STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, DISSENTING IN PART

Re: *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage; Revision of the Commission's Program Carriage Rules, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*

Today, we take steps to improve our procedures for handling program carriage complaints. By setting forth the requirements to establish a *prima facie* case, along with timelines for filings and decisions, we increase the likelihood that frivolous complaints will be summarily dismissed and legitimate cases will be investigated expeditiously as mandated by Congress.[1] I support these actions.

Regrettably, the majority has adopted rules requiring multichannel video programming distributors ("MVPDs") to continue to carry programming on pre-existing terms and conditions, also known as "standstill" arrangements. Pursuant to these rules, an agreement will be extended until a program carriage dispute is resolved. The Commission, however, did not provide adequate notice and opportunity for comment under the Administrative Procedure Act ("APA"). An analysis of a possible standstill framework would benefit significantly from further debate. Accordingly, I respectfully dissent from this portion of the *Order*.

The APA requires that a notice contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[2] Here, as evidence of notice, the majority points to one sentence in a 2007 notice requesting comment on whether to adopt rules "to protect programmers from potential retaliation if they file a complaint."[3] The majority asserts that the standstill rules are a "logical outgrowth" of this proposal. I disagree.

In interpreting the "logical outgrowth" standard, courts have stated that "notice must be sufficient to fairly apprise interested parties of the issues involved, but it need not specify every precise proposal which [the agency] may ultimately adopt as a rule."[4] On the other hand, notice

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[1] 47 U.S.C. § 536(a)(4).

[2] 5 U.S.C. § 553(b)(3).

[3] Leased Commercial Access and Development of Competition; Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Notice of Proposed Rulemaking*, 22 FCC Rcd 11222, 11227 ¶ 16 (2007).

[4] *See* Nuvio Corp. v. FCC, 473 F.3d 302, 310 (D.C.Cir. 2006) (citing Action for Children's Television v. FCC, 564 F. 2d 458, 470 (D.C.Cir. 1977)). Courts have asserted that fair notice to the affected parties is of paramount importance. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) ("The Courts of Appeals have generally interpreted [the APA notice requirement] to mean that the final rule the agency adopts must be 'a logical outgrowth of the rule proposed. The object, in short, is one of fair notice.'" (internal citations omitted)); *see also* Council Tree Commc'ns, Inc. v. FCC, 619 F. 3d 235, 250 (3d Cir. 2010) (citing Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C.Cir. 2005)).

can also be "too general to be adequate."[5] Without reasonable notice regarding the specific ideas and alternatives being considered, "interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking."[6]

Although it may be difficult to identify precisely how much notice is sufficient under the "logical outgrowth" standard, the relationship between retaliation and standstill arrangements, which is tenuous at best, makes the rule adopted today vulnerable to a court remand.[7] In this instance, standstill arrangements were not discussed in the 2007 notice, so interested parties were not aware that comments should be filed on the subject during the notice-and-comment period.[8] In fact, the idea of a standstill provision was not raised by any parties submitting initial comments. Instead, the matter was advanced after the close of the comment period.[9] Thus, all interested parties may not have had an opportunity to opine on the inclusion of a standstill arrangement as part of the program carriage complaint process.[10]

I am also disappointed that the majority has failed to consider the recent media ownership decision, *Prometheus II*, in which the U.S. Court of Appeals for the Third Circuit held that two sentences in a notice of proposed rulemaking that indicated the Commission's intention to revise the cross-ownership rule was too general and open-ended to have fairly notified the public of the

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[5] Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 209 (D.C.Cir. 2007); Small Refinery Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C.Cir. 1983). *See also* Prometheus Radio Project v. FCC, No. 08-3078, slip op. at 30 (3d Cir. July 7, 2011) (stating that the language in the NPRM was "simply too general and open-ended to have fairly apprised the public.").

[6] *Small Refinery Lead Phase-Down Task Force*, 705 F.2d at 549; United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, 839 (D.D.C. 1985). *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.").

[7] It is arguable, under the interpretation of some courts, that the "logical outgrowth" doctrine would not even apply in this instance, because the notice did not suggest the possibility of standstill arrangements and "[s]omething is not a logical outgrowth of nothing." *Council Tree Commc'ns*, 619 F.3d at 250*; Int'l Union, United Mine Workers of Am.*, 407 F.3d at 1259; Kooritzky v. Wright, 17 F.3d 1509, 1513 (D.C.Cir. 1994).

[8] *See, e.g.,* CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80 (D.C. Cir. 2009); Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C.Cir. 2004).

[9] *See Order* at 19 n.101 (citing *ex parte* letters discussing standstill arrangements with the earliest being filed in November 2007); Media Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rule Making Regarding Leased Commercial Access and the Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Public Notice*, 22 FCC Rcd 13190 (2007) (announcing the deadlines for comments and reply comments as September 4, 2007 and September 21, 2007, respectively); Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Order Granting Extension of Time for Filing Comments and Reply Comments*, 22 FCC Rcd 16103 (2007) (extending the deadlines for comments and reply comments to September 11, 2007 and October 12, 2007, respectively).

[10] *See* Nat'l Exch. Carrier Ass'n, Inc. v. FCC, 253 F.3d 1, 4 (D.C.Cir. 2001) (stating that "the logical outgrowth test normally is applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule."); *Small Refinery Lead Phase-Down Task Force*, 705 F.2d at 549 (stating that an agency "must *itself* provide notice of a regulatory proposal [and], having failed to do so, it cannot bootstrap notice from a comment.").

new approach to cross ownership.[11] Here, the majority adopts rules based on far less specificity provided to the public for its analysis and comment. The 2007 notice does not explicitly, or even implicitly, contemplate standstill arrangements. Furthermore, it does not suggest the proposed extension of program carriage agreements or the continuation of programming during the complaint process, even in the most general of terms.

Furthermore, I am not convinced by the majority's argument that the regulations codifying standstill arrangements are solely rules of agency procedure for which no notice is required under the APA.[12] These rules confer substantive rights by authorizing the Media Bureau, upon the filing of a petition by a complainant, to grant a temporary standstill of the price, terms, and other conditions of the existing contract. A rule that extends a contractual arrangement and determines the amount of compensation parties will receive after the program carriage dispute is resolved is outside the scope of Commission procedure.[13]

Moreover, I am not persuaded by the majority's position that these rules are procedural based on our previous use of standstills as a form of injunctive relief under section 4(i) of the Communications Act.[14] Although I recognize that standstills in program carriage disputes have been implemented on a case-by-case basis, these arrangements have not been reviewed by the Commission or a court for consistency with Section 616 of the Communications Act, which allows for penalties and remedies, such as ordering program carriage, only upon the finding of a violation, or Section 624, which prohibits the Commission from imposing requirements on the provision or content of cable services beyond those provided by statute.[15] While the majority

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[11] *Prometheus Radio Project*, No. 08-3078, slip op. at 30.

[12] 5 U.S.C § 553(b)(A). The cases cited by the majority state that actions, such as application freezes, and rules regarding the filing and processing of applications and amendments are agency procedure and practice. *See Order* at 27-28 n.149. Here, we are not only setting forth procedural rules, such as what petition to file and when, but also taking actions that "alter the rights or interests of the parties." *See, e.g.,* James V. Hurson Assocs, Inc. v. Glickman, 229 F.3d 277, 280 (D.C.Cir. 2000); JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320, 326 (D.C.Cir. 1994).

[13] *See, e.g.,* Sprint Corp. v. FCC, 315 F.3d 369, 375 (D.C.Cir. 2003) (holding that rule changes regarding payment obligations require notice under the APA); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C.Cir. 1987) ("Substantive rules are ones which 'grant rights, impose obligations, or produce other significant effects on private interests' or which 'effect a change in existing law or policy.'"). "[T]he APA's procedural rule exception is to be construed very narrowly, and it does not apply where the agency 'encodes a substantive value judgment.'" *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C.Cir. 1989) (citing *Am. Hosp. Ass'n*, 834 F.2d at 1047).

[14] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[15] 47 U.S.C. § 536(a)(5) (providing for "appropriate penalties and remedies for violations of [regulations governing program carriage agreements], including carriage"); 47 U.S.C. § 544(f)(1) (prohibiting any Federal agency, State, or franchising authority from "impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in this subchapter."); 47 C.F.R. 76.1302(g)(1) ("*Upon completion of* [a program carriage] *proceeding*, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system.") (emphasis added); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, *Notice of Proposed Rule Making*, 8 FCC Rcd. 194, 206 ¶ 58 (seeking comment about implementing Section 616(a)(5) of the

asserts that there are parallels to the program access regime where Section 4(i) was relied upon in adopting standstill rules, there are significant statutory and regulatory differences between program access – where a programmer is under an obligation not to withhold the network from the MVPD[16] – and program carriage – where the carriage of programming is not assured and the statute and rules explicitly state that carriage is a remedy that can only be imposed upon a finding of a violation of the rules.[17] Ironically, despite the alleged similarities between program access and program carriage frameworks raised by the majority, we determined that specific comment regarding standstill arrangements and procedures was necessary only in the program access proceeding.[18]

The majority's insistence in keeping the standstill provisions in the *Order* is even more perplexing when today's *Order* is accompanied by a *Notice* seeking comment on possible revisions to the Commission's program carriage rules. Curiously, the rules adopting the standstill arrangements appear in the *Order*, but we then seek comment on several aspects of their actual implementation in the *Notice*.[19] With an available vehicle at our disposal, clarity and

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Cable Act of 1992, including what procedures should be established for mandatory carriage and how long should such carriage last). *Compare* United States v. Sw. Cable Co., 392 U.S. 157, 181 (1968) (finding that the FCC, in the absence of a statue, did not exceed or abuse its authority under the Communications Act by regulating the community antenna television industry under Section 4(i)), *with* Am. Tel. & Tel. Co. v. FCC, 487 F.2d 865, 875-76 (2d Cir. 1973) (holding that Section 4(i) cannot be used to circumvent "statutorily prescribed procedures with consequent frustration of the statutory purpose.").

[16] *Compare* 47 U.S.C. § 536(a)(3), *and* 47 C.F.R. § 76.1301(c), *with* 47 U.S.C. § 548(c)(2)(B), *and* 47 C.F.R. § 76.1002(b) (showing that the program carriage rules make discrimination unlawful only insofar as it is "on the basis of affiliation," whereas the program access rules make discrimination unlawful across the board. Further, the program carriage rules prohibit MVPDs from discriminating in the "*selection*, terms or conditions of carriage", whereas the program access rules prohibit discrimination in the "prices, terms or conditions" of sale, making it clear that the carriage of the particular network is presumptive in the program access context but not in the program carriage context (emphasis added)).

[17] *Compare* 47 U.S.C. § 548(e)(1) ("Upon completion of [a program access] adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor"), *and* 47 C.F.R. 76.1003(h)(1) ("Upon completion of [a program access] adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the imposition of damages, and/or the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor."), *with* 47 U.S.C. § 536(a)(5) (stating explicitly that remedies, including *carriage*, can be ordered upon the finding of a violation or the program carriage rules), *and* 47 C.F.R. 76.1302(g)(1) (stating that *mandatory carriage* can be ordered upon completion of a program carriage proceeding).

[18] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket Nos. 07-29 and 07-198, *Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, 17868-70 ¶¶ 135-137 (2007). We also requested comment regarding the Commission's authority provide for mandatory interim carriage during retransmission consent disputes. *See* Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, *Notice of Proposed Rulemaking*, 26 FCC Rcd 2718, 2727-29 ¶¶ 18-19.

[19] For example, the right to seek a standstill arrangement for all program carriage complaints is adopted in the *Order*, but we then seek comment on whether there are circumstances in which the Commission's authority to issue

transparency would be served, with limited delay, by seeking comment on the entirety of the standstill rules and procedures, as opposed to the current approach of dividing the matter between the *Order* and *Notice*.[20]

As we move ahead, I look forward to engaging with my colleagues and interested parties on the myriad program carriage issues, and I thank the Media Bureau for its work on this matter.

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temporary standstills is statutorily or otherwise limited. Similarly, the majority reasons that we have provided ample notice for implementing the standstill rules based on comment as to whether we should adopt retaliation rules, but, curiously, we seek comment in the *Notice* regarding the extent of our authority to adopt any anti-retaliation provisions. Furthermore, the *Order* adopts rules to determine how the parties will be compensated (the "true up") after resolution of the program carriage complaint. However, we seek comment regarding how the true up will be determined in more complex program carriage disputes, such as when the programming is discontinued or the programming tier is challenged. Thus, certain standstill arrangements may be implemented while we are still considering the best methodology for making the parties whole after the complaint process concludes making the adopted standstill regime almost literally "half baked." The Commission is capable of providing a much better work product than this.

[20] Moreover, as a policy matter, I am concerned about the unintended consequences of these standstill rules. For instance, will standstill arrangements, generally, and the requirement to submit a petition for a standstill 30 days before expiration of a programming agreement negatively affect the negotiation process by prematurely ending the discussions between parties? Could these rules enhance the bargaining power of vendors with the most popular programming resulting in price increases that will be passed along to consumers? What is the appropriate standard that the complainant has to meet to obtain a government-mandated extension of the terms and conditions of a privately-negotiated contract? Will MVPDs be reluctant to add new, unproven programming to their packages knowing that existing carriage agreements could be extended if they try to renegotiate terms or discontinue programming, even if it is not popular with subscribers? What are the First Amendment implications of implementing standstill arrangements in program carriage disputes? These important questions, along with whether we have statutory authority to implement standstills, could have been illuminated by requesting further comment. However, I am encouraged to see that the majority recognizes that standstill relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" and that the Media Bureau will consider, when determining whether to grant a standstill, the First Amendment rights of the MVPD, whether irreparable harm has been established, and the circumstantial nature of the evidence in program carriage complaints. *See Order* at 22 n.110 (citing Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 21 (2008)).