DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR

Re: *In the Matter of Amendment of Fostering Independent and Diverse Sources of Video Programming*, MB Docket No. 24-115, Notice of Proposed Rulemaking.

I am open to the FCC taking a fresh look at the authority Congress delegated to the agency over carriage agreements between multichannel video programming distributors (MVPDs) and video programming vendors in Section 616 of the Communications Act in light of the modern media landscape. But today's Notice of Proposed Rulemaking (NPRM) does not do that. Instead, it proceeds from a dated view of the marketplace that can only further tilt the regulatory playing field in a way that will not serve consumers' interests. It also offers up a series of expansive conclusions about our Section 616 authority that go beyond the specific provisions Congress included in that law.

It is no surprise that the NPRM starts from a legacy viewpoint. After all, the NPRM revives a 2016 FCC initiative that looked at these same issues. The Commission first launched that 2016 effort earlier that same year through a broad Notice of Inquiry, followed by public listening sessions, before ultimately proposing new rules in an NPRM adopted by a 3-2 vote.[1] The FCC never proceeded to adopt a final order on those proposed rules, and in 2020, the agency terminated the dormant proceeding after years of no new activity in the record.

In the intervening years, the video marketplace has continued to evolve dramatically. Consumers have more programming choices than they did in 2016, especially as over-the-top (OTT) streaming services have emerged and fundamentally altered the competitive landscape. Traditional MVPDs, meanwhile, have seen a sharp decline in market share as consumers continue to cut the cord. Indeed, the market shows signs of fierce competition—as the FCC's own NPRM today acknowledges.

This proceeding—whether intended or not—will only serve to widen the regulatory imbalance between traditional MVPDs and their OTT competitors. Since the FCC first went down this path in 2016, OTT streaming services, including those offered by Big Tech companies, have solidified their positions as the new 800lb gorillas. So it does not strike me that now is the time for the FCC to look at more heavily regulating traditional MVPDs through one-sided rules. At the moment the FCC moves forward with this proceeding, those traditional MVPDs are bleeding subscribers by the millions to their unregulated competitors. If the FCC's past is prologue, then the agency's piecemeal meddling will end up doing more harm than good. And from my perspective, the last thing we should be doing is further widening the gap between traditional MVPDs and Big Tech streaming services when it comes to regulation. Unless and until Congress decides to delegate additional authority to the FCC over OTT streaming, we should act with the appropriate dose of regulatory humility.

Regrettably, this isn't a one-off instance. We've seen in recent months the Biden Administration push for greater government control over the media landscape. A few months ago, for instance, the FCC took the unprecedented step of dictating how MVPDs advertise their prices. And in a separate proceeding, the FCC seems poised to regulate MVPD consumer contracts by restricting termination fees. These initiatives rested on dubious legal authority.

Today's NPRM appears to me to be part and parcel of that broader effort, which I cannot support. It relies on Section 616(a) of the Communications Act, which lists six very specific things the FCC can

[1] *See Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Proposed Rulemaking, 31 FCC Rcd 11352, 11394-96 (2016) (dissenting statement of Commissioner Ajit Pai).

regulate in MVPD carriage agreements. That list provides a good clue of how Congress intended to circumscribe our statutory authority. But the NPRM asserts that we may go beyond that list and exercise freewheeling authority over private carriage agreements. I am dubious. A similarly expansive interpretation of Section 616(a) bogged down the Commission's 2016 efforts, so it is unfortunate to see it carried over here.

None of this is to suggest that diverse and independent programmers don't face real challenges to having their content reach wide audiences. I've long been sympathetic to those headwinds and remain open minded about potential paths forward. But I do not see one in this proceeding. I dissent.