Program Access and Program Carriage

Nearly 25 Years In, Where Do the Fraternal Twins of Video Programming Distribution Stand? Part Two

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Part One of this article examined the origins and development of the FCC's Program Access rules, which ensures "multichannel video programming distributors" ("MVPDs") have a certain degree of access to license carriage of video programming. Now, we turn to Program Carriage, the "fraternal twin" of Program Access. Where Program Access protects MVPDs against potential abuses by programmers, Program Carriage protects programmers against certain potential abuses by MVPDs.

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The Program Carriage regime comprises a thick and often murky mixture of anti-discrimination and antitrust doctrines. Program Carriage proceedings can be long and expensive processes almost akin to an antitrust trial, entailing factually intense issues of whether video programmers have been "coerced," "retaliate[ed] against," or the targets of discrimination "on the basis of affiliation" that "unreasonably restrains" the programmer's ability to "compete fairly." Fewer than ten proceedings have been brought in the nearly 25 years that Program Carriage has existed and not a single, reported victory for the protected class (non-affiliated programmers) has survived the appeal process. The critical question now is whether the Program Carriage regime (or some form of it) can and should be used to ensure continued program diversity and competitiveness as the distribution arm of the industry "skinnies up," repackages, and revamps to compete with an ever-growing field of new services.

I. The Basics of the Program Carriage Regime

A. Statutory Mandate

The "Program Carriage" regime derives from Section 616 of the Communications Act of 1934, 47 U.S.C. Section 536. Section 616 was added in 1992 as part of the omnibus Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Among other things, the 1992 Cable Act sought to protect against potential harms that might flow from vertical integration of cable operators and programmers. Congress broadly directed the FCC to promulgate regulations "governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." 47 U.S.C. § 536(a).

Congress specified that the Program Carriage regulations were to prohibit at least three types of conduct by an MVPD believed to pose a threat to competition and diversity in video programming:

(1) any requirement that a programmer grant an MVPD a financial interest in the programming service as a condition for carriage ("Financial Interest");

(2) any effort to make exclusivity a condition of carriage on an MVPD either through coercion of a programmer or retaliation if a programmer failed to provide the MVPD an exclusive carriage license ("Exclusive Rights");

(3) any conduct by an MVPD the "effect" of which is to "unreasonably restrain the ability of an unaffiliated [programmer] to compete fairly" by "discriminating . . . on the basis of affiliation or nonaffiliation of [programmers] in the "selection, terms, or conditions for carriage of video programming" ("Discrimination").[1]

Congress further specified that the FCC must put a process in place for "expedited review" of any Program Carriage complaints.[2] The FCC also is authorized to determine "appropriate penalties and remedies" for Program Carriage violations, including requiring forced "carriage."[3] Finally, to prevent abuse of the Program Carriage rules as a negotiating tool, Congress authorized the FCC to impose penalties for "frivolous" Program Carriage complaints.[4]

B. The FCC's Implementing Regulations

The FCC's implementing "Program Carriage Rules" are found at 47 C.F.R. § 76.1301, et seq. The FCC issued the first set of Program Carriage Rules in 1993,[5] whic it then amended in 1994.[6] The FCC recognized that the Program Carriage regime requires a balance between preventing harmful, anticompetitive abuse by MVPDs and preserving legitimate business practices that undergird a robust marketplace to create and distribute programming. Thus, the FCC sought to put in place regulations that would carry out the Program Carriage requirements of the 1992 Cable Act, but "without unduly interfering with legitimate negotiating practices between multichannel video programming distributors and programming vendors."[7]

In 2011, the FCC sought to overhaul key aspects of the Program Carriage Rules based on more than a decade of experience, including its conclusion that the procedures were "ineffective" and "in need of reform."[8]

The 1993, 1994, and 2011 rules are discussed in detail below. In addition, in 2011, the FCC also issued a Notice of Proposed Rulemaking for even more reforms.[9] To date, however, the Commission has not issued any further Program Carriage rules.

II. Lifecycle of a Program Carriage Proceeding

The basic processes for Program Carriage claims are set forth at 47 C.F.R. 76.1302, along with general FCC procedural rules found at 47 C.F.R. 1.1, et seq. The key phases of a Program Carriage proceeding are:

- Pre-Filing Notice: Before filing a Program Carriage Complaint, the Complainant must give the subject MVPD at least 10 days' notice that it intends to file a Complaint. The pre-filing notice must be "sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint."

- Pleadings: Complainant files complaint along with documentary evidence or affidavits sufficient to support a prima facie case of a Program Carriage violation. MVPD has 60 days to respond to the complaint, including specific, responsive evidence.[10] The Complainant has 20 days to file any reply.

- Prima Facie Determination: The Media Bureau has 60 days from the reply date to determine whether the Complainant has demonstrated a prima facie case and, if so, determine whether (1) the case will proceed before the Media Bureau on the papers, (2) the Media Bureau will order limited discovery to allow it to resolve the complaint, or (3) the case will be referred to an ALJ for an initial decision.

- Resolution by Media Bureau: For claims kept within the Media Bureau, the bureau must issue its decision on the merits within 60 days (if no discovery ordered) or 150 days (if limited discovery is ordered), each time frame measured from the date of the prima facie case determination.

- Resolution by ALJ: For claims sent to an ALJ (currently, there is just one), the parties will be asked to advise the ALJ whether they will first seek to use an ADR process to resolve the dispute. If ADR is not chosen or does not resolve the dispute, the ALJ has 240 days to hold a hearing and issue a decision on the merits. These ALJ timeframes may be "tolled," however: (1) if the parties agree, (2) if Due Process requires, or (3) if tolling is required in light of the resources available to the Office of Administrative Law Judges.[11]

- Review by Commission: A party aggrieved by a Media Bureau or ALJ decision may petition the Commission for review within 30 days of the decision. There is no deadline for the Commission to decide such petitions.

- Appeals to Circuit: The Commission's final decision can be appealed by petition to a Circuit Court of Appeals within 60 days of the publication of the decision. The petitioning party may petition either to the D.C. Circuit or to the Circuit in which the petitioner "resides of has its principal office."[12]

III. Key Procedural Issues

The process for Program Carriage claims is relatively straightforward on its face. Over the years, however, it has proven fraught with uncertainty and controversy.

A. Standing

The initial 1993 regulations allowed only aggrieved programmers to bring a Program Carriage claim. Certain cable operators and an industry group quickly petitioned to expand the regulations to allow MVPDs to bring Program Carriage complaints.[13] They argued that, although the Program Carriage regime is aimed at curbing certain conduct by MVPDs, the conduct at issue impacts both programmers and other MVPDs. For example, if an MVPD coerces an exclusivity provision from a programmer, competing MVPDs obviously are impacted. MVPDs asserted that they needed their own standing to press Program Carriage claims because a programmer (especially one that has been coerced) may not be willing to file a complaint.[14] The FCC agreed, adding MVPD standing in the 1994 amendments to the Program Carriage Rules.[15]

B. Statute of Limitations

The statute of limitations is illustrative of the basic procedural uncertainties in Program Carriage proceedings. Section 1302(h) provides a one-year period to bring a Program Carriage complaint.[16] Despite (and perhaps because of) three rounds of rulemaking, however, a fundamental dispute remains as to what conduct triggers the one-year period.

As the rules currently are drafted, the one-year limitation period is triggered by one of three events: (1) the execution of a carriage agreement that violates the Program Carriage Rules, (2) an offer of new carriage that violates the Rules, or (3) sending a pre-filing notice.[17] It is the third option that has created controversy.

The Media Bureau has repeatedly asserted that section 1302(h)(3) should be read literally and, therefore, permits a complaining party to bring a Program Carriage complaint within one-year of a pre-filing notice, regardless of when the underlying violation allegedly occurred (and, potentially, regardless of whether the limitations period might otherwise be triggered under sections 1302(h)(1) or (2)).[18] In each case, however, the Bureau has also observed that the complaint was filed within one year of the alleged violation itself. As such, section 1302(h)(3) has been used to allow claims brought within one year of an allegedly discriminatory denial of a request to move a channel from one "tier" of programming to another under a contract executed years before the denial of re-tiering.[19] A lengthy, concurring opinion in the D.C. Circuit, however, asserted that section 1302(h)(3) was intended to apply only to claims based on failures or refusals to negotiate for carriage and any claim based on alleged discriminatory application of an existing contract right can be brought only within one year of the execution of the underlying contract, as provided in section 1302(h)(1).[20]

In 2011, the Commission proposed to amend its rules to replace the tripartite statute of limitations with a single provision requiring Program Carriage complaints to be brought within one-year of the claimed violation.[21] To date, however, the Commission has issued no such rule, nor otherwise amended the statute of limitations rule.

Given the Media Bureau's readings and years of inaction on changing section 1302(h), complaining parties may be able to argue that any reinterpretation of section 1302(h) now would be unduly prejudicial. The safer, conservative approach, however, would be to bring a Program Carriage complaint within one year of the alleged violation rather than rely solely on triggering the limitations period by the pre-filing notice under section 1302(h)(3).

C. Expeditious Determination

In 1992, Congress mandated "expedited" review of Program Carriage complaints. The reality, however, is that the issues presented in Program Carriage disputes are rarely simple. And there is much at stake, for both sides. ALJ hearings in Program Carriage disputes look much more like a federal antitrust trial than a "fact" hearing to determine who said what and when. And the process, from beginning to end, typically takes years to resolve.

For example, in July 2015, an ALJ held a two-week hearing on the Game Show Network's Program Carriage complaint against Cablevision. The parties were represented by multiple senior lawyers on both sides and presented a total of six expert and six fact witnesses. The parties submitted both pre-hearing briefs and post-hearing proposed Findings of Fact and Conclusions of Law. Moreover, the Enforcement Bureau (which participated in the hearing, although not a party), was asked to provide its own comments on the post-hearing proposals. Closing arguments were not held until October 30, 2015.

As of the writing of this article (June 2016), the ALJ had not yet issued his decision on Game Show Network's claims. Once it is issued, it will be subject to further review by, at least, the full Commission, which itself could take a year or more to issue its decision. Add on a year or two for review by a Circuit Court of Appeals, and the process plainly is far from "expedited."

The speed of proceedings today was not always the case. In 2006, the FCC itself ordered an ALJ to issue a recommended decision and order in just 45 days in a dispute concerning Comcast's carriage of the MASN regional sports network.[22] Similarly, in 2008, the Media Bureau issued an omnibus Hearing Designation Order ("HDO") in six Program Carriage disputes requiring the ALJ to issue decisions in all six disputes within 60 days of the HDO.[23] When the ALJ instead scheduled hearings to take place months after the deadline, the Media Bureau sought to step in and take the matters back to resolve without judicial intervention.[24] In response to an emergency petition from the MVPD respondents, and notwithstanding its own order in the first MASN proceeding, the FCC determined that the Due Process rights of the parties could not be subordinated to desires for expedition decisions. The Commission returned the matters to the ALJ.[25] Rather than set a firm (let alone expedited) date for decision, the FCC directed the ALJ to decide the disputes "as expeditiously as possible, consistent with the mandates of fairness and due process."

In response to proposed rulemaking in 2007, programmers complained that the process no longer provided the "expedited review" Congress mandated and that the delays were discouraging Program Carriage complaints from being filed.[26] After a four-year rule-making process, the FCC issued regulations in 2011 that put in place the current timeframes.

Overall, the current rules contemplate a seven to ten month lifecycle for complaints to be resolved by the Media Bureau and a thirteen month period for complaints to be resolved by an ALJ.[27] These periods are just to get an initial Media Bureau or ALJ decision. Tack on time for an almost certain appeal to the Commission and a possible petition to a Circuit Court of Appeals, and resolution of a Program Carriage complaint is likely to span at least 2-3 years.

The FCC acknowledged that these periods were longer than it had initially hoped. Nonetheless, it determined based on its experience with the Program Carriage complaints that had been filed that such time frames were needed in view of the "fact-intensive nature" of Program Carriage claims and the need (in many cases) for detailed analysis of negotiations, as well as comparisons of programming.[28]

In practice, the timeframes put in place in 2011 have not led to more frequent use of Program Carriage proceedings. Only two proceedings have been commenced since the new rules were enacted.[29] Whether the pace of proceedings is discouraging complaints is far from clear. For example, it could easily be that programmers are more "discouraged" by the fact that no programmer has obtained relief under the Rules and by the fact that Program Carriage proceedings have evolved over time into relatively complex cases litigated at levels more akin to an antitrust case than an administrative proceeding. Finally, in considering whether the current timeframes strike the right "balance," it is worth observing that, in the Game Show Network case, the length and pace of the proceedings has largely been the result of requests and agreements of the parties themselves.

D. Standstill

Although the Program Access rules incorporate certain anti-retaliation and anti-coercion protections, the FCC was nonetheless concerned that programmers seeking renewal of an existing carriage agreement may be reluctant to pursue legitimate claims if, in the meantime, the MVPD could drop the channel or refuse to continue carriage other than on the allegedly unlawful terms. Accordingly, in 2011, the FCC issued rules allowing a Complainant to seek a temporary standstill order at the outset of the case, essentially equivalent to a preliminary injunction preserving the status quo of the programmers' then-current carriage.[30]

Among other things, the FCC noted that similar standstill rules already existed under the Program Access regime and that automatic "stays" existed for carriage renewal arbitrations brought under Commission orders approving certain media company mergers.[31] The FCC also rejected arguments that the standstill orders would violate MVPDs' First or Fifth Amendment rights.[32] The FCC reasoned that the standstill rule was content-neutral, subject to only intermediate review, and that there continued to be an important and substantial government interest in ensuring that vertically integrated MVPDs did not undermine competition and diversity in the marketplace, such as by discriminating against programmers on the basis of affiliation. The FCC concluded that the case-by-case approach of the Program Access rules was sufficiently tailored to burden no more speech of the MVPDs than necessary to address actual abuses of vertical integration.[33] The FCC similarly rejected arguments that the standstill provision would affect an unconstitutional "taking."[34]

Following implementation of the standstill rules, MVPDs petitioned the Second Circuit to hold that the entire Program Carriage regime violated the First Amendment. Alternatively, the MVPDs argue that the standstill rules specifically should be struck for violation of the notice of rulemaking requirements under the Administrative Procedure Act. In August 2013, the Second Circuit rejected the First Amendment challenge (discussed below), but agreed that the FCC had failed to give sufficient notice of its intent to enact a standstill rule.[35]

To date, the FCC has not instituted new rule making proceedings for a standstill rule.

III. Substantive Standards for Discrimination Cases

In the nearly twenty-five years that the Program Carriage Rules have been in effect, only three discrimination claims have gone to final decision.[36] Each case failed at a different level in the process, but the ultimate decision was that the evidence did not show discrimination on the basis of affiliation or non-affiliation within the meaning of the Program Carriage Rules. Given the limited precedent, it is worth reviewing why each claim was found lacking.

A. TCR (MASN) v. Time Warner Cable

The first case is TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc. [37] The complaining programmer was Mid-Atlantic Sports Network ("MASN") a regional sports network that televises (among other things) games played by the Baltimore Orioles and the Washington Nationals. MASN had been in discussions with Time Warner Cable ("TWC") for a number of years seeking carriage on TWC's North Carolina cable systems. MASN claimed that TWC unlawfully discriminated against MASN and ostensibly in favor of two channels then-affiliated with TWC, News 14 and Turner South. The crux of MASN's claim was that News 14 (which briefly aired NBA Charlotte Bobcats games) and Turner South (which televised NBA Atlanta Hawks and NHL Atlanta Thrashers) were carried by TWC on its "analog tier," the most widely purchased package in North Carolina, but that TWC refused to similarly carry MASN in that most-popular package.[38]

TWC countered, among other things, that it had not refused to carry MASN, but had instead offered to carry MASN throughout North Carolina on the "digital tier" available to customers for an additional fee and that it also had suggested carrying MASN on the analog tier in the eastern portions of North Carolina.[39] TWC also argued that its decisions with respect to MASN were based on the lack of demand within much of North Carolina for Baltimore and DC games, the relative cost to carry MASN, and its desire to conserve its bandwidth for other uses.

Two arbitrators each concluded that TWC's refusal to carry MASN on the analog tier throughout North Carolina was discriminatory.[40] The FCC Media Bureau agreed, denying TWC's petition for review.[41] The Commission, however, reversed the Bureau.[42] That decision was upheld by the Fourth Circuit.[43]

The decisions in TCR spanned from 2008 to 2012 and highlight several core, recurring issues in Program Carriage discrimination cases.

1. Burden of Proof: Throughout the proceedings, the parties battled over the burden of proof with respect to discriminatory treatment.

MASN pressed for a standard that presumes all programmers "similarly situated" to those affiliated with an MVPD are entitled to equal treatment and that the burden is on the MVPD to justify any "disparate treatment."[44] TWC equated that approach to a "common carrier" standard and argued instead that the burden remains on the programmer to prove that the reason for any differential treatment was the fact that the programmer was not affiliated with the MVPD.[45] The Commission expressly declined to resolve the issue, finding that TWC would have prevailed under either formulation.[46] The

Fourth Circuit similarly found a decision on the burden of proof unnecessary.[47]

2. Editorial Judgment and Allocation of Resources: TWC argued throughout the proceedings that the Program Carriage anti-discrimination rules cannot unduly interfere with an MVPD's "editorial judgment."[48]

The arbitrator and the Media Bureau gave the argument short shrift, reasoning that discrimination by an MVPD based on programmer affiliation is not protectable "editorial judgment."[49] Indeed, the arbitrator categorically declared that a vertically-integrated MVPD could not assert that it declined carriage of a non-affiliated channel based on a cost-benefit analysis.

The Commission, however, found that deference to an MVPD's "editorial judgment" does impact the assessment of claims of discrimination. In particular, the Commission ruled that TWC could defend its alleged differential treatment of MASN and TWC-affiliated channels based on a cost-benefit analysis of carrying MASN, including an assessment of demand for MASN, the per subscriber fees, and the additional cost to TWC of bandwidth.[50] Among other things, the Commission highlighted that there was no evidence that TWC's decision not to carry MASN had caused customers to defect to another carrier or competitors even to try to use MASN as a hook to draw away TWC customers.[51] The Commission also found it compelling that most other cable operators in North Carolina came to the same conclusion as TWC and opted not to carry MASN.[52]

3. Undocumented or Post Hoc Rationales: TCR also raised important questions of whether an MVPD charged with carriage discrimination can justify its decision with analyses that it did not conduct at the time of the actual decision and that it generally does not conduct at all, including when deciding on carriage for its affiliated channels.

The arbitrator was dismissive of much of TWC's evidence comparing MASN and other sports channels and justifying its decision as a reasonable "cost-benefit" analysis because TWC had not engaged in an extensive, detailed, and documented analysis at the time of its decision. And, in response to evidence that TWC did not generally assess the ratings or other measures of demand for its own networks, the Media Bureau did not just discount the evidence. Rather, it held that "the program carriage provisions . . . prohibit[] [an MVPD] from applying to unaffiliated programming services more stringent standards, including ratings standards, than those it applie[s] to affiliates." [53]

The Commission, by contrast, reasoned that "nothing in Section 616 of the Act or its implementing rules requires program carriage defendants to memorialize any aspect of their decision making process" and there was no evidence in the record that cable operators typically document their carriage decisions.[54] The Commission therefore did not find the lack of contemporaneous records was grounds to dismiss the testimony of TWC's witnesses as to why their carriage decision was justified. It did, however, note that "prudence" suggested MVPDs document their decisions to some extent, if only to avoid prolonged litigation.[55] The Fourth Circuit agreed with the Commission, citing decisions in the employment discrimination context that "decline to read significance solely into the timing of a defendant's explanation or the absence of contemporaneous evidence."[56]

4. Economic Incentives: TCR also brought to the fore core issues about what constitutes unlawful "discrimination" on the basis of affiliation versus lawful, head-to-head competition. In particular, the Media Bureau concluded that its finding of discrimination was bolstered by evidence that TWC allegedly "had an economic incentive" to thwart MASN's growth because the TWC affiliated channels and MASN often competed to license the same sports rights from teams.[57] The Commission, however, underscored that, where there is evidence that an MVPD acted for legitimate, non-discriminatory reasons, the mere fact that it may have had an "economic incentive" to discriminate is of no consequence.[58]

5. Unreasonable Restraint on Ability to Compete: Finally, the parties in TCR disputed the standard to prove the additional element of an "unreasonable restraint" on the ability of the programmer to compete. TWC argued that MASN would have to show that TWC's failure to carry the channel would so severely disadvantage MASN that the channel would be at risk of failure altogether.[59] MASN argued that it could meet this burden by showing that TWC's differential treatment simply placed MASN at a relative disadvantage compared to other RSNs.[60] The

Media Bureau agreed with MASN.[61] The Commission declined to decide the issue given its threshold finding that the evidence did not show unlawful discrimination.[62]

B. Herring Broadcasting, Inc. v. Time Warner Cable, et al.

The second Program Carriage claim to go to decision was a consolidated set of four complaints by Herring Broadcasting concerning its channel, WealthTV.[63] Herring claimed that the four distributors that own iN DEMAND (TWC, Cox Communications, Bright House Networks, and Comcast) had discriminated against WealthTV in favor of MOJO, a short-lived HD channel offered by iN DEMAND. The essence of the claim was that Wealth TV was "similarly situated" to MOJO, but the iN DEMAND owners carried only MOJO.[64]

As in TCR (MASN), the Media Bureau found that WealthTV had presented a sufficient prima facie case of discrimination to warrant an evidentiary hearing by an ALJ.[65] In particular, the Bureau found that WealthTV's complaint laid out a sufficient basis to claim that (a) WealthTV was "similarly situated" to MOJO (a channel affiliated with the respondents), (b) the MVPDs had treated WealthTV differently than MOJO (not carrying the former, while carrying the latter), and (c) the lack of carriage itself imposed an "unreasonable restraint" on WealthTV's ability to compete. The Bureau further concluded that the written record pointed to factual disputes as to whether the MVPDs' failure to carry WealthTV was based on affiliation discrimination in favor of MOJO.[66]

In contrast to TCR (MASN), however, the ALJ ultimately found no discrimination. The FCC affirmed.[67] While each case is fact specific, the WealthTV decisions again provide several useful insights about the Program Carriage regime and its evolution.

1. Burden of Proof:

Like MASN, WealthTV argued that its presentation of a prima facie case shifted the burden of production and persuasion to the MVPDs to show that they had not discriminated against WealthTV based on lack of affiliation. The ALJ, however, reasoned that the complaining party always bears the ultimate burden of proof of a violation and, in any event, WealthTV had waived its argument by failing to timely raise it before the hearing when the ALJ first announced his view of the burdens.[68] Once again, the Commission did not resolve the issue, agreeing with the ALJ that the MVPDs would have prevailed even under WealthTV's view of the burdens.[69]

2. Similarly Situated:

A principal issue in WealthTV was whether WealthTV was "similarly situated" to MOJO. The issue loomed large because WealthTV sought to prove an "indirect" discrimination claim, rather than one based on direct proof that any MVPD had discriminated against WealthTV based on its lack of affiliation. In an "indirect" case, an inference of discrimination can be raised by proof that an unaffiliated channel is "similarly situated" to one affiliated with the respondent MVPD, but that the unaffiliated channel was treated differently and worse than the affiliated channel. The question then becomes whether there are legitimate business reasons for the MVPD's actions with respect to the unaffiliated channel.[70]

WealthTV sought to prove that it was similar to MOJO because it allegedly offered similar programming and targeted the same audience as MOJO. Both the ALJ and the Commission, however, found that the evidence did not support WealthTV's claim. The Commission implied (again, without deciding) that proof of "similarity" did not require proof that the two channels were "substantially identical." Nonetheless, the Commission agreed with the ALJ that the MVPDs had presented persuasive expert evidence showing that the mix of genres featured on WealthTV and MOJO were substantially different,[71] and the overall "look and feel" of the two channels was "demonstrably different."[72]

Importantly, although not specifically discussed, it appears that the ALJ and the Commission employed a much looser standard for the admissibility of expert evidence than the federal courts now use under Daubert and its progeny. For example, in response to WealthTV's objection that the "look and feel" analysis lacked "formality" and were in the nature of ipse dixit conclusions, the Commission offered the seeming non sequitur response that WealthTV had not shown that the conclusions were "erroneous," nor offered any countervailing evidence of "look and feel," ignoring WealthTV's position that "look and feel" is not a credible standard at all.[73] The appropriate standard for experts in such proceedings has not been determined.

The Commission also upheld the ALJ's finding that WealthTV's target audience was far broader than MOJO's. That is, while MOJO was aimed at young adult males, the ALJ found that the evidence overwhelmingly showed that WealthTV targeted a broader audience both by age and gender.[74] There are two important potential implications from this. First, the fact that two channels share some overlapping target audience (i.e., WealthTV's broader target audience allegedly included MOJO's more focused demographic) may not be enough to prove that they are "similarly situated" for purposes of a discrimination claim. Second, the analysis of "target audience" relied heavily on WealthTV's marketing pitches to potential distributors. But that itself may be an unfair comparison, if independent channels, such as WealthTV, are more likely to market themselves (accurately or not) as having broad, general appeal to maximize their ability to secure carriage. By contrast, a channel such as MOJO affiliated with multiple MVPDs may have less (or no) need to broadly market itself and, therefore, can afford to "target" a niche demographic. It does not appear that any evidence or argument was presented on this issue in the WealthTV matter.

3. Factors Weighing Against Discrimination

In addition to finding that WealthTV and MOJO were not similar, the ALJ likewise found there was no evidence that any of the MVPDs had considered MOJO one way or the other when making their decisions about WealthTV. To the contrary, the ALJ deemed it particularly important that the MVPDs had added MOJO to their lineup long before WealthTV even launched. And there was no evidence that the MVPDs had an incentive to undercut WealthTV to favor MOJO. Indeed, the evidence was that the MVPDs viewed MOJO as a short-term experiment in HD offerings. The fact that the MVPDs did not appear to be choosing between an affiliated and a non-affiliated MVPD drove the determination that the MVPDs had not discriminated based on affiliation. [75]

An additional factor weighing against discrimination was that a number of MVPDs continued to negotiate or meet with WealthTV despite their initial conclusions that they were not interested in carrying the channel. The fact that meetings continued bolstered the testimony that the MVPDs were considering legitimate business concerns about carriage and in good faith.[76]

Finally, as in TCR (MASN), the ALJ and the Commission were persuaded that the MVPDs had decided that it was not worth the cost or bandwidth to carry WealthTV. WealthTV offered no compelling proof that those legitimate reasons for non-carriage were mere pretext, such as its own analysis of value vs. cost.[77]

C. The Tennis Channel v. Comcast

The third Program Carriage case to go to decision was the Tennis Channel's claim that Comcast discriminated against it by refusing to "retier" The Tennis Channel to the same, broadly penetrated tier on which Golf and Versus (Comcast affiliated channels) were carried.[78] Significantly, the Tennis Channel case (1) is the only case to date in which the Commission itself agreed that there had been a violation of the anti-discrimination rules and (2) that Commission finding of discrimination was vacated on review by the D.C. Circuit in an important, "seminal" decision (within the sparse Program Carriage case law), the ramifications of which are still playing out, including after the D.C. Circuit heard yet a second appeal after remand to the FCC.

1. Commission Decision

Unlike the decisions in TCR (MASN) or WealthTV, the Commission's decision in Tennis Channel includes substantive discussions of several precepts that, the Commission believed, underlie the anti-discrimination rules.

First, the Commission rejected Comcast's position that Section 616 is premised on the antitrust "essential facilities" doctrine. Comcast argued, based on antitrust law, that to find a violation of the anti-discrimination rules, there must be proof that a programmer suffered a "severe competitive handicap" by being denied access to a "necessary" distribution service.[79] The Commission, however, concluded that Section 616 was intended to provide new rights and remedies, not merely duplicate the antitrust laws. The Commission interpreted the legislative history of Section 616 to show that Congress was concerned generally about the impact of vertical integration on the pay tv industry and enacted Section 616 as a compromise instead of prohibiting vertical integration altogether.[80] Relatedly, the Commission concluded that Section 616 was not limited to situations in which the accused MVPD had "market power" in an antitrust sense, but instead applied whenever an MVPD's conduct put a programmer at a relative competitive disadvantage in terms of carriage fees, advertising revenues, etc.[81]

Second, the Commission credited evidence allegedly showing that Comcast had a general pattern of favoring its affiliated networks over non-affiliated networks, particularly with respect to sports.[82] The Commission agreed that such a pattern was not conclusive of discrimination in the specific case of the Tennis Channel. But it did agree that such a pattern could be considered to assess the credibility and plausibility of justifications offered with respect to the Tennis Channel.[83] Importantly, the Commission's approach potentially expands the scope of anti-discrimination claims to "pattern and practice" assertions that could call into question carriage decisions far afield from the alleged specific act of discrimination.

Third, the Commission chastised Comcast for seeking to justify its decision by reference to costs for carriage of the Tennis Channel without also considering the benefits.[84] In doing so, it seemed to place the burden on the MVPD to show that costs outweighed benefits. Again, this is consistent with a view that similarly situated channels presumptively should be carried similarly, but whether that is an appropriate inference under the Program Carriage Regime is a hotly contested issue.

Fourth, the Commission explained that it found no inherent contradiction between a finding, on the one hand, that two channels are "similarly situated" (including due to similar ratings) and a finding, on the other, that the non-affiliated channel has been restrained in its ability to compete. The Commission said it would be a "Catch-22" if proof of a programmer's success to show "similarly situated" meant that the programmer could never show competitive harm. The Commission concluded that proof that a channel had been successful enough to be positioned to compete with other similar channels in no way precluded a finding that discriminatory conduct thwarted that ability to compete.[85] Again, this seems to reflect the Commission's view of Section 616 as a mechanism to ensure that unnecessary impediments to competition are swept away, rather than narrowly construing Section 616 to grant MVPDs maximum control over their line-up.

Fifth, the Commission sought to take into account how the carriage decisions of one MVPD impact other MVPDs and, thus, a programmer's potential success in the marketplace as a whole. As part of its rebuttal case, Comcast argued that other MVPDs also treated the Tennis Channel "worse" than Golf and Versus. The Commission found that Comcast was looking at the comparisons incorrectly and that, even accounting for the other MVPDs, Comcast was still treating the Tennis Channel much "worse" than Golf and Versus. More importantly, however, the Commission observed that the carriage decisions of larger MVPDs, like Comcast, generally have a "ripple" effect on other MVPDs. Whether and how Comcast carries a channel impacts whether and how other MVPDs carry it. Thus, the Commission reasoned, even if other MVPDs were tiering the Tennis Channel, Golf, and Versus similarly to Comcast, it does not mean that the other MVPDs' tiering decisions were untainted by affiliation discrimination. If Comcast discriminates and others follow its lead, the carriage decisions of the others cannot be used as purportedly "objective" proof of the desirability of the channel.[86]

Finally, the Commission found that, where discrimination takes the form of differential "tiering," Section 616 allows the Commission to order equal carriage by the MVPD (and payment of any additional carriage fees that may result from such move).[87] The Commission further concluded that such an "equal carriage" remedy did not violate the First Amendment because (a) it is based on affiliation discrimination, not content per se and (b) it is sufficiently tailored just to remedy the harm at issue.[88]

2. D.C. Circuit: Main Opinion

Following the Commission's decision, Comcast petitioned the D.C. Circuit to vacate. The D.C. Circuit granted the petition. The decision is notable because, in addition to a sharp and narrow "opinion of the court" reversing the essential finding of discrimination, there were two lengthy concurrences musing on various issues in dicta.

The main opinion took the FCC to task for what the Court deemed a fundamental error. The Court underscored that, to the extent Comcast's tiering decision was based on legitimate business concerns, there was no violation of Section 616. The Court then observed that it was undisputed that, if Comcast were to re-tier the Tennis Channel to the more broadly penetrated tier, Comcast's costs (carriage fees) would increase. The Court found that the FCC failed to give sufficient weight to this cost increase. It held that, because there was no evidence of any countervailing, net benefit to Comcast if it were to re-tier the Tennis Channel, the FCC could not conclude that Comcast's decision was based on an illegitimate reason (affiliation), as opposed to a legitimate reason (costs with no net benefit).[89]

Importantly, the Court's approach is the polar opposite of the Commission's on how to consider the cost/benefit issues in carriage decisions. Whereas the Commission had assumed that Comcast bore the burden to prove that the benefits did not outweigh the costs of re-tiering, the Court ruled that it was the complaining party's burden to prove that re-tiering would create a net benefit. This difference in approaches is fundamental and stems from very different perspectives on the relevance of vertical integration. That is, the FCC presumes that a vertically integrated MVPD should bear the burden to justify its differential treatment of similarly situated affiliated and non-affiliated channels. But the D.C. Circuit presumes that the carriage decisions of a vertically integrated MVPD are as legitimate as those of any other MVPD and, therefore, the complaining party bears the burden to show that a decision was irrational or unjustified from a business perspective. The extent to which the DC Circuit's perspective affects future Program Carriage disputes remains to be seen.[90]

The two concurring opinions offered (lengthy) dicta on two additional issues that may also impact future proceedings.

3. D.C. Circuit: Judge Edwards' Concurrence

In his concurrence, Judge Edwards concluded that the entire Tennis Channel complaint was untimely because it was not brought within one year of the date of the underlying carriage agreement. He severely criticized the FCC for its interpretation of the statute of limitations provisions of the Program Carriage Rules (47 C.F.R. section 76.1302(f)), as well as for what he deemed an unwarranted intrusion by the FCC on "the sanctity of the parties' contractual commitments."[91]

The FCC read section 76.1302(f)(3) as allowing any Program Carriage claim to be brought within one year of the date on which the complaining party gives notice to the MVPD that the complaining party intends to bring a Program Carriage action.[92] Although the plain words of the regulation so provide, Judge Edwards read the legislative history as showing that section 76.1302(f)(3) had been drafted to apply only to discriminatory refusals to negotiate for carriage. Instead, he concluded that the applicable section would be 76.1302(f)(1), which requires a proceeding to be brought within one year of execution of any contract alleged to violate the Program Carriage Rules.[93]

The concern with applying section 76.1302(f)(1) to claims like the Tennis Channel's is that it would not permit a programmer to complain about alleged discrimination in the performance of a contract if the discrimination arose more than one year after the contract had been executed. For example, the Tennis Channel admitted that its contract with Comcast gave Comcast discretion to carry the channel on any tier. Its complaint was that Comcast allegedly used that discretion in a discriminatory manner by refusing to re-tier the Tennis Channel. Judge Edwards viewed the Tennis Channel's complaint, however, as an attempt to reopen the contract, conduct that he viewed as not covered by the Program Carriage Rules.[94]

Judge Edwards' concurrence highlights an important issue: to what extent do the Program Carriage rules apply to allegedly discriminatory conduct where the conduct itself is expressly permitted by a contract? Judge Edwards' statute of limitations analysis seems to assume that, once a contract is in place, the parties should look only to that agreement— i.e., the "sanctity of their contractual commitments"—for their rights and remedies. By contrast, the FCC and the Media Bureau have repeatedly ruled that an MVPD's rights under a carriage agreement can never be deemed to include the right to discriminate based on affiliation.[95] And it is not difficult to imagine scenarios in which an MVPD could enforce its contractual rights in a manner that deliberately favors affiliated channels and/or deliberately hobbles competing, non-affiliated channels. To the extent that there is any legitimate concern that programmers would misuse such claims to unduly escalate ordinary contract disputes, the answer may lie in the ability of the respondent MVPD to inform the Media Bureau of the "true" context of a claim, allowing the Media Bureau to more closely examine a complaint to determine whether it presents a genuine prima facie Program Carriage Claim or whether it should, instead, be dismissed.

4. D.C. Circuit: Judge Kavanaugh's Concurrence

In a separate concurrence, Judge Kavanaugh explained why, in his view, the anti-discrimination rules (and perhaps the whole Program Carriage regime) had outlived its lawful utility.[96] In effect, Judge Kavanaugh championed arguments that the MVPDs had been making since the TCR (MASN) case. Judge Kavanaugh reasoned (contrary to the FCC) that the Program Carriage Regime must be guided by antitrust principles. Because the core issue to be addressed by the Program Carriage Regime is vertical integration, Judge Kavanaugh concluded that a discrimination claim could not be proven without proof that the accused MVPD has "market power" in a relevant market, just as market power is nearly always required to prove an antitrust claim based on a vertical agreement.[97]

Judge Kavanagh further reasoned that an antitrust level of harm to competition was necessary to issue any remedy under the Program Carriage Rules because those rules impact the First Amendment rights of the MVPDs. Judge Kavanaugh concluded that, to the extent that carriage regulations had survived First Amendment challenges in the past, those relevant Supreme Court and D.C. Circuit opinions each cited the threats of market or monopoly power as the justification for regulation of the MVPD's speech.[98] But, he argued, the MVPD market was far more competitive in 2013 than it had been in 1992 when Section 616 was enacted and cable operators, in particular, no longer have "bottleneck power" over programming.[99] As such, Judge Kavanaugh concluded, "the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon … what books to sell …."[100]

Again, Judge Kavanaugh's concurrence is dicta, and neither of the other two panelists joined in it. However, it raises the question of whether the FCC has been holding off on further rule making under the Program Carriage Regime out of concern that MVPDs or other parties would challenge the rule making before the D.C. Circuit on First Amendment grounds and, in doing so, seek to strike down the entire Program Carriage Regime. As discussed below, the Second Circuit rejected a facial First Amendment challenge to Program Carriage just months after the D.C. Circuit's decision in Comcast. However, its holding arguably rested on the then-current state of the video marketplace, leaving open the possibility that MVPDs may seek to reopen the challenge on the ground that the marketplace has evolved.

IV. First Amendment Challenges and the New Requirement of Market Power

Throughout the history of the Program Carriage Regime, there has been an ongoing debate as to whether it violates the First Amendment by unduly interfering with the editorial discretion of MVPDs.[101] In its 2011 rulemaking, the FCC concluded that the rules were content neutral, subject only to intermediate scrutiny, and met that standard by regulating no more speech than necessary.[102] Certain MVPDs challenged that conclusion in a petition before the Second Circuit in the Time Warner Cable case.[103]

The MVPDs' principal arguments were two-fold.

First, they argued that the Program Carriage Rules are content and speaker based restrictions that are subject to, and fail to satisfy, strict scrutiny.[104] The Second Circuit, however, found that (like other regulations under the 1992 Cable Act) the Rules are both content and speaker neutral. In particular, the Court concluded that the Rules prohibited discrimination by a vertically integrated MVPD only where the MVPD acts based on the affiliation of a programmer and that an MVPD remained free to refuse to carry, for example, a non-affiliated channel because it objected to the content carried on that channel.[105] And, although questions such as whether two channels are "similarly situated" does, in fact, require an examination of their respective content, the nature and purpose of the analysis is not to promote or chill any particular content.[106] Likewise, the Court rejected the argument that the Rules are "speaker-based" restrictions because, other than potentially in the realm of political speech, "speaker-based" restrictions are subject to strict scrutiny only when the speaker distinctions are used to favor certain content and viewpoints.[107]

Second, the MVPDs argued that the Rules violate the First Amendment even under intermediate scrutiny because the cable industry no longer has "bottleneck power" over the marketplace that might justify interfering with operators' editorial discretion in allocating their finite bandwidth and budgets. Importantly, the Court highlighted that it would not be overly deferential to the FCC's assessment of the marketplace and of the alleged ongoing need for the Rules.[108] Moreover, the Court observed that "current burdens . . . must be justified by current needs."[109]

Although the Court agreed with the MVPDs that the competitive mix of distributors in 2013 was very different from what it had been in 1992 and that cable companies, in particular, had lower market shares and a greater number of competitors (DirecTV, DISH, Verizon FiOS, etc.), it nonetheless agreed with the FCC that the competitive situation presented a "mixed picture" of improvement because cable operators continued to hold more than 55% of the national MVPD market and even greater shares in certain local markets.[110] The Court likewise found that the record showed that vertical integration remained significant, even if diminished.[111] As such, the Court agreed that "the FCC could reasonably conclude that cable operators continue "to have the incentive and ability to favor their affiliated programming vendors in individual cases" and harm the ability of unaffiliated vendors "to compete fairly."[112] It was this point---that Program Carriage cases are examined and decided on a case-by-case basis---that ultimately compelled the Second Circuit to find that the Rules were still an appropriately tailored response to an important, legitimate concern.[113]

Despite largely agreeing with the FCC's conclusions as to the continuing need for the Program Carriage Regime, the Second Circuit did intimate that it disagreed with the FCC on one important issue---whether an affiliation discrimination claim requires proof that the accused MVPD possesses "market power." The MVPDs---bolstered by Judge Kavanaugh's concurrence in the Tennis Channel case---argued that Section 616's requirement of an "unreasonable restraint" necessarily requires proof of market power. The Court reasoned that it did not need to decide the issue definitively given that it was hearing only a facial challenge to the Rules and it might be possible to prove a violation absent actual market power.[114]

Nonetheless, it emphasized that it "expect[ed]" the FCC to consider market power in the "vast majority" of future cases and regardless of whether its current rules specifically require such proof as part of a prima facie case.[115] Moreover, the Court pointedly noted that, as the market continues to develop, there may come a time when the Program Carriage Rules can no longer be justified under an intermediate scrutiny analysis.[116]

II. Conclusion

The FCC's Program Carriage Rules are poised at an important juncture. After nearly twenty-five years, the substance of the Rules is finally maturing and two Circuits have weighed in on core issues. And, as the market for linear video distribution (i.e., cable companies) comes under increasing pressure from non-linear sources (i.e., Hulu, Netflix, and an array of other on-demand services), unaffiliated channels claim to be bearing the brunt of the squeeze,[117] potentially increasing the opportunity for discriminatory treatment (and potentially making it more attractive for such channels to take a chance on a Program Carriage claim if they believe they have nothing to lose). Yet changes in the marketplace may also make the Program Carriage Rules obsolete (or, at least, unconstitutional) and MVPDs are likely to renew the challenge to the Rules as they seek maximum flexibility to adapt their businesses in the changing environment.

Will the Program Carriage Rules survive? Will they matter in an "app" based future? As always, Stay Tuned!

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Endnotes:

[1] 47 U.S.C. § 536(a).

[2] 47 U.S.C. § 536(a)(4).

[3] 47 U.S.C. § 536(a)(4), (5).

[4] 47 U.S.C. § 536(a)(6).

[5] 9 FCC Rcd 2642 ("1993 Program Carriage Order"). Because the 1993 Program Carriage Order was the second order implementing the 1992 Cable Act, it is sometimes referred to as the "Second Report and Order." However, in 2011, the FCC also issued a "Second Report and Order" in MB Docket No. 07-42, which was a rule making proceeding begun in 2007 with respect to Program Carriage and Leased Access Rules. In the Program Carriage context, the FCC refers to the 2011 order as the "Second Report and Order." 26 FCC Rcd 11494.

[6] 9 FCC Rcd 4415 ("1994 Program Carriage Order").

[7] Id.

[8] Second Report and Order. 26 FCC Rcd 11494, at 11500.

[9] 26 FCC Rcd at 11521-46.

[10] Currently, a Complainant can raise a prima facie case of affiliation discrimination either through direct evidence (such as the proverbial, "smoking gun" email explaining that a decision was made in order to favor an affiliated programmer) or through circumstantial inference based on evidence that (1) a non-affiliated and affiliated channel are "similarly situated" by reference to genre, ratings, target audience, etc. and (2) the affiliated channel is treated better by its affiliated MVPD than the non-affiliated channel. E.g., 23 FCC Rcd at 14795-97. In either case, a complainant must also provide evidence that its ability to compete has been unreasonably restrained by the alleged discrimination. 27 FCC Rcd 5113, 5119-20 (Media Bureau 2012).

[11] With respect to available resources, the Office of the ALJ has only one full-time ALJ at this time, a situation that has persisted for years.

[12] 28 U.S.C. sections 2342-44.

[13] See 9 FCC Rcd 4415 at ¶ 2.

[14] Id., ¶ 11.

[15] Id., ¶¶ 24-31.

[16] 47 CFR section 76.1302(h).

[17] Id.

[18] E.g., 23 FCC Rcd at 14819-20, 23 FCC Rcd at 14833-35 25, 25 FCC Rcd at 14155.

[19] 25 FCC Rcd at 14155-56

[20] Comcast Cable Commc'ns v. FCC, 717 F.3d 982, 994-1005 (D.C. Cir. 2013) (Edwards, J., concurring).

[21] 26 FCC Rcd at 11522-23.

[22] 21 FCC Rcd 8989 (Jul. 31, 2006). MASN ultimately abandoned the proceeding and refiled in 2008 after further negotiations with Comcast. 23 FCC Rcd 14787 (Oct. 10, 2008).

[23] 23 FCC Rcd 14787 (Oct. 10, 2008).

[24] E.g., 23 FCC Rcd 18378 (Dec. 31, 2008).

[25] 24 FCC Rcd 1581 (Jan. 27, 2008).

[26] 26 FCC Rcd at 11507.

[27] 26 FCC Rcd at 11512.

[28] Id.

[29] Game Show Network v. Cablevision and Liberman Broadcasting (Estrella TV) v. Comcast.

[30] 26 FCC Rcd at 11512-13.

[31] Id.

[32] Id. at 11517-20.

[33] Id. at 11518-19.

[34] Id. at 11519-20.

[35] Comcast Comm'cns v. FCC, 717 F.3d 982 (2d Cir. 2013).

[36] Two additional Program Carriage claims are pending now, Game Show Network v. Cablevision and Liberman Broadcasting (Estrella TV) v. Comcast.

[37] 25 FCC Rcd 18099 (Dec. 22, 2010). Although the TCR Sports case technically arose from an arbitration brought pursuant to the FCC's "Adelphia Order" (21 FCC Rcd 8203), it was governed by the Program Carriage discrimination rules incorporated into the Adelphia Order. TCR also commenced a similar program carriage proceeding against Comcast in 2006, but the case was later settled and dismissed. 24 FCC Rcd 14776 (Dec. 23, 2009).

[38] 25 FCC Rcd at 18103.

[39] Id. at 18100, n.6.

[40] The first arbitrator was removed by the AAA after the liability phase, but before the remedy phase, due to concerns about the arbitrator's post-decision communications with the press.

[41] 23 FCC Rcd 15783 (Oct. 30, 2008).

[42] 25 FCC Rcd 18099.

[43] TCR Sports Broadcasting Holding, L.L.P. v. F.C.C., 679 F.3d 269 (4th Cir. 2012).

[44] 23 FCC Rcd 15783, 15790.

[45] Id.

[46] 25 FCC Rcd at 18105.

[47] 679 F.3d at 277. The Fourth Circuit did, however, agree that the FCC's case-by-case approach to discrimination claims strikes the appropriate balance between ferreting out prohibited discrimination, while preserving "legitimate business practices" that "fuel competition." Id. at 277-78.

[48] 25 FCC Rcd at 18106.

[49] 23 FCC Rcd at 18512.

[50] 25 FCC Rcd at 18106.

[51] 25 FCC Rcd at 18109, 18112-13. As discussed below, the FCC's attention in TCR to an MVPD's cost-benefit analysis, including the impact of carriage on the

size of the overall customer base, presaged the D.C. Circuit's later decision in Comcast (Tennis Channel) concerning the standard of proof for discrimination.

[52] 25 FCC Rcd at 18111-12.

[53] 23 FCC Rcd at 15802.

[54] 25 FCC Rcd at 18114.

[55] Id.

[56] 679 F.3d at 275. The Fourth Circuit similarly upheld as reasonable the FCC's conclusions that MVPDs do not "typically document their internal carriage decisions," and that there was at least some contemporaneous evidence to corroborate the hearing testimony about what TWC did and did not consider in its carriage discussions with MASN. Id. at 275-76.

[57] 23 FCC Rcd at 15805. The Media Bureau also concluded that TWC's part ownership of iN DEMAND also created an economic incentive not to widely carry MASN, on the theory that, if MASN were available, customers would be less inclined to purchase the MLB Extra Innings service carried on iN DEMAND and less inclined to watch the MLB Network that TWC allegedly agreed to carry as part of iN DEMAND's Extra Innings agreement. Id. Notably, MASN never claimed that it was similarly situated to either MLB Extra Innings or MLB Network. The Media Bureau's consideration of TWC's alleged incentives with respect to these other channels and services suggests the Bureau's willingness to consider the totality of the circumstances in assessing affiliation discrimination.

[58] 25 FCC Rcd at 18114.

[59] 23 FCC Rcd at 15791.

[60] 23 FCC Rcd at 15799.

[61] Id.

[62] 25 FCC Rcd at 18115.

[63] 24 FCC Rcd 12967 (ALJ 2009); 26 FCC Rcd 8971 (FCC 2011).

[64] 26 FCC Rcd at 8974.

[65] 23 FCC Rcd 14787 (2008).

[66] 23 FCC Rcd at 14814.

[67] 26 FCC Rcd at 8988.

[68] Id. at 8977-78.

[69] Id. As the Commission noted in WealthTV, it proposed to resolve the burden of proof issue through additional rule-making. See 26 FCC Rcd 11494, 11544-45. To date, however, the Commission has not issued new rules from that proposed rule-making.

[70] Again, which side bears the burden of proof on these issues is not yet resolved.

[71] 26 FCC Rcd at 8979 (citing expert testimony that analysis of a two week sample of programming from both channels revealed that 54 percent of MOJO's programming consisted of sports, music, and movies, compared to just 3% of WealthTV's programming for these genres and, by contrast, 60 percent of WealthTV's programming was devoted to travel, recreation, lifestyle, food and wine, and the like, whereas MOJO devoted only 19% of its programming to such genres).

[72] Id.

[73] Id. at 8983-84.

[74] Id. at 8980.

[75] Id. at 8975-76.

[76] Id. at 8980-81.

[77] Id. at 8982.

[78] 27 FCC Rcd 8508.

[79] Id. at 8523.

[80] Id. at 8524.

[81] Id. But see Time Warner Cable Inc. v. FCC, 729 F.3d 137 (2d Cir. 2013) (noting in dicta that it "expect[ed]" FCC to require proof of market power in "vast majority" of affiliation discrimination claims to avoid undue interference with MVPD editorial discretion).

[82] Id. at 8524-26.

[83] Id.

[84] Id. at 8536-37.

[85] Id. at 8532-33.

[86] Id. at 8534.

[87] Id. at 8542-44.

[88] Id. at 8545-49.

[89] Comcast Cable Commc'ns v. FCC, 717 F.3d 982, 987 (D.C. Cir. 2013).

[90] On remand to the FCC, the Tennis Channel argued that the D.C. Circuit's decision changed the standard for proving discrimination and, as such, the Tennis Channel should be permitted to reopen discovery and retry the dispute. The FCC rejected the Tennis Channel's position and the D.C. Circuit affirmed the FCC in a July 5, 2016 decision, The Tennis Channel, Inc. v. FCC, No. 15-1067 (D.C. Circuit July 5, 2016). Because of the administrative posture in which the issue came back to the D.C. Circuit, the Circuit was able to side-step any direct ruling on whether its first decision established a "new" rule. Instead, it found that the FCC had a reasonable basis to read the first decision as simply finding insufficient evidence in the "fully developed" record to support a finding of discrimination given the

long-standing rule that there is no discrimination if a decision is "based on business justification." Id.at 6-7.

[91] Id. at 994-95.

[92] Section 76.1302(f)(3) provides that a complaint must be filed within one year of the date on which "a party has notified a [MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section."

[93] Section 1302(f)(2) applies to complaints based on an offer for carriage where the parties have no existing carriage agreement.

[94] 717 F.3d at 1004.

[95] E.g., 23 FCC Rcd at 14821 (Media Bureau Hearing Designation Order in NFL v. Comcast) (explaining that "[w]hether or not Comcast had the right to retire the NFL Network pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules."); 27 FCC Rcd at 8521 (Commission Order and Opinion in The Tennis Channel v. Comcast) (agreeing with Media Bureau that, to the extent Comcast had contractual discretion to tier the Tennis Channel, "Comcast had an obligation to exercise that discretion consistent with Section 616.").

[96] 717 F.3d at 987-994.

[97] In the case of Comcast, Judge Kavanaugh glossed over figures suggesting that Comcast may have market power (albeit not monopoly power) in one or more geographic markets. 27 FCC Rcd at 8541-42.

[98] 717 F.3d at 992-94 (citing Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994), Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 197 (1997), and Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996)).

[99] Id. at 993-94 (citing Comcast Corp. v. FCC, 579 F.3d 1, 8 (D.C. Cir. 2009) and Cablevisions Sys. Corp. v. FCC, 597 F.3d 1306, 1324 (D.C. Cir. 2010) (Kavanaugh, J., dissenting)).

[100] Id. at 994.

[101] E.g., 23 FRR Rcd at 14825, n. 361; 23 FCC Rcd at 15811-12, 27 FCC Rcd at 9284-86.

[102] 26 FCC Rcd 11518-19.

[103] 729 F.3d 137 (2013).

[104] Id. at 154.

[105] Id. at 156.

[106] Id. at 157.

[107] Id. at 159-60 (narrowly construing Citizens United v. FEC, 558 U.S. 310 (2010)).

[108] Id. at 160-61.

[109] Id. at 161 (citing Shelby County v. Holder, 133 S.Ct. 2612, 2622 (2013)).

[110] Id.

[111] Id.

[112] Id. at 162 (emphasis added).

[113] Id. at 161, 164.

[114] Id. at 165.

[115] Id. at 165-66.

[116] Id. at 167.

[117] E.g., Second Media Bureau Workshop on the State of the Video Marketplace, April 25, 2016, (video at https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace).