative impact." *Id.* at 718.

Petitioners further contend that strict scrutiny should apply because "the program carriage rules prefer the speech of unaffiliated programmers to the speech of MVPDs and their affiliated programmers." TWC Br. 28. According to petitioners, it is "unconstitutional" for the FCC to promote "the speech of a certain category of speaker … over others." TWC Br. 42. The D.C. Circuit, however, has rejected a virtually identical argument. In *Time Warner*, 211 F.3d at 1321, it found no merit in TWC's argument that "because the Congress expressed concern that cable operators might favor their affiliated programming services[,] the legislature's 'stated design was to suppress cable operators' speech,' and to advance the speech of nonaffiliated programmers." Instead, the D.C. Circuit concluded that "the legislative concern was not with the speech of a particular source but solely with promoting diversity and competition in the cable industry." *Id.* The same is true here.

Petitioners incorrectly assume that "all speaker-partial laws are presumed invalid." *Turner I*, 512 U.S. at 658. The Supreme Court, however, has made clear that "speaker-based laws demand strict scrutiny" only "when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* (citing *Regan v. Taxation with Representation of*

Washington, 461 U.S. 540, 548 (1983)). So long as speaker distinctions "are not a subtle means of exercising a content preference," they "are not presumed invalid under the First Amendment." *Id.* at 645.[6] Nor do the rules challenged in this case "restrict the speech of some elements of our society in order to advance the relative voice of others." TWC Br. 43 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). The rules are designed to prevent anticompetitive conduct.

In sum, strict scrutiny is inapplicable because the program carriage rules do not reflect any preference for (or aversion to) any particular content. The purpose of the rules has nothing to do with programming content. For that reason, intermediate scrutiny applies.

[6] *Citizens United v. FEC*, 130 S. Ct. 876 (2010), did not hold otherwise. The Court there observed that, "apart from the purpose or effect of regulating content, … the Government *may* commit a constitutional wrong when by law it identifies certain preferred speakers." *Id.* at 899 (emphasis added). Petitioners misconstrue that statement to mean that *all* "speaker-based restrictions infringe the First Amendment even when they are not content-based." NCTA Br. 51 n.12; *see also* TW Br. 28. The Court said no such thing. Nor did it purport to alter settled law by declaring that all speaker-based laws are subject to strict scrutiny. The Court applied strict scrutiny in *Citizens United* because that case (unlike this one) concerned a law—equivalent to a prior restraint—that burdened "speech uttered during a campaign for political office." 130 S. Ct. at 896, 898 (citation omitted).

B. The Rules Satisfy Intermediate Scrutiny.

A content-neutral regulation will withstand intermediate scrutiny if it: (1) "advances important governmental interests unrelated to the suppression of free speech"; and (2) "does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

The program carriage rules satisfy both parts of this test. They promote competition and diversity of programming sources in the video programming market—two substantial government interests. *Order* ¶ 32 (JA____). And they "burden no more speech than necessary" to advance those interests. *Order* ¶ 34 (JA____).

1. The Rules Advance Substantial Government Interests.

By "promoting fair treatment of unaffiliated programming vendors," the program carriage rules foster "competition in the video programming market" and "diversity" in the available sources of video programming. *Order* ¶ 32 (JA____). These policy goals are "important governmental objectives unrelated to the suppression of speech." *Time Warner*, 93 F.3d at 969. In 2009, this Court relied on the same policy goals to uphold an FCC order against First Amendment challenge, noting that it had "no trouble in concluding that the order 'advances important governmental interests

unrelated to the suppression of free speech.'" *Cablevision*, 570 F.3d at 97 (citation omitted).

The "Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Turner I*, 512 U.S. at 664. And "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Id.* at 663. Indeed, "the First Amendment stems from the premise that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 477 (2d Cir. 1971) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

Petitioners do not dispute that the government has a substantial interest in promoting competition and diversity in the video programming and distribution markets. They maintain, however, that the program carriage statute and implementing rules are no longer needed to achieve those ends because "the marketplace is now vigorously competitive." TWC Br. 16. Petitioners assert that the FCC cannot continue to justify regulation without evidence that cable operators retain a "bottleneck" monopoly (*i.e.*, gatekeeper

control over distribution of video programming) in the MVPD market. TWC Br. 36-37, 54; NCTA Br. 56-57.

This argument rests on the mistaken assumption that Congress adopted the program carriage statute solely to restrain the "bottleneck" power that cable operators possessed in 1992. NCTA Br. 55-56. If that were so, Congress presumably would have limited the statute's application to cable operators (just as it did with the must-carry statute). Unlike the must-carry statute, however, Section 616 applies to *all* MVPDs—including non-cable MVPDs like DIRECTV, which have *never* held a bottleneck monopoly. 47 U.S.C. § 536(a).

The principal factor motivating Congress to regulate program carriage was not the cable "bottleneck," but the potential for affiliation-based discrimination created by vertical integration. Congress found that "[a]s a result" of vertical integration, "cable operators have the incentive and ability to favor their affiliated programmers." 1992 Cable Act, § 2(a)(5).[7] As the D.C. Circuit has explained, the "vertically integrated programmer provisions" of the 1992 Cable Act were justified by "both 'the bottleneck monopoly

[7] *See also* Senate Report at 25 ("vertical integration gives cable operators the incentive and ability to favor their affiliated programming services"); House Report at 41 ("vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services").

power exercised by cable operators' *and* the unique power that vertically integrated companies have in the cable market." *Time Warner*, 93 F.3d at 978 (citations omitted; emphasis added).[8]

Two recent decisions of the D.C. Circuit confirm that vertically integrated companies continue to retain such unique power and that the FCC has good reason to remain wary of the prospect of anticompetitive conduct by vertically integrated MVPDs. Specifically, the court found that "the transformation in the MVPD market" since 1992, "although significant, presents a 'mixed picture' when considered as a whole." *Cablevision*, 649 F.3d at 712 (quoting *Cablevision*, 597 F.3d at 1314).

As the D.C. Circuit observed, "[w]hile cable no longer controls 95 percent of the MVPD market, as it did in 1992, cable still controls two thirds of the market nationally," *Cablevision*, 597 F.3d at 1314; and cable "enjoy[s] [even] higher shares in several markets." *Cablevision*, 649 F.3d at 712. In addition, "as of 2007, 'the four largest cable operators [were] still vertically

[8] In adopting Section 616, Congress was motivated by concerns that some local markets could be more vulnerable than others to the anticompetitive effects of vertical integration because "the extent of market power in the cable industry varies in each locality." Senate Report at 24. For example, a large vertically integrated MVPD like Comcast could have a much larger market share in some metropolitan markets than in others. Given the local variations in market conditions, Congress was concerned that a vertically integrated MVPD "in certain instances" could "abuse its locally-derived market power" to discriminate against unaffiliated programmers. *Id.*

integrated with six of the top 20 national networks, some of the most popular premium networks, and almost half of all regional sports networks.'" *Cablevision*, 649 F.3d at 712 (quoting *Cablevision*, 597 F.3d at 1314). In view of this evidence, the D.C. Circuit found "no reason to question" recent FCC findings that "cable operators still have a dominant share of MVPD subscribers … and still own significant programming." *Cablevision*, 649 F.3d at 712 (citation omitted).

Petitioners urge the Court to disregard the D.C. Circuit's *Cablevision* decisions because they involved program access rules rather than program carriage rules. TWC Br. 38-39. But the findings in those cases confirmed the continuing need for both program access *and* program carriage rules. As the Commission explained (*Order* n.100 (JA___)), both regulatory regimes are animated by the same concerns about competition and the threat posed by vertical integration. *Compare Cablevision*, 597 F.3d at 1308 (program access), *with* 1992 Cable Act, § 2(a)(5) (program carriage).

Even under petitioners' conception of the statutory scheme (including their contention that a showing of "market power" should be required as part of a *prima facie* case of program carriage discrimination), petitioners' facial challenge fails. To survive that facial challenge, the Commission need not "establish that vertically integrated cable companies retain a stranglehold

nationally." *Cablevision*, 649 F.3d at 712. And the D.C. Circuit observed only last year that "clustering and consolidation" of cable systems have "bolster[ed] the market power of cable operators," leaving some local markets "'highly susceptible to near-monopoly control by a cable company.'" *Id.* (quoting *Cablevision*, 597 F.3d at 1309).

Likewise, in the *Order*, the Commission found that cable continues to dominate some MVPD markets. In particular, it found that the recent merger of Comcast (the largest MVPD in the nation) with media conglomerate NBC Universal "highlight[ed] the continued need for an effective program carriage complaint regime." *Order* ¶ 33 (JA ____). That merger produced "an entity with increased ability and incentive to harm competition in video programming by engaging in … discriminatory actions against unaffiliated video programming networks." *Id.* (quoting *Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc.*, 26 FCC Rcd 4238, 4284 ¶ 116 (2011) ("*Comcast/NBCU Order*")). Before approving the merger, the Commission expressed concern that Comcast's exceptionally large market share in major metropolitan markets (*e.g.*, "as much as 62 percent in the Chicago [market] and 67 percent in the Philadelphia [market]") would enhance Comcast's ability to "disadvantage rival networks that compete with NBCU networks." *Comcast/NBCU Order*, 26 FCC Rcd at 4285 ¶ 116. "The

Commission specifically relied upon the program carriage complaint process to address these concerns." *Order* ¶ 33 (JA____) (citing *Comcast/NBCU Order*, 26 FCC Rcd at 4288 ¶ 123). The *Order*'s discussion of the 2011 merger refutes petitioners' claim that the Commission relied "solely on congressional findings from *1992*" to justify the continued enforcement of the program carriage rules. TWC Br. 34.

In light of the Comcast-NBC Universal merger, the Commission reasonably found that vertically integrated MVPDs still retain "the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain the ability of an unaffiliated programming vendor to compete fairly." *Order* ¶ 33 (JA____-____). That potential remains even if no "bottleneck" exists. Therefore, the Court should reject petitioners' premise that only the existence of "bottleneck" power can justify program carriage regulation.[9] The Commission in the *Order* properly concluded that a case-by-case evaluation of program carriage complaints

[9] Insofar as that flawed premise underlies most of petitioners' constitutional and APA challenges to the carriage discrimination rule and the FCC's procedures for establishing a *prima facie* case and obtaining standstill relief, those challenges are unavailing. *See* TWC Br. 36, 47-56; NCTA Br. 55-57.

remains necessary to guard against individual instances of anticompetitive conduct. *See Order* ¶ 33 (JA____).[10]

Petitioners next contend that the program carriage rules are no longer needed to promote diversity because the number of national programming networks has grown and the percentage of vertically integrated networks has declined since 1992. TWC Br. 40-41. Recently, however, the D.C. Circuit found evidence that "despite major gains in the amount and diversity of programming," vertical integration still pervades the programming market. *Cablevision*, 649 F.3d at 712. Moreover, "the number of cable-affiliated networks recently increased significantly" when Comcast merged with NBC Universal. *Order* ¶ 33 (JA____). Given the continuing presence of vertical integration in the MVPD market, the program carriage rules remain necessary

[10] For that reason, petitioners' reliance on *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), and *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009), is misplaced. Those cases involved a different type of rule—a categorical rule under which the FCC limited "individual cable operators to a maximum percentage [*i.e.*, 30 percent] of subscribers nationwide." *Order* ¶ 33 (JA____). The D.C. Circuit concluded in 2009 that the development of competition among MVPDs obviated the need for a national cable subscriber cap of 30 percent. *Comcast*, 579 F.3d at 8. Two years later, however, the same court found that the national trend toward greater MVPD competition did not foreclose the possibility of individual cases of anticompetitive conduct by vertically integrated MVPDs. *Cablevision*, 649 F.3d at 712. The program carriage complaint process—which "requires an assessment of the facts of each case and the impact on the ability of an unaffiliated programming vendor to compete fairly," *Order* ¶ 33 (JA___)—is specifically tailored to address such cases.

to address complaints that raise legitimate concerns about competition and diversity.

Petitioners suggest that the growth of the Internet and online video diminish the need for the government to promote programming diversity. TWC Br. 12-14. At this point, however, online video does not provide programmers with a commercially viable alternative to MVPD carriage. While "the amount of online viewing is growing," market studies indicate that "most consumers *today* do not see [online video] service as a substitute for their MVPD service." *Comcast/NBCU Order*, 26 FCC Rcd at 4269 ¶ 79. A 2010 study commissioned by Nielsen showed that "only three percent of people who watch video from the Internet on their television sets plann[ed] to drop cable subscriptions." *Comcast/NBCU Order*, 26 FCC Rcd at 4269 n.173.

Equally flawed is petitioners' attack on the agency's reliance on diversity of voices as an interest furthered by the program carriage rules. Petitioners contend that it was "nonsensical" to rely on that objective because the Commission employs a "similarly situated" analysis in a subset of program carriage cases, and this can only result in carriage of similar—rather than diverse—programming. TWC Br. 41. That contention misses the point that diversity in this context refers to diversity of *sources* of information. *See*

Order ¶ 32 & n.127 (JA____); *Time Warner*, 93 F.3d at 969. Far from suggesting that this objective infringes free speech interests, the Supreme Court has emphasized that ensuring public access to "a multiplicity of information sources … *promotes* values central to the First Amendment." *Turner I*, 512 U.S. at 663 (emphasis added).

2. The Rules Do Not Burden Substantially More Speech Than Necessary To Achieve Their Objectives.

To survive intermediate scrutiny, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner I*, 512 U.S. at 662. A content-neutral regulation will be sustained if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (quoting *Ward*, 491 U.S. at 799).

a. The Carriage Discrimination Rule and Standstill Procedure.

The carriage discrimination rule easily satisfies this requirement. The Commission will find a violation of the rule "only after" the complainant "proves" that a violation has occurred. *Order* ¶ 34 (JA____); *see also TCR Sports Broad. Holding v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, 18105 ¶ 10 (2010) (denying program carriage complaint because TWC had "provided evidence establishing legitimate and non-discriminatory reasons" for its carriage decision), *aff'd, TCR Sports Broad. Holding v. FCC*, 2012 WL

1672264 (4th Cir. May 14, 2012). Thus, "the burden imposed by" the rule "is congruent to the benefits it affords." *Turner II*, 520 U.S. at 215. The rule "burden[s] no more speech than necessary" to achieve the government's objectives of protecting competition and promoting diversity. *Order* ¶ 34 (JA____).

There is no basis for petitioners' assertion that "the program carriage regime applies a one-size-fits-all approach" to "*all* adverse carriage decisions rendered by MVPDs *anywhere*." TWC Br. 43. To the contrary, rather than prohibiting vertical integration altogether, Congress enacted a closely drawn statute "[t]o ensure that cable operators do not favor their affiliated programmers over others." Senate Report at 27. The program carriage statute (like the corresponding FCC rule) is structured to prohibit discrimination on the basis of affiliation *only* when such discrimination has the effect of "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly." 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c). Accordingly, by their terms, the statute and FCC rule apply only where an anticompetitive impact is shown in a particular case. *Cf. Cablevision*, 649 F.3d at 711-12 ("[b]y imposing liability [under the program access rules] only when complainants demonstrate that a company's unfair act has 'the purpose or effect' of 'hinder[ing] significantly … or prevent[ing]'

the provision of satellite programming, the Commission's … rules specifically target activities where the government interest is greatest"). By considering each program carriage complaint "on a case-by-case basis," examining the particular facts underlying each complaint, *see Order* ¶ 33 (JA____), the FCC ensures that its rules are narrowly tailored to burden no more speech than necessary.[11]

For similar reasons, petitioners are wrong in asserting that the derivative standstill procedure "imposes a greater burden on speech than necessary because it authorizes the FCC to compel speech before any program-carriage violation has been found." NCTA Br. 58. The FCC's procedure is no more constitutionally infirm than the courts' practice of granting preliminary injunctive relief in appropriate cases, even though such relief implicates a party's First Amendment rights. *See, e.g.*, *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir.

[11] Petitioners' supposition (TWC Br. 44) that the FCC could have selected "other regulatory options that would impose fewer burdens on MVPDs' First Amendment rights" is beside the point. Because the FCC's rules (like the underlying statute) are "not substantially broader than necessary to achieve the government's interest," *Turner II*, 520 U.S. at 218, they are constitutional. A content-neutral regulation "will not be invalid simply because … the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* (citation omitted).

2002) (affirming grant of preliminary injunction enjoining dissemination of prayerbook that likely infringed plaintiff's copyright).

To obtain a standstill, a complainant must show not only that it will suffer irreparable harm absent a stay of the existing contract's terms, but also that it is likely to prevail on the merits. *Order* ¶ 27 (JA___). That, in turn, requires a showing—supported by evidence—that the complainant will likely prevail in establishing (a) affiliation-based discrimination, and (b) an unreasonable restraint of a programming vendor's ability to fairly compete. 47 C.F.R. § 76.1301(c). Thus, the standstill remedy is narrowly tailored like the underlying rule itself. Furthermore, one of the prerequisites to obtaining standstill relief—under the same standard that courts apply in considering stays—is that parties other than the complainant will not be substantially harmed. *Order* ¶ 27 (JA____). That requirement will fully accommodate petitioners' speech interests as standstill requests are considered on a case-by-case basis.

In sum, it was reasonable for the Commission to conclude that the standstill rule, on its face, does not burden substantially more speech than necessary to achieve its objectives. *See Washington State Grange*, 552 U.S. at 449-50 (in assessing a facial First Amendment challenge, courts "must be careful not to go beyond the [rules'] facial requirements and speculate about

'hypothetical' or 'imaginary' cases"). To the extent petitioners believe that issuance of a standstill order in a particular case would insufficiently accommodate First Amendment values, they are free to assert that argument in opposing standstill relief in that case. *Cf. Cablevision*, 649 F.3d at 713 (rejecting as unripe an "as-applied preenforcement challenge" under the First Amendment, but recognizing that cable operator could assert as-applied arguments in particular cases).[12]

b. The *Prima Facie* Rule.

Petitioners argue that the FCC's rule requiring complainants to establish a *prima facie* case of program carriage discrimination is not narrowly tailored because it does not require a showing of "market power." TWC Br. 47-51. Petitioners are "barred from raising this point on appeal" because no party presented this argument to the Commission. *Capital Tel.*

[12] In a reprise of one of their principal themes, petitioners contend that the standstill procedure is not narrowly tailored because it does not require a showing of bottleneck market power. TWC Br. 53-54. As shown in Part I.B.1 above, however, a finding of bottleneck power is not necessary to establish a violation of Section 616. The sort of anticompetitive conduct that the statute prohibits can occur whether or not a "bottleneck" exists.

Co. v. FCC, 777 F.2d 868, 871 (2d Cir. 1985) (citing 47 U.S.C. § 405).[13] In any event, petitioners' argument lacks merit.

Petitioners cannot plausibly claim that the *prima facie* rule imposes any burden on MVPDs' speech, much less that it "encourages" the filing of complaints. TWC Br. 22. That rule *benefits* cable operators. It establishes procedures that allow a cable operator or other MVPD defendant to seek dismissal of a program carriage complaint for failure to state a claim. *Order* ¶ 16 (JA____-____).

Far from "chilling … speech" by "permit[ting] baseless program carriage complaints" to proceed (TWC Br. 45), the requirement that complainants establish a *prima facie* case of program carriage discrimination—supported by evidence—is carefully crafted "to ensure that only legitimate complaints proceed to further evidentiary proceedings." *Order* ¶ 10 (JA____). In any event, petitioners have produced no proof that the *prima facie* rule (or, for that matter, any of the other program carriage rules) has actually "chilled" any MVPD's speech. Petitioners cannot sustain

---

[13] *See also Adelphia Commc'ns Corp. v. FCC*, 88 F.3d 1250, 1255-56 (D.C. Cir. 1996) (exhaustion requirement under 47 U.S.C. § 405 applies to constitutional claims). For the same reason, petitioners failed to preserve for appellate review their claim that the "FCC's refusal to require a showing of bottleneck control" under the *prima facie* rule is "arbitrary and capricious." TWC Br. 51.

a First Amendment claim—much less a facial claim—based on hypothetical "chilling" allegations.[14]

Petitioners likewise fail to substantiate their claim that a "market power" showing is needed to make a *prima facie* case. The program carriage statute itself makes no reference to "market power." *See* 47 U.S.C. § 536. And the statute's legislative history makes clear that Section 616 "does not amend existing antitrust laws," but instead "provides new FCC remedies" that differ from traditional antitrust remedies. Senate Report at 29. Nor would it make sense for Congress to have enacted a new statute to protect against the anticompetitive effects of vertical integration if that statute simply replicated the antitrust laws.

Instead of requiring a "market power" showing at the *prima facie* stage, the FCC required a carriage discrimination complaint to "contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complaining programming vendor to compete fairly." *Order* ¶ 15 (JA____). That requirement is consistent with the terms of Section 616. *See* 47 U.S.C. § 536(a)(3).

---

[14] *See, e.g.*, *Williams v. Town of Greenburgh*, 535 F.3d 71, 78 (2d Cir. 2008) (plaintiff's First Amendment claim failed "as a matter of law" because he produced no evidence "that his speech was either silenced or chilled").

Petitioners assert that the FCC, in construing this requirement, has treated "adverse carriage action of any kind as an *unreasonable* restraint." TWC Br. 50. They base that claim on two orders in which the FCC's Media Bureau designated carriage discrimination complaints for hearing.[15]

Even if petitioners had fairly characterized those Media Bureau orders, the Commission "is not bound by the actions of its staff if the agency has not endorsed those actions," *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008), and the agency has never endorsed the proposition that *all* adverse carriage decisions "unreasonably" restrain programmers' ability to compete fairly.

Nor has the Media Bureau ever taken that position. Rather, in the orders cited by petitioners, the Bureau found specific evidence that the challenged carriage decisions had unreasonably restrained an unaffiliated programmer's ability to compete. As the Bureau's analysis in those cases reflected, a carriage decision constitutes an "unreasonable" restraint only if it has a material effect on an unaffiliated programmer's ability to compete. For example, the Bureau found evidence that Comcast's "refusal to expand [t]he Tennis Channel's distribution" was "particularly detrimental to the network"

---

[15] *See Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 25 FCC Rcd 14149 (Med. Bur. 2010); *Herring Broad., Inc. v. Time Warner Cable Inc.*, 23 FCC Rcd 14787 (Med. Bur. 2008).

because "Comcast is the dominant cable operator in seven of the ten largest television markets." *Tennis Channel*, 25 FCC Rcd at 14161 ¶ 20; *see also Herring*, 23 FCC Rcd at 14798 ¶ 19 (finding that "TWC has 'quasi monopolies' in key markets"—including New York and Los Angeles—"that are essential to WealthTV's long-term viability").

II. THE COMMISSION PROPERLY CONCLUDED THAT IT HAS AUTHORITY TO ISSUE PROGRAM CARRIAGE STANDSTILL ORDERS GOVERNING CABLE OPERATORS

Although petitioners do not dispute that the FCC has statutory authority to order carriage at the conclusion of program carriage proceedings, they maintain that the Communications Act bars the agency from granting interim relief that preserves the status quo while a carriage complaint is pending against a cable operator. TWC Br. 21-34. That argument is meritless.

Like courts, administrative agencies may grant interim relief in appropriate cases to preserve the status quo before addressing the merits of a proceeding. The FCC is no exception. In a variety of contexts, it has exercised its authority to grant "interim injunctive relief, in the form of a standstill order," under Section 4(i) of the Communications Act. *See Order* ¶ 26 (JA____). Section 4(i) empowers the Commission to "make such rules and regulations, … not inconsistent with this [Act], as may be necessary in

the execution of its functions." 47 U.S.C. § 154(i). In this proceeding, the Commission also relied on its authority to issue interim relief in the program carriage context under Section 616 of the Act. That provision "expressly directs the Commission to 'establish regulations governing program carriage agreements and related practices.'" *Order* n.107 (JA____) (quoting 47 U.S.C. § 536(a)).

Petitioners base their challenge to the FCC's standstill authority on Section 624(f)(1) of the Act, which prohibits government authorities (including the Commission) from imposing "requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Act]." 47 U.S.C. § 544(f)(1). Petitioners contend that Section 624(f)(1) bars the FCC from issuing program carriage standstill orders governing cable operators because Title VI does not expressly authorize such orders. NCTA Br. 21-34. Before the FCC, however, TWC not only failed to oppose standstill relief but affirmatively suggested that the FCC *may issue* such relief in cases where the traditional four-part test for granting stays is

satisfied—the very standard the agency has adopted.[16] Petitioners' position on appeal—that Section 624(f)(1) unambiguously precludes the FCC from awarding interim injunctive relief in appropriate cases—is at odds with the text and purposes of Section 616, and should be rejected.

In particular, Section 624(f)(1) is not violated here because, as the Commission explained (*Order* n.107 (JA____)), Section 616(a)—a provision of Title VI—expressly directs the Commission to "establish regulations governing program carriage agreements and related practices." 47 U.S.C. § 536(a). Given that Section 624(f)(1) excludes from its reach requirements "expressly provided in [Title VI]," the language of Section 616(a) by itself refutes petitioners' argument.

Indeed, Section 616(a)'s specific directives regarding the content of the FCC's regulations confirm that the Commission is authorized to issue standstill orders. Sections 616(a)(1) and (3) expressly direct the FCC to

---

[16] *See* Letter from Arthur Harding, Counsel for TWC, to Marlene Dortch, Secretary, FCC, at 2 (filed June 1, 2011) (JA____) ("An MVPD should remain free to exercise its contractual rights to drop or reposition a programmer who has filed a program carriage complaint *unless the Commission determines that the traditional factors for granting a stay are satisfied*.") (emphasis added). TWC's newfound objections to the standstill procedure are particularly puzzling given that the company previously agreed to be bound by a similar standstill condition in conjunction with the FCC's approval of TWC's acquisition of cable systems formerly owned by Adelphia. *See Adelphia Commc'ns Corp.*, 21 FCC Rcd 8203, 8337 (2006) (Appendix B, § 2(c)) (cited in *Order* n.116 (JA____)).

establish rules that "include provisions *designed to prevent*" cable operators or other MVPDs from, *inter alia*, discriminating on the basis of affiliation. 47 U.S.C. § 536(a)(1), (3) (emphasis added). Similarly, Section 616(a)(2) expressly directs the FCC to establish rules that "include provisions *designed to prohibit*" cable operators or other MVPDs from coercing a programmer to provide exclusive rights as a condition of carriage (or retaliating against a programmer that refuses to do so). 47 U.S.C. § 536(a)(2) (emphasis added).

The standstill procedure falls squarely within the express grant of rulemaking authority under the first three subsections of Section 616(a). Consistent with the terms of those provisions, the standstill procedure is "designed to prevent" or "prohibit" cable operators or other MVPDs from taking actions that the statute forbids. If a program carriage complainant can show that it will likely prevail on the merits and will suffer irreparable harm absent an order preserving the status quo (*i.e.*, two of the four prerequisites for obtaining such relief), issuance of such an order is necessarily designed to prevent any ongoing conduct that likely violates the statute—conduct that otherwise might persist for the duration of the proceeding, which may take many months to resolve. It is no answer that the defendant ultimately may prevail (notwithstanding the complainant's prior showing of likelihood of

success on the merits); that is a risk attendant to any form of preliminary injunctive relief.

As the Commission explained, one way in which the standstill provision is designed to prevent or prohibit MVPDs from taking actions in violation of the substantive antidiscrimination provision is by discouraging retaliation for the filing of program carriage complaints. *See Order* ¶ 25 (JA___). Preventing retaliatory conduct itself furthers the goals of the underlying antidiscrimination rule. *Cf. Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 567 (2d Cir. 2011) ("'by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII]'s basic guarantees,'" anti-retaliation provision furthers statute's substantive goal of prohibiting discrimination) (citation omitted).

Petitioners repeatedly contend that the standstill procedure cannot protect against retaliation because there may be situations where an MVPD's decision not to carry a network itself precipitates a complaint and request for standstill relief, so that no further retaliation is possible. NCTA Br. 29-30, 45, 58. Petitioners, however, overlook other situations. For example, an MVPD may propose that, upon expiration of a carriage contract, it will continue carriage of an unaffiliated network, but only on new terms that are

less favorable than those the MVPD affords to its own affiliated networks (such as carriage on a programming tier with a limited subscriber base). In that scenario, the unaffiliated network's filing of a program carriage complaint may cause the MVPD to retaliate by taking a more severe discriminatory action—including dropping the complaining network altogether. A remedy that prevents such retaliation is designed to prevent a violation of the substantive rule.[17]

In any event, petitioners are incorrect in assuming (NCTA Br. 29) that the Commission's sole rationale for standstill relief was to prevent retaliation. As the agency explained, "absent a standstill, programming vendors may feel compelled to agree to the carriage demands of MVPDs, even if these demands violate the program carriage rules, in order to maintain carriage of video programming in which they have made substantial investments." *Order* ¶ 25 (JA____) (citing submissions from unaffiliated networks). Indeed, without interim relief, the ultimate relief awarded (in the form of a carriage order) could be worthless if time-sensitive programming (such as

[17] The Commission left open the possibility that Section 624(f)(1) might bar the issuance of program carriage standstill orders "in *some* circumstances." *Order* n.107 (JA____). It asked for further comment on that issue. *Order* ¶ 60 (JA____). Even assuming that standstill orders might be prohibited in *some* cases, petitioners cannot prevail on their facial challenge to the standstill rule unless they show that Section 624(f)(1) bans standstills in *all* cases involving cable operators. They have failed to make that showing.

seasonal sports programming) is involved; by the time a program carriage proceeding has concluded, the damage already may have been done.

The entry of a stay pending further review is a traditional means of preventing potentially unlawful conduct while a dispute is resolved. Just as judicial stays are designed "to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits,"[18] program carriage standstill orders are designed to prevent irreparable injury in order to preserve the FCC's ability to respond effectively to carriage complaints.

Finally, petitioners' reading of the statute is not only contrary to the text and remedial purposes of Section 616; it also makes little sense as a practical matter. Even under petitioners' reading of the statute, standstill orders would *not* be precluded in all program carriage cases. By its terms, Section 624(f)(1) does not apply to non-cable MVPD services. It refers only to "requirements regarding the provision or content of *cable* services." 47 U.S.C. § 544(f)(1) (emphasis added). Under petitioners' proposed interpretation, Section 624(f)(1) would bar the FCC from issuing standstill orders governing cable operators, but the agency would remain free to issue

[18] *WarnerVision Entm't, Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996) (internal quotation marks omitted)

such orders against other MVPDs, such as satellite television providers.[19] Thus, as petitioners construe the statute, the Commission could issue standstill orders to prevent misconduct by DIRECTV or DISH Network, but it would be powerless to order standstills to stop misconduct by TWC or Comcast (the largest MVPD in the nation). It is highly unlikely that Congress intended to create such an anomalous regulatory regime.

III. THE COMMISSION COMPLIED WITH THE APA WHEN IT CODIFIED ITS STANDSTILL PROCEDURE

Petitioners argue that the Commission's codification of its procedure for granting standstill relief was "arbitrary and capricious" (NCTA Br. 40-47), and that the Commission failed to satisfy the APA's notice requirements before codifying that procedure (TWC Br. 56-60; NCTA Br. 34-39). Neither contention has merit.

A. The Commission Acted Well Within Its Discretion In Codifying Its Standstill Procedure.

Petitioners maintain that the Commission abused its discretion in codifying its standstill procedure because the "costs" of the standstill rule

[19] Apart from the Commission's direct authority to grant standstills pursuant to the express mandate of Section 616, it is undisputed that the Commission has authority to impose standstills on non-cable MVPDs under Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). *See Order* ¶ 26 (JA____-____).

supposedly exceed its "benefits." NCTA Br. 40-47. This argument, however, overlooks the case-by-case nature of standstill relief.

In evaluating standstill requests, the Commission follows the same approach that courts use when considering stay motions. The Commission specifically assesses, *inter alia*, whether "grant of a stay will … substantially harm other interested parties" and whether "the public interest favors grant of a stay." *Order* ¶ 27 (JA___-___). Thus, the costs of granting standstill relief in any particular case will be fully considered and weighed against the benefits in the context of case-by-case adjudication. Indeed, NCTA "[r]ecogniz[es] the highly fact-intensive nature of program-carriage disputes." NCTA Br. 41. In appropriate cases, standstill relief will be denied.

While petitioners speculate that "erroneous standstills" may be granted (NCTA Br. 42), the FCC's standard for granting such relief is the same one that TWC itself proposed. *See* n. 16 *supra*. A complainant cannot obtain a standstill unless it meets the stringent four-part test for preliminary injunctive relief. And, as the Commission emphasized, "'injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the [complainant] is entitled to such relief.'" *Order* n.110 (JA___) (quoting *Winter*, 555 U.S. at 21). The risk of erroneous standstill orders is therefore speculative at best.

Petitioners assert that the Commission will be unable "to provide meaningful relief to an MVPD" in the event of an erroneous standstill order. NCTA Br. 41. In particular, they contend that the availability of interim relief is unduly burdensome because interlocutory review will not be available "to police and deter erroneous standstills." NCTA Br. 42. That is incorrect. Nothing prevents a disappointed cable operator against whom standstill relief is granted from seeking a stay of such relief from the full Commission. *See* 47 C.F.R. §§ 1.43-1.45 (stay procedures), 1.298 (allowing interlocutory relief in cases before ALJ); *see also Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, FCC 12-50 (released May 14, 2012) (staying an ALJ's decision requiring Comcast to carry the Tennis Channel on the same tier as Comcast's affiliated sports networks).[20] Additionally, an MVPD that objects to a standstill order can always seek a judicial stay of the order under the All Writs Act, 28 U.S.C. § 1651. *See, e.g.*, *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985).

[20] FCC Rule 76.10, cited by NCTA (Br. 42), is not to the contrary. That provision bars a litigant from seeking "review" of an interlocutory order. *See* 47 C.F.R. § 76.10(a). Read in context, the provision refers to a request for review on the merits in the form of an "application for review," *see id.* § 76.10(a)(2). It does not state that a request for a *stay* of an interlocutory order (as opposed to review on the merits) will not be entertained.

In the event that an MVPD ultimately prevailed after issuance of a standstill order, the Commission explained that its staff could develop an appropriate remedy for the MVPD "on a case-by-case basis." *Order* ¶ 29 (JA____). The FCC's resolution of a difficult remedial issue in an isolated case might be an appropriate subject for an as-applied challenge to a future Commission order. But at this point, petitioners' conjecture about remedial issues provides no basis for wholesale invalidation of the standstill rule.[21]

Where a standstill is justified, the rule will yield significant benefits. As shown above, a standstill may be "necessary to prevent the likely occurrence of one of the practices expressly prohibited" by Section 616. *Order* ¶ 25 & n.107 (JA____, ____); *see also* Part II, *supra* (discussing retaliation and pressure on unaffiliated networks to agree to unlawful carriage demands). While petitioners assert that the Commission had insufficient evidence that standstill relief was needed (NCTA Br. 44-47), they do not dispute that the FCC received submissions from unaffiliated networks

[21] Equally unfounded is petitioners' argument that standstill relief will distort negotiations which, NCTA contends, "typically occur in the final days or weeks of the existing contract." NCTA Br. 43. Where issuance of standstill relief is a realistic possibility, such negotiations simply will occur earlier. Furthermore, the Commission explained that a standstill may be vacated if the adjudicator "finds that the stay is having a negative effect on settlement negotiations or is otherwise no longer in the public interest." *Order* ¶ 27 (JA___).

attesting to the risk of retaliation absent a standstill. *Order* n.101 (JA___). And it is well settled that agencies can "adopt prophylactic rules to prevent potential problems before they arise. An agency need not suffer the flood before building the levee." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). The potential for anticompetitive conduct by vertically integrated MVPDs justified the FCC's codification of a "prophylactic" standstill rule "regardless of whether there was clear evidence of the existence of such evils." *Viacom Int'l Inc. v. FCC*, 672 F.2d 1034, 1040 (2d Cir. 1982).

B. The Commission Complied With The APA's Notice Requirements.

Before an agency may adopt a rule, the APA generally requires that the agency provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). This notice requirement, however, does not apply to "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The Commission correctly concluded that its codification of its existing standstill procedure fell within this exception to the notice requirement. *Order* ¶ 36 (JA ____-____).

Courts have found several FCC rules to be purely procedural, including the agency's "hard look" rules under which it may summarily dismiss a

defective license application. As the court explained in *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994), those rules were procedural because they "did not change the substantive standards by which the FCC evaluates license applications." This Court applied the same analysis in *Notaro v. Luther*, 800 F.2d 290 (2d Cir. 1986) (*per curiam*), where it held that an "approach set out in [a] training aid" issued by a parole commission fell within the exception to the APA's notice requirement because the aid "accord[ed] with the Commission's regulations and past practices." *Id.* at 291 (citing 5 U.S.C. § 553(b)(A)); *see also Donovan v. Red Star Marine Servs., Inc.*, 739 F.2d 774, 783 (2d Cir. 1984) ("rules that do not change 'existing rights and obligations'" are exempt from APA notice). The FCC's codification of its longstanding procedure for granting standstills falls squarely within this precedent.

The Commission has granted interim injunctive relief in a variety of contexts. *See Order* n.104 (JA___) (citing examples). Even before the Commission codified its program carriage standstill procedure, FCC rules permitted parties to request "temporary relief" from the agency pending resolution of a complaint against an MVPD. *See, e.g.*, 47 C.F.R. §§ 1.45(d), 1.298(a), 76.7(e)(1). Such "temporary relief" plainly encompasses a standstill order to preserve the status quo. Indeed, more than 40 years ago,

the Supreme Court upheld the FCC's issuance of an order barring a cable operator from expanding its service area while the agency reviewed a complaint against the operator. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178-81 (1968).

Petitioners urge the Court to disregard this precedent by asserting that "[t]he FCC has identified no established practice of ordering such relief *in program-carriage cases*." NCTA Br. 35 (emphasis added). That frames the relevant question too narrowly. Standstill relief, like any form of interim injunctive relief, may be granted in a broad array of contexts. Thus, it does not matter that the FCC has not granted such relief specifically in the program carriage context any more than it would matter in determining whether a court has authority to grant a stay that it had not previously granted such relief in that particular category of cases. Nor is it surprising that the FCC has not yet granted a standstill order in the program carriage context. At the time the *Order* was adopted, only eleven program carriage complaints had been filed since Congress enacted Section 616 in 1992. *Order* n.27

(JA____).[22] And, as the Commission explained, standstill relief is an extraordinary remedy rarely granted. *See* Order n.110 (JA___).[23]

Petitioners further contend that the APA notice requirement applies to the standstill rule because the rule affects "substantive rights." TWC Br. 57. Because the rule merely codifies an existing procedure, however, it does not affect substantive rights any more than the pre-existing standstill procedure did. *Order* n.149 (JA___). In any event, "all procedural rules affect substantive rights to greater or lesser degree." *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983); *see also James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) ("an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties"). Indeed, the same could have been said of the FCC's rules allowing the agency to summarily dismiss defective license applications, yet that did not prevent the

---

[22] Only one additional complaint has been filed since the *Order* was adopted.

[23] Petitioners claim to find an inconsistency between the Commission's position that notice was not required here and its decision to seek comment before adopting the program access standstill rule. NCTA Br. 36-37; TWC Br. 59-60. There is no inconsistency. "Agencies are free to grant additional procedural rights in the exercise of their discretion." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978). That the agency previously *chose* to seek comment on standstill procedures in the program access context does not mean that it was *required* by the APA to seek comment again on such relief in the related program carriage context.

rules from being exempt from APA notice requirements. *JEM*, 22 F.3d at 326-28.

In any event, even if the Commission was required to provide notice of the standstill rule, it provided sufficient notice to satisfy the APA. In the *NPRM*, the FCC requested comment on whether it "should adopt additional rules to protect programmers from potential retaliation if they file a complaint." *NPRM* ¶ 16 (JA____). The standstill rule was "a 'logical outgrowth' of this proposal" because the rule "will help to prevent retaliation while a program carriage complaint is pending." *Order* ¶ 36 (JA____). Therefore, the agency's notice complied with the APA. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

Petitioners fault the Commission for failing to propose any "specific" rule concerning standstills. NCTA Br. 38. As this Court has recognized, however, the APA "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." *Mt. Mansfield*, 442 F.2d at 488. Indeed, the APA does not require a rulemaking notice to contain *any* rule proposals. A notice will suffice if it contains "a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3); *see also National Black Media Coal. v. FCC*, 822 F.2d 277, 283 (2d Cir. 1987) (notice is adequate if

it "fairly apprise[s] interested persons of the subjects and issues" of the rulemaking) (internal quotation marks omitted).

Because the APA "does not require a precise notice of each aspect of the regulations eventually adopted," an agency's notice is adequate "so long as it affords interested parties a reasonable opportunity to participate in the rulemaking process." *State of New York Dep't of Soc. Servs. v. Shalala*, 21 F.3d 485, 495 (2d Cir. 1994) (internal quotation marks omitted). The notice here met that requirement. It informed the public "of the issues covered" by the rulemaking and "the purpose" of "any potential regulation." *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006). In particular, the *NPRM* notified interested parties that the FCC was considering the adoption of "rules to protect programmers from potential retaliation if they file a complaint." *NPRM* ¶ 16 (JA____). That proposal led to the standstill rule. *Order* ¶ 36 (JA____).

Petitioners question the relationship between the standstill rule and the prevention of retaliation. NCTA Br. 38; TWC Br. 58. As noted above, however, it was entirely reasonable for the Commission to anticipate that, in the absence of a standstill, an MVPD might respond to a program carriage complaint by threatening to drop the complainant's programming unless the complainant withdrew its complaint and acceded to carriage demands that

violate Section 616. *See* Part II, *supra*. Because "such a possibility" was "reasonably foreseeable," *Long Island Care at Home*, 551 U.S. at 175, the standstill rule was a "logical outgrowth" of the Commission's proposal to consider measures to prevent retaliation.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

JOSEPH F. WAYLAND
ACTING ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SEAN A. LEV
ACTING GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

/s/ James M. Carr

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1762

June 26, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIME WARNER CABLE INC. AND NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 11-4138 (CONSOLIDATED WITH NO. 11-5152)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 13,914 words.

/s/ James M. Carr
James M. Carr
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)
(202) 418-2819 (Fax)

June 26, 2012

STATUTORY APPENDIX

5 U.S.C. § 553

47 U.S.C. § 405
47 U.S.C. § 536
47 U.S.C. § 544

47 C.F.R. § 76.1300
47 C.F.R. § 76.1301
47 C.F.R. § 76.1302

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise

statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 536

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART II. USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

§ 536. Regulation of carriage agreements

(a) Regulations

Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall--

(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(b) “Video programming vendor” defined

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.

47 U.S.C. § 544

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART III. FRANCHISING AND REGULATION

§ 544. Regulation of services, facilities, and equipment

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system--

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise--

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

(c) Enforcement authority respecting franchises effective under prior law

In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

(d) Cable service unprotected by Constitution; blockage of premium channel upon request

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

(3)(A) If a cable operator provides a premium channel without charge to cable subscribers who do not subscribe to such premium channel, the cable operator shall, not later than 30 days before such premium channel is provided without charge--

(i) notify all cable subscribers that the cable operator plans to provide a premium channel without charge;

(ii) notify all cable subscribers when the cable operator plans to offer a premium channel without charge;

(iii) notify all cable subscribers that they have a right to request that the channel carrying the premium channel be blocked; and

(iv) block the channel carrying the premium channel upon the request of a subscriber.

(B) For the purpose of this section, the term "premium channel" shall mean any pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R.

(e) Technical standards

Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

(2) Paragraph (1) shall not apply to--

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this subchapter; and

(B) any rule, regulation, or order under Title 17.

(g) Access to emergency information

Notwithstanding any such rule, regulation, or order, each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the

same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.

(h) Notice of changes in and comments on services

A franchising authority may require a cable operator to do any one or more of the following:

(1) Provide 30 days' advance written notice of any change in channel assignment or in the video programming service provided over any such channel.

(2) Inform subscribers, via written notice, that comments on programming and channel position changes are being recorded by a designated office of the franchising authority.

(i) Disposition of cable upon termination of service

Within 120 days after October 5, 1992, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.

47 C.F.R. § 76.1300

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 76. MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART Q. REGULATION OF CARRIAGE AGREEMENTS

§ 76.1300 Definitions.

As used in this subpart:

(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.

(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.

(c) Buying groups. The term “buying group” or “agent,” for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

(d) Multichannel video programming distributor. The term “multichannel video programming distributor” means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

(e) Video programming vendor. The term “video programming vendor” means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

47 C.F.R. § 76.1301

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 76. MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART Q. REGULATION OF CARRIAGE AGREEMENTS

§ 76.1301 Prohibited practices.

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

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

(c) Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

47 C.F.R. § 76.1302

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 76. MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART Q. REGULATION OF CARRIAGE AGREEMENTS

§ 76.1302 Carriage agreement proceedings.

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

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

(c) Contents of complaint. In addition to the requirements of § 76.7, 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.

(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, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

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

(e) Answer.

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

(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.

(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 one of the following events occurs:

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

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

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

(i) Deadline for decision on the merits.

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

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall

release a decision on the merits within 150 calendar days after the Chief, Media Bureau's prima facie determination.

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

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

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

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

(j) Remedies for violations--

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

law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

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

(k) Petitions for temporary standstill.

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

11-4138 and 11-5152

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Time Warner Cable Inc. and National Cable & Telecommunications Association, Petitioners

v.

Federal Communications Commission and the United States of America, Respondents.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on June 26, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Floyd Abrams
Landis C. Best
Cahill Gordon & Reindell LLP
Eighty Pine Street
New York, NY 10005
Counsel for: Time Warner Cable Inc.

Matthew A. Brill
Amanda E. Potter
Matthew Murchison
Richard P. Bress
Latham & Watkins LLP
555 11th Street, N.W.
Suite 1000
Washington, D.C. 20004
Counsel for: Time Warner Cable Inc.

Miguel A. Estrada
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for: National Cable & Telecommunications Association

Nancy C. Garrison
Catherine G. O'Sullivan
US Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530
Counsel for: USA

/s/ James M. Carr