PUBLIC VERSION - REDACTED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

LIBERMAN BROADCASTING AND LBI MEDIA PETITION FOR RECONSIDERATION

September 26, 2016

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PETITION FOR RECONSIDERATION

Pursuant to section 1.106 of the Commission's rules,[1] Liberman Broadcasting, Inc. and LBI Media, Inc. (collectively, "LBI") respectfully request that the Media Bureau ("Bureau") reconsider the order released on August 26, 2016 in the above-captioned proceeding ("*Order*").[2]

I. SUMMARY

The *Order* is wrong as a matter of law because it erroneously concluded that a "video programming vendor" under section 616 of the Communications Act of 1934, as amended (the "Act"), excludes a television broadcast station. The Act specifically and unambiguously includes a "television broadcast station" as a video programming vendor. This error alone justifies reconsideration of the *Order*.

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[1] 47 C.F.R. § 1.106.

[2] *See* Liberman Broadcasting, Inc. and LBI Media, Inc. v. Comcast Corporation and Comcast Cable Communications, LLC, MB Docket No. 16-121, *Memorandum Opinion and Order*, DA 16-972 (Aug. 26, 2016) ("*Order*").

The *Order* also erred by deviating from, indeed even failing to acknowledge, Commission precedent where the Commission shortly after the passage of the 1992 Cable Act[3] concluded that section 616 includes "a broadcast network." Compounding these errors of law, the *Order* questioned whether LBI offered its video programming for sale, when the facts indisputably and without challenge from Comcast indicate LBI sought payment for its programming from Comcast. Finally, the *Order* failed to find standing, even pursuant to its own erroneous interpretation of it, where LBI sought carriage from Comcast in so-called "white areas," where LBI does not operate or own a broadcast station and is not affiliated with a broadcast station.

The Bureau should reconsider and vacate the *Order*, find that LBI has established a *prima facie* case under section 616 of the Act, and refer the complaint to the Administrative Law Judge to address outstanding questions of fact.

II. BACKGROUND

LBI and its subsidiary, Estrella TV, produce, create, and distribute Spanish-language programming by means of (1) LBI-owned and operated broadcast stations, (2) third party-owned broadcast affiliates, and (3) cable and satellite multichannel video programming distributors ("MVPDs"). LBI creates 75% of its own, original programming in its studios in Burbank, California. This programming is popular with viewers, and when given a fair opportunity, it is distributed by every major MVPD. In critical Hispanic TV markets, Estrella TV's popularity exceeds that of Comcast-owned Telemundo during certain hours of the day, including in prime time. Estrella TV's popularity consistently exceeds NBC Universo's.

[3] Cable Television and Consumer Protection Competition Act of 1992, 106 Stat. 1460 ("1992 Cable Act").

Based on the popularity and success of Estrella TV, in the fall of 2014 LBI engaged Comcast in negotiations for the carriage of Estrella TV. LBI sought distribution and compensation similar to that received by Telemundo: (1) carriage and compensation for all Estrella TV owned and operated stations; (2) carriage in markets where non-owned Estrella TV broadcast affiliates operate; and (3) carriage and compensation in "white areas" where there is neither an Estrella TV owned and operated station nor an Estrella TV affiliate. Comcast repeatedly and comprehensively rejected LBI's attempts to obtain fair carriage and compensation. During the course of these negotiations, it became clear that Comcast's intransigence had nothing to do with the merits of LBI's request but rather Comcast's well-documented incentive to discriminate in favor of its affiliated programming, Telemundo and NBC Universo.

On February 9, 2016, LBI provided Comcast with written notice of its intent to file a program carriage complaint. On April 8, 2016, LBI filed its complaint, establishing a *prima facie* case that Comcast had violated section 616 of the Act, sections 76.1301(a) and (c) of the Commission's rules,[4] and conditions placed on Comcast by the *Comcast-NBCU Order*. On August 26, 2016, the Bureau issued the *Order* erroneously dismissing LBI's complaint.

[4] As established in the complaint, and contrary to Commission rules, Comcast also sought to require LBI to give Comcast a financial interest in Estrella TV's digital rights as a condition of carriage.

III. THE BUREAU IGNORED THE PLAIN LANGUAGE OF THE ACT, COMMISSION PRECEDENT, AND UNDISPUTED FACTS TO CONCLUDE THAT LBI IS NOT A "VIDEO PROGRAMMING VENDOR" OFFERING ITS PROGRAMMING "FOR SALE" UNDER SECTION 616

A. The Act Unambiguously States: "Video Programming Means Programming...Provided By A Television Broadcast Station"[5]

The *Order* erroneously concludes that a "video programming vendor" under section 616 *excludes* a television broadcast station, even though the statute specifically and unambiguously *includes* television broadcast stations in the definition of video programming vendor. The *Order* started with the language of section 616, which states that a video programming vendor is "a person engaged in the production, creation, or wholesale distribution of video programming for sale,"[6] but then determined that "a better reading of [video programming vendor] excludes broadcast licensees."[7] In doing so, it failed to account for the fact that Congress defined the term "video programming" in section 602.

In section 602, Congress unambiguously defined the term "video programming" as "programming provided by...a television broadcast station."[8] Section 616 uses this defined term. Therefore, the term "video programming vendor" in section 616 must be read as "a person engaged in the production, creation, or wholesale distribution of[, among things, programming provided by a television broadcast station]."[9] By finding that the "better reading" of "video

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[5] 47 U.S.C. § 522(20).

[6] 47 U.S.C. § 536(b). Even if "video programming" was not specifically defined, LBI is a video programming vendor pursuant to the unambiguous plain reading of section 616, as previously argued by LBI.

[7] *Order* ¶ 12.

[8] 47 U.S.C. § 522(20).

[9] *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning....That is to say, the statute 'read as a whole'...leads the reader to a definition" that must be followed) (citing

programming vendor" excludes a television broadcast station, the Bureau unlawfully *excluded* the specifically defined term "video programming." But the Bureau—indeed the Commission—lacks the authority to substitute its "better reading" for the plain meaning of the statute.[10] Under *Chevron*, the Bureau "must give effect to the unambiguously expressed intent of Congress"[11] and therefore may not "read out" broadcasters from the definition of "video programming vendor."[12]

B. Retransmission Consent and Section 616 Are Not Mutually Exclusive

Rather than relying on a straightforward interpretation of the statute, the *Order* instead justified its interpretation of "video programming vendor" by declaring the retransmission consent regime and section 616 mutually exclusive. But the notion that a term so specifically defined by statute can be redefined "when read in the context of the statute as a whole" is an overreach of the Bureau's authority.[13] Indeed, it is the Bureau that failed to read the statute "as a

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Meese v. Keene, 481, U.S. 465, 484-85 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term") and *Colautti v. Franklin*, 439 U.S. 379, 392-93, n.10 (1979) ("As a rule, 'a definition which declares what a term "means" ... excludes any meaning that is not stated'")).

[10] *See Order* ¶ 12.

[11] *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 942 (8th Cir. 2015), *aff'd*, 136 S. Ct. 1072 (2016) (Mem.) (finding language of the Equal Credit Opportunity Act unambiguous and refusing to defer to the Federal Reserve's interpretation).

[12] *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 234 (1994) (finding that "our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the federal Communications Act of 1934" and upholding the D.C. Circuit's striking down of Commission's mandatory detariffing policy); *Sw. Bell v. FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995) ("Congress enacted the Communications Act and the mandates of the Act are not open to change by the Commission or the courts.").

[13] *See Util. Air Regulatory Group. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("The power of executing the laws...does not include a power to revise clear statutory terms..."); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007) ("To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is...an entirely unacceptable method of construing statutes").

whole" by failing to account for the statutorily defined term "video programming." Consequently, the statute read as a whole requires the Commission to conclude that the term "video programming vendor" includes broadcast stations.

Even if the statute were vague or ambiguous (which it is not), there is nothing in the statute itself or its legislative history that establishes this purported mutual exclusivity.[14] The Commission has never held that sections 325 and 614 of the Act are mutually exclusive from section 616.[15] The Bureau's reliance on instances where the Commission discusses sections 325 and 614, relating to must carry and retransmission consent, without also addressing section 616 in those same discussions, cannot reasonably be interpreted to indicate mutual exclusivity; it just means that there are two distinct, rather than mutually exclusive, provisions of the Act. The two regimes redress different shortcomings in the marketplace, and their attendant injuries. The retransmission consent provisions remedy MVPD failure to negotiate in good-faith,[16] while section 616 remedies discrimination by MVPDs in favor of affiliated content.[17] They can and do coexist as remedies available to broadcasters that are also programmers. There are instances where a broadcaster will need the protection of section 616; for example, a broadcaster may not discover a cable operator's discrimination, with the potential remedy coming only from section

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[14] Because section 616 unambiguously incorporates television broadcast stations within its scope, the Bureau's findings in paragraphs 13-18 are moot. Nevertheless, LBI disagrees with the Bureau's reasoning that section 616 and retransmission consent are mutually exclusive.

[15] *See Order* ¶ 17 n.71. Similarly, the Bureau's reliance on the Commission's order implementing section 207 of the Satellite Home View Extension and Reauthorization Act of 2004 for the proposition that "other than mandatory carriage and other circumstances specifically identified in the Act, 'all other lawful carriage of television broadcast stations is by retransmission consent'" is unavailing. Section 616 establishes protections for broadcasters and other video programming distributors against discrimination and coercion. It does not establish a general program carriage regime.

[16] 47 C.F.R. § 76.65(a).

[17] 47 U.S.C. § 536(a).

616, until after a negotiation over retransmission has begun.[18] It would seem odd that, given the special status the Act affords broadcasters (with which even Comcast agrees in this case),[19] Congress would permit discrimination by a cable operator in favor of its own broadcast stations but not its own cable channels.[20]

The *Order* incorrectly concludes, again without any support, that sections 325 and 614 together "establish a comprehensive set of rights and obligations" for broadcasters and MVPDs.[21] In fact, retransmission consent remedies merely require an MVPD and broadcaster to negotiate in good-faith.[22] Where retransmission obligations apply to every MVPD, Congress adopted section 616 in those narrower and unique sets of circumstances where an MVPD is a vertically-integrated content provider.[23] And where retransmission consent addresses only the rights a broadcaster may have in its signal, section 616 addresses the rights that a broadcaster that is also a programmer may have with respect to the carriage of its programming, both within its broadcast regions and outside of such regions. Consequently, retransmission consent and

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[18] Moreover, simply because a broadcaster has not previously filed a program carriage complaint does not mean broadcasters are precluded from doing so, especially given clear Commission precedent stating a broadcaster's qualification as a "video programming vendor." Indeed, in the twenty-four years since the adoption of section 616, only eleven (including LBI's) program carriage complaints ever have been filed with the Commission and made it to a Bureau decision. And only nine retransmission complaints (excluding unauthorized retransmission complaints) have been filed. Each retransmission complaint was settled by the parties or denied. To date, no complainant in a program carriage dispute has ultimately prevailed. Such a record no doubt has dissuaded potential complainants from coming forward over the years.

[19] *See* Comcast Answer at 30 ¶ 44 (citing the 1992 Cable Act § 2(a)(12)).

[20] Among other reasons, because section 616 applies only to vertically-integrated MVPDs that discriminate in favor of their affiliated content, making the remedies of section 616 available to broadcasters would not open a floodgate of additional program carriage complaints.

[21] *Order* ¶ 15.

[22] 47 C.F.R. § 76.65(a).

[23] 47 U.S.C. § 536(a)(3).

section 616 can and do coexist as remedies available to broadcasters that are also programmers. Section 616 is not a "third carriage option," as the *Order* declares.[24] Rather, it provides a remedy in a narrow and unique circumstance of unlawful discrimination by a vertically-integrated cable operator. That Congress crafted a nondiscrimination remedy that exists alongside rules governing the general relationship between broadcasters and cable operators is not surprising, nor unusual. Indeed, remedies involving discrimination often apply alongside more general laws that govern commercial relationships.[25]

C. The *Order* Conflicts With Commission Precedent

The *Order* also errs by rejecting and even ignoring Commission precedent that squarely addresses the question of whether a television broadcast station is a video programming vendor under section 616. Shortly after the passage of the 1992 Cable Act, the Commission found in its report to Congress that "video programming vendor" includes a television broadcast station:

> [T]he term 'video programming vendor' refers to *any provider of video programming*, not just cable entities, and therefore *includes a broadcast network*....[26]

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[24] *See Order* ¶ 15.

[25] For example, the laws that govern the relationship between workers, employers, unions, and government exist in tandem with anti-discrimination laws that are triggered in narrower cases involving discrimination based on race, color, religion, sex or national origin. *Compare* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a), 207 (establishing minimum wage, maximum hours worked and collective bargaining) *with* Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) *and* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2 (prohibiting certain discriminatory employment practices); *compare* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et al.* (establishing regulatory regime for employee benefit rights) *with* 29 U.S.C. § 1140 (a narrowly tailored provision preventing employers from discriminating against employees for exercising a vested right).

[26] Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration, *Interim Report*, 8 FCC Rcd. 4875, 4889 ¶ 74 (1993) (emphasis added) ("*Commission Interim Report*").

In making this finding, the Commission explicitly relied on the statute's reference to "video programming vendors," without further categorization, to support its interpretation, and explicitly rejected the conclusion that legislative history suggested a more narrow interpretation.[27] The Commission affirmed this conclusion in its Final Report.[28] Acting under delegated authority, the Bureau must apply established Commission policy and precedent.[29] It certainly cannot reverse it. Such failure is grounds for reconsideration.[30]

The Commission subsequently has applied its conclusion that "video programming vendor" includes a broadcaster in no less of a context than in a program carriage complaint proceeding involving the Tennis Channel's claim that Comcast unlawfully discriminated against the Tennis Channel in favor of its affiliated network, the Golf Channel. In the appeal of that matter, the Commission's brief to the U.S. Court of Appeals for the D.C. Circuit stated:

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[27] *See id.*

[28] *See* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration, *Final Report*, 9 FCC Rcd. 3440, 3442 ¶ 3 (1993).

[29] *See* 47 C.F.R. § 1.115(b)(2)(i) (providing action taken pursuant to delegated authority that is in conflict with statute, regulation, case precedent or established Commission policy as grounds for Commission review); Atlantic Telecommunications, Inc. Application to Modify Private Land Mobile Radio Station WPLR713, Brooming Grove, New York, *Order on Reconsideration*, 16 FCC Rcd. 2940, 2941 ¶ 5 (2001) (finding that the Bureau "must reverse" on reconsideration its prior decision that was not in accordance with the Commission's rules) ("*Atlantic Telecommunications*").

[30] *See* 47 C.F.R. § 1.115(b)(2)(i); *Atlantic Telecommunications*, 16 FCC Rcd. at 2941 ¶ 5. Despite the Commission's specific rejection of legislative history in favor of the plain, broad definition of "video programming vendor," *see Commission Interim Report*, 8 FCC Rcd. at 4889 ¶ 74, the Bureau's decision rested substantially on such legislative history. Indeed, the Bureau justified its decision almost exclusively on "the design and legislative history" of the statute, which it believed "establish[s] separate and mutually exclusive regulatory regimes to govern the relationships between: (i) broadcasters and MVPDs; and (ii) non-broadcast programming networks and MVPDs." *Order* ¶¶ 13-14.

"programming vendors, such as broadcast stations…produce video programing."[31] While the *Order* acknowledges this statement in a footnote, it simply responds without explanation that the Commission's brief was not summarizing prior Commission interpretations of the term "video programming vendor."[32] In fact, however, the Commission's statement appears in the section of the brief titled "Statutory and Regulatory Background," where the Commission informs the court about the definitions of relevant terms in section 616.[33] In the brief, the Commission explains that the term "video programming vendor" includes broadcast stations, citing the definition of "video programming vendor" in the Commission's regulations.[34] Indeed, the Commission did not provide the court with a summary of prior Commission interpretations, but rather it accurately described the unambiguous, statutory definition of a term central to the case before the court.

D. LBI Offered Its Video Programming "For Sale"

The *Order* also erred in questioning whether LBI makes its programming available "for sale." The *Order* superfluously observed that "in its capacity as a broadcaster, LBI is engaged in the retail distribution of its programming for free."[35] But how LBI distributes its programming

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[31] Brief for Respondents, *Tennis Channel, Inc. v. FCC*, No. 15-1067, 2016 WL 3606323, at 4 (Oct. 21, 2015) ("*Commission's Tennis Channel Brief*"). Additionally, in the 1993 *Broadcast Signal Carriage Report and Order*, the Commission observed that "it is possible that Section 616 may apply separately to retransmission consent agreements." Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, *Report and Order*, 8 FCC Rcd. 2965, 3006 n.452 (1993) ("*Broadcast Signal Carriage Report and Order*"). While this statement by itself may have left an open door for standing, the Commission quickly closed that door in the *Commission Interim Report* three months later. *Commission Interim Report*, 8 FCC Rcd. at 4889 ¶ 74.

[32] *See Order* ¶ 12 n.57.

[33] *See Commission's Tennis Channel Brief*, 2016 WL 3606323, at 4.

[34] *Id.*

[35] *Order* ¶ 12.

to its broadcast audiences is not at issue. The relevant question is whether LBI sought compensation from Comcast in exchange for making its programming available to the cable operator.

In the ten program carriage complaints where the Bureau has found standing, the controversy between the video programming vendor and the MVPD involved, among other things, the fee that the complainant sought in its negotiations with the MVPD.[36] For example, the Bureau found in the *NFL-Comcast HDO* that the NFL Network sought a licensing fee from Comcast in exchange for making video programming available.[37] In each case, the complainant met the "for sale" requirement by seeking fees for the distribution of its programming. Similarly, the genesis of the underlying complaint before the Commission is Comcast's refusal to pay LBI money in exchange for being able to carry Estrella TV content. There is no dispute over this fact.[38] The *Order*'s characterization was plain error.

The *Order*'s reasoning would have the additional perverse effect of denying standing to a cable-only network that seeks carriage without a per subscriber fee. Under the Bureau's interpretation of "for sale," pure cable channels that seek carriage without a per subscriber fee

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[36] *See e.g.*, Game Show Network, LLC v. Cablevision Sys. Corp., *Hearing Designation Order and Notice of Opportunity for Hearing Forfeiture*, 27 FCC Rcd. 5113, 5118 ¶ 7 (2012); Tennis Channel, Inc. v. Comcast Cable Communications, Inc., *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 25 FCC Rcd. 14149, 14161 ¶¶ 19-20 (2010) ("*Tennis Channel HDO*"); NFL Enters. LLC v. Comcast Cable Communications, LLC, *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14818, 14825 ¶¶ 66-67, 79 (2008) ("*NFL-Comcast HDO*"); TCR Sports Broad. Holding, L.L.P, D/B/A Mid-Atlantic Sports Network v. Comcast Corp., *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14839 ¶¶ 115-16 (2008).

[37] *See NFL-Comcast HDO*, 23 FCC Rcd. at 14815, 14818, 14825 ¶¶ 59, 66-67, 79.

[38] Complaint at 23 ¶ 36 ("LBI approached Comcast...to secure...distribution (and related compensation) on Comcast nationwide"); Comcast Answer at 88 ¶ 36 (admitting that "LBI demanded increased distribution and compensation for carriage from Comcast").

would not constitute "video programming vendors," and cable operators would be free to discriminate against such networks. Those networks do not have the ability under the statute to seek carriage on a retransmission consent or must-carry basis.[39] The result would be that such cable-only networks would have no protection under the Act even in the face of clear discriminatory behavior. But there are good reasons for a cable channel to choose not to charge a per subscriber fee—for example, to build a larger viewer base and gain exposure.[40]

The *Order* goes on to conclude that LBI sought compensation only for its *signal*, not its programming, reasoning that "[c]ompensation for cable carriage of the video programming content carried by television broadcast stations is governed by the compulsory copyright license."[41] This is wrong. Statutory licensing is available to cable providers under section 111(c) of the Copyright Act, but the provision does not "govern" compensation between a cable provider and content owners. Such licensing is available only when the retransmission is otherwise permissible under Commission rules.[42] Absent retransmission consent, Comcast cannot retransmit Estrella TV without violating Commission rules.[43] Therefore, until LBI grants

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[39] *See* 47 U.S.C. § 325; 47 U.S.C. § 534.

[40] Such cable networks are likely to be small and lack market power, and thus the most in need of protection from the anti-discrimination statute. *See e.g.*, *Tennis Channel HDO*, 25 FCC Rcd. at 14151 ¶ 5 (noting that the Tennis Channel, "to foster its growth,...offered preferential terms to distributors, like Comcast, that agreed to carry the network before it had become well-established.").

[41] *Order* ¶ 12.

[42] *See e.g.*, Bill Lake, *The Time Has Come to End Outdated Broadcasting Exclusivity Rules*, FCC Blog (Sep. 22, 2015), https://www.fcc.gov/news-events/blog/2015/09/22/time-has-come-end-outdated-broadcasting-exclusivity-rules ("The fact that an MVPD pays to retransmit the 'signal' of a station does not hide the fact that the payment is the key that unlocks the right to retransmit the content carried on the signal and that the content providers have been paid for inclusion of their programming.")

[43] 47 C.F.R. § 76.64(a).

such consent, Comcast cannot avail itself of the statutory license. And in electing retransmission consent in lieu of must carry in its broadcast markets, LBI sought to sell *both* its content and its signal to Comcast.[44] LBI holds property rights in *both* its signal and its content.[45] To the extent that Comcast would pay statutory royalties (under 17 U.S.C. § 111) for LBI's consent for retransmissions in LBI's broadcast markets (under 47 U.S.C. § 325), such royalties are only a portion of compensation for vendors such as LBI (or Telemundo) that own their own content and seek retransmission consent. In any event, LBI clearly sought compensation for its content in non-broadcast markets, where statutory royalties are not available.[46]

IV. LBI HAS STANDING UNDER THE *COMCAST-NBCU ORDER* AND IS ENTITLED TO THE COMCAST-NBCU REMEDIES

The Bureau found that LBI failed to demonstrate standing to bring a program carriage complaint under the *Comcast-NBCU Order* for "substantially the same reasons" as in the section 616 context.[47] As the Bureau noted, the definition of "video programming vendor" in the *Comcast-NBCU Order* is identical to the definition in section 616(b).[48] Thus, the plain meaning of "video programming vendor," and Commission precedent, as discussed above, supports a

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[44] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fourteenth Report*, 27 FCC Rcd. 8610, 8780 n.1251 (2012) (recognizing that "broadcast stations negotiate for retransmission consent for MVPD carriage of their signals, including broadcast network programming").

[45] Government Accountability Office, Statutory Copyright Licenses: Stakeholders' Views on a Phaseout of Licenses for Broadcast Programming, at 9-10 (May 2016), http://www.gao.gov/assets/680/676935.pdf (the property right over their broadcast signal granted to broadcast television stations is "distinct from the right to perform copyright-protected material embedded in the broadcast signal.").

[46] *See* 17 U.S.C. § 111(c).

[47] *Order* ¶ 2.

[48] *Id.* ¶ 5; *see also* Applications of Comcast Corporation, General Electric Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4358, Appendix A (2011) ("*Comcast-NBCU Order*").

finding of standing for LBI to bring a complaint under the *Comcast-NBCU Order* on reconsideration.

This means that LBI is entitled to a corresponding benefit of the remedies made available under those procedures. Under the *Comcast-NBCU Order*, an aggrieved vendor is required only to show that it was discriminated against on the basis of its affiliation or non-affiliation and does not have to prove that it was unreasonably restrained from competition.[49]

V. THE BUREAU ERRED IN NOT CONSIDERING ESTRELLA TV DISTRIBUTION OUTSIDE AREAS WHERE ESTRELLA TV IS BROADCAST

Even were section 616 to apply only to cable channels (it does not), the Bureau nevertheless erred in failing to consider LBI's case against Comcast in the "white area" markets that have neither an LBI-owned and operated broadcast station nor a broadcaster affiliate. Contrary to the Bureau's conclusion that LBI did not argue that its satellite feed qualifies as a "video programming vendor,"[50] both of LBI's counts for relief were broadly worded and referred to illegal action against Estrella TV generally, and not just with regard to its provision of video programming in a broadcast capacity.[51] As the Bureau recognized, LBI alleged that it had sought from Comcast carriage and compensation of Estrella TV in "white area" markets where there is neither an Estrella TV-owned and operated station, nor an Estrella TV affiliate, and thus

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[49] *See Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121. While, for the reasons set forth below and in the complaint, LBI has fully meet its burden of demonstrating such unreasonable restraint, *see* 47 C.F.R. § 76.1301(c), LBI is not required to do so and is entitled to the remedies available under the *Comcast-NBCU Order*.

[50] *Order* ¶ 19 n.77.

[51] Complaint at 51 ¶¶ 87, 89 (alleging that Comcast "has discriminated against LBI by refusing to carry Estrella TV on comparable terms and conditions as similar channels owned by Comcast" and violated the Commission's rules by "requiring LBI to give Comcast a financial interest in Estrella TV's digital rights as a condition of carriage").

where Estrella TV is provided on a non-broadcast basis.[52] Comcast denied this request for carriage of Estrella TV's programming in white areas. LBI further alleged that Comcast violated section 616 by refusing "LBI fair and critically important distribution comparable to that enjoyed by Comcast-owned Telemundo and NBC Universo,"[53] which are both carried in many markets as cable channels.

VI. LBI HAS DEMONSTRATED A *PRIMA FACIE* CASE UNDER SECTION 616

LBI has demonstrated a *prima facie* case under section 616, for both its broadcast and non-broadcast markets, and therefore has standing. Besides making a showing of qualification as a "video programming vendor," a *prima facie* case of program carriage discrimination prohibited by section 616 is demonstrated when (1) the defendant is an MVPD as defined in section 76.1300(d) of the Commission's rules; (2) the complainant programmer is similarly situated to a programmer affiliated with the defendant MVPD; (3) the defendant MVPD has treated the complainant programmer differently from its similarly situated, affiliated programmer with respect to the selection, terms, or conditions for carriage; and (4) the defendant MVPD's discriminatory conduct has the effect of unreasonably restraining the ability of the complainant programmer to compete fairly.[54]

LBI has met each of these factors in both its broadcast and non-broadcast markets. First, Comcast is an MVPD.[55] Second, LBI also has shown that Estrella TV is similarly situated to Telemundo and NBC Universo, both of which are Comcast affiliates. As discussed in the complaint,

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[52] *Order* ¶ 8.

[53] Complaint at 34 ¶ 56.

[54] *Tennis Channel HDO*, 25 FCC Rcd. at 14153-54 ¶ 9.

[55] *Order* ¶ 1.

> Estrella TV competes closely with Telemundo and NBC Universo programming in genre, ratings, target audience, target advertisers, and target programming. That is: (i) all three networks are Spanish language; (ii) Telemundo *and* Estrella TV each offers a closely comparable mix of programming that includes news, sports, reality, talk, drama, and comedy programming targeting audience and advertisers; and (iii) NBC Universo offers a programming mix similar to Telemundo and Estrella TV, but without news.[56]

Because Estrella TV's programming is distributed "throughout the United States by means of LBI-owned and operated broadcast stations, third party-owned broadcast affiliates, and cable and satellite multichannel video programming distributors," Estrella TV competes with, and is similarly situated to, Telemundo and NBCU Universo in both markets where it is distributed by television broadcast stations and where it is distributed solely via cable.[57]

Third, Comcast has treated Estrella TV differently from Telemundo and NBC Universo in that it has "refuse[d] to engage Estrella TV in any bona fide, legitimate discussion of the business merits of fair Comcast distribution of Estrella TV" and "denie[d]...that Estrella TV has any distribution value and, on that ostensible basis, refuse[d] LBI fair and critically important distribution comparable to that enjoyed by Comcast-owned Telemundo and NBC Universo."[58]

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[56] Complaint at 14 ¶ 24; *id.* at Ex. 12 (identifying in detail similarities between Estrella TV, Telemundo and NBCUniverso, including target audiences, advertisers, and type of programming).

[57] *Id.* at iii; *see id.* at 7 ¶ 11 ("Comcast distributes Telemundo across its many markets throughout the United States" and "Comcast widely distributes NBC Universo within the United States"); *id.* at Ex. 12 (Comcast has lauded NBC Universo as "one of the most widely available modern cable channels for U.S. Latinos" and Telemundo as a network available through multiple platforms, including through seventeen owned stations, and broadcast and MVPD affiliates); Comcast Answer at 75 ¶ 130 ("Telemundo and NBC Universo target nationwide Hispanic viewers").

[58] *Id.* at 26, 34 ¶¶ 41, 56; *see id.* at Ex. 19 {{**BEGIN CI** [redacted]

This discrimination in distribution and compensation occurred for both Estrella TV's television broadcast stations (including LBI owned and operated stations and non-owned affiliate stations), and in Estrella TV's non-broadcast, "white area" markets.[59]

Finally, Comcast's discriminatory conduct has the effect of unreasonably restraining the ability of LBI to compete fairly because it limits Estrella TV's ability to compete for viewers with Telemundo and NBC Universo in both LBI's broadcast and non-broadcast markets. In LBI's broadcast markets, Comcast's discontinuation of Estrella TV led to the significant reduction of Estrella TV's ratings, and a corresponding benefit to Telemundo.[60] In LBI's non-broadcast markets, Comcast's discriminatory actions unreasonably restrain LBI's ability to fairly compete by

> creat[ing] an unfortunate array of collateral damage, which includes, but is not limited to, harming Estrella TV's ability to continue to produce unique programming; foreclosing access by Estrella TV advertisers to Comcast markets; and depriving consumers of programming they want to watch, including but not limited to popular news programming that provides substantial public interest benefits.[61]

LBI has therefore made the *prima facie* showing required to bring a complaint under section 616 in both its broadcast and non-broadcast markets.

[redacted] **END CI}}**

[59] *Id.* at 23 ¶ 37.

[60] *Id.* at 29 ¶ 46; *id.*, Appendix A, Expert Report of Harold W. Furchtgott-Roth at 24-27 ¶¶ 60-67.

[61] Complaint at 39 n.89. Even if the Bureau finds that LBI has not made a *prima face* case that Comcast's discriminatory conduct has the effect of unreasonably restraining the ability of LBI to compete fairly, such conduct still constitutes a violation of the *Comcast-NBCU Order* and the Bureau must allow the Complaint to proceed under the *Comcast-NBCU Order* remedies. *See id.* at 10-13 ¶¶ 21-23; n.41 *infra*.

VII. REQUEST FOR "PERMIT BUT DISCLOSE" STATUS

This Petition for Reconsideration involves "primarily issues of broadly applicable policy"[62] — namely the definition of "video programming vendor" — and not just the rights and responsibilities of specific parties. Therefore, in accordance with the Commission's ex parte rules, the Petition for Reconsideration should be converted to "permit but disclose" status so that public participation in the proceeding can be ensured, including through ex parte meetings with Commission staff.[63] As with similar contexts, LBI understands that the complaint proceeding itself would remain restricted such that the merits of the complaint would not be discussed in any ex parte meetings.[64]

VIII. CONCLUSION

For these reasons, the Commission should grant LBI's Petition for Reconsideration and designate the complaint for hearing.

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[62] 47 C.F.R. § 1.1208 n.2.

[63] *See id.* The ex parte rules of section 1.1206 should be applied to the Petition for Reconsideration instead of the restricted proceeding rules of section 1.1208. *See id;* 47 C.F.R. § 1.1206.

[64] *See, e.g.,* Media Bureau Action – "Permit But Disclose" Ex Parte Procedures Established for Docket Seeking Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, *Public Notice*, 29 FCC Rcd. 11600 (Sep. 30, 2014).

Respectfully Submitted,

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September 26, 2016

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on this 26th day of September, 2016, I caused true and correct copies of the foregoing to be served upon the following:

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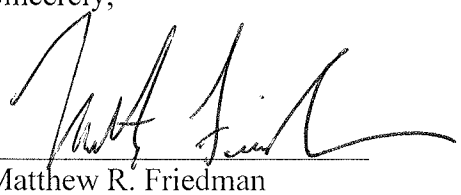
Sincerely,



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