

Before the
Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 2016

Released: August 26, 2016

By the Chief, Media Bureau:

I. INTRODUCTION

1. By this Memorandum Opinion and Order (Order), we dismiss the above-captioned program carriage complaint filed by Liberman Broadcasting, Inc. and LBI Media, Inc. (LBI) against Comcast Corporation and Comcast Cable Communications, LLC (Comcast).1 In its Complaint, LBI alleges that Comcast, a vertically integrated multichannel video programming distributor (MVPD), discriminated against LBI in the selection, terms, and conditions of carriage of LBI’s Spanish language programming network, Estrella TV, on the basis of affiliation, in violation of section 616(a)(3) of the Communications Act of 1934, as amended (the Act),2 section 76.1301(c) of the Commission’s rules,3 the Commission’s order approving Comcast’s acquisition of NBCUniversal (NBCU), and the Comcast-NBCU conditions.4 In addition, LBI claims that Comcast violated section 616(a)(1) of the Act and section 76.1301(a) of the Commission’s rules by requiring LBI to provide Comcast with a financial interest in Estrella TV’s digital rights as a condition of carriage.5

2. After reviewing the Complaint, we find that LBI has failed to put forth sufficient

1 Program Carriage Complaint of Liberman Broadcasting, Inc. and LBI Media, Inc., MB Docket No. 16-121, File No. CSR-8922-P (filed Apr. 8, 2016) (Complaint).

2 47 U.S.C. § 536(a)(3).

3 47 CFR § 76.1301(c).

4 See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4355 & App. A (2011) (Comcast-NBCU Order).

5 Complaint at 50-51. Among other things, LBI requests that the Commission order Comcast “to distribute and compensate Estrella TV on terms comparable to the terms on which Comcast distributes Telemundo or on such other equitable terms as the Commission may determine.” Id. at 52.

evidence of its program carriage claims to establish a *prima facie* case.⁶ In particular, as explained below, we find that LBI has failed to demonstrate that it has standing to bring a program carriage complaint pursuant to section 616 of the Act and section 76.1301 of the Commission's rules because it has failed to show that its broadcast stations qualify as "video programming vendors." For substantially the same reasons, we find that LBI has failed to demonstrate that it has standing to bring a program carriage complaint with regard to its broadcast television stations under the *Comcast-NBCU Order* and conditions. Accordingly, we dismiss, without prejudice, LBI's program carriage complaint against Comcast.⁷

II. BACKGROUND

3. Section 616(a) of the Act directs the Commission to establish rules governing program carriage agreements and related practices between cable operators or other MVPDs and "video programming vendors" that, among other things:

prevent [an MVPD] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;⁸ and

prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.⁹

In implementing these statutory provisions, the Commission adopted section 76.1301(a) and (c) of its rules, which closely track the language of section 616(a)(1) and (a)(3).¹⁰ The Commission has established specific procedures for the review of program carriage complaints.¹¹ Those rules, among other things, afford standing to file a program carriage complaint to "[a]ny video programming vendor or [MVPD]

⁶ See *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11506, para. 17 (2011) ("[T]he Media Bureau's determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only."). See also *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149, n.3 (MB 2010) (stating that a *prima facie* determination requires the Bureau to assess the evidence set forth in the complaint).

⁷ As discussed below, we dismiss LBI's complaint on the basis that it has sought relief as a broadcast licensee and thus lacks standing to bring a program carriage complaint. We note, however, that to the extent Estrella TV acts as a non-broadcast network that qualifies as a video programming vendor under the statute, it is free to file a program carriage complaint on that basis. In addition, with regard to its retransmission consent negotiations for carriage of its broadcast television stations, LBI could file a complaint pursuant to the retransmission consent rules if it believes that Comcast is failing to negotiate retransmission consent in good faith. See 47 CFR § 76.65(b).

⁸ 47 U.S.C. § 536(a)(1).

⁹ 47 U.S.C. § 536(a)(3).

¹⁰ See 47 CFR § 76.1301(a) ("No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems."); *id.* § 76.1301(c) ("No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.").

¹¹ See *id.* § 76.1302.

aggrieved by conduct that it believes constitute a violation of the [program carriage provisions].”¹²

4. Other provisions of the Communications Act set forth the mandatory carriage (must carry) and retransmission consent rights of television broadcasters. Broadcasters elect every three years whether to pursue cable carriage under the retransmission consent requirements of section 325 of the Act, or the must carry requirements of section 614.¹³ While a broadcaster electing must carry status is guaranteed carriage on cable systems in its market, the cable operator does not compensate the broadcaster for such carriage.¹⁴ A broadcaster electing retransmission consent status, in contrast, may negotiate with the cable operator (or satellite provider) for compensation. Section 325(b)(3) of the Act directs the Commission to establish rules governing retransmission consent agreements between MVPDs and television broadcast stations.¹⁵ The statute provides that those rules must prohibit both MVPDs and television broadcast stations from failing to negotiate in good faith.¹⁶ The Commission implemented the statutory retransmission consent provisions through sections 76.64 and 76.65 of its rules.¹⁷ The Commission has established specific procedures that govern retransmission consent complaints, distinct from the procedures that govern program carriage complaints.¹⁸

5. When the Commission approved Comcast’s acquisition of NBCU, it imposed certain conditions on Comcast’s carriage of unaffiliated video programming. Specifically, the Commission barred Comcast from discriminating against “video programming vendors” based on affiliation,¹⁹ and it incorporated the same definition of “video programming vendor” that appears in the Act and in the Commission’s program carriage rules.²⁰ The Commission directed claimants to bring claims for a violation of this condition pursuant to the program carriage complaint procedures.²¹ The Commission adopted separate protections applicable to broadcast station programming, including separate non-discrimination protections for eligible broadcasters in their retransmission consent negotiations with Comcast.²²

6. LBI, a television broadcast station licensee, launched Estrella TV in September 2009 as a national Spanish language television network with multiple owned and non-owned television station

¹² 47 CFR § 76.1302(a).

¹³ 47 U.S.C. §§ 325(b), 534. We note that the must carry requirements in section 614 apply to cable operators. Carriage of local broadcast signals by satellite carriers is governed by section 338 of the Act and its implementing rules. *See* 47 U.S.C. § 338; 47 CFR § 76.66. Section 338, among other things, requires satellite carriers that choose to offer one local broadcast television station in a local market, to carry all of the local broadcast television stations in that market, generally for no cost. *Id.*; 47 CFR § 76.66(l).

¹⁴ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2992, para. 111 (1993) (“*Broadcast Signal Carriage Order*”); *see also* 47 U.S.C. § 534(b)(10).

¹⁵ 47 U.S.C. § 325(b)(3).

¹⁶ *Id.* § 325(b)(3)(C)(ii)-(iii).

¹⁷ 47 CFR §§ 76.64, 76.65.

¹⁸ *See id.* § 76.65(c)-(e).

¹⁹ *Comcast-NBCU Order*, 26 FCC Rcd at 4358.

²⁰ *Id.*

²¹ *Id.* at 4359.

²² *Id.* at 4371.

affiliates broadcasting its programming in various markets nationwide.²³ LBI describes Estrella TV's programming as "a unique aggregation of Spanish language programming (which includes national and local news shows as well as sports, variety, talk, reality, drama, music, and comedy programming), some 75 percent of which is produced by LBI at its headquarters in Burbank, California, by an overwhelmingly Hispanic workforce numbering approximately 1,000."²⁴ Estrella TV broadcast affiliates today include both LBI owned and operated television stations and stations owned by other broadcast companies.²⁵ A wide variety of MVPDs including Time Warner, Charter, AT&T/DIRECTV, Verizon, and Cablevision carry Estrella TV stations.²⁶

7. Comcast is currently the largest cable-only MVPD in the U.S., and it operates as an MVPD in at least 69 U.S. markets.²⁷ Comcast has an ownership interest in several programming networks, including two Spanish language networks, Telemundo and NBC Universo, which it distributes on its MVPD systems as well as other MVPD systems.²⁸ Comcast acquired Telemundo in 2011 as part of its transaction with NBCU, and it launched NBC Universo on February 1, 2015.²⁹ Telemundo features carriage of *telenovelas* while NBC Universo focuses on sports and reality shows.³⁰

8. For several years prior to 2015, Comcast distributed Estrella TV in the Houston, Denver, and Salt Lake City markets central to the Complaint as must-carry stations.³¹ Based on Estrella TV's "sustained ratings success" during the retransmission cycle that ended December 31, 2014, LBI decided to elect retransmission consent rather than must-carry with respect to all of its Estrella TV owned and operated stations for the three-year cycle beginning January 1, 2015.³² In September 2014, an LBI consultant approached Comcast to negotiate a retransmission consent agreement for the Estrella TV stations.³³ LBI asserts that it sought carriage and compensation comparable to that Comcast afforded to Telemundo.³⁴ In particular, LBI sought from Comcast: (i) "carriage and compensation for all Estrella TV

²³ Complaint at 3 and Exh. 3 (listing all Estrella TV owned and non-owned affiliated broadcast stations). *See also id.* at 14, n.39 (stating that "MVPDs distribute . . . an amalgam of . . . 'cable-only networks' (networks that are not also carried by broadcasters over the air) . . . and 'broadcast networks' (networks originated over the air through a web of affiliated broadcast stations)" and that "Estrella TV, like Telemundo, is a broadcast network, one of six U.S. Spanish language broadcast networks. . ."). Although LBI makes references to its distribution of Estrella TV programming even in areas where it does not own, or is not affiliated with, a broadcast station, *i.e.*, so called "white areas," *see, e.g.*, Complaint at 23, Reply at 9, n.8, the focus of LBI's pleadings is on carriage of its broadcast stations, particularly in the Houston, Denver and Salt Lake City markets at issue. *See, e.g.*, Complaint at iv-v, 26-27; Reply at 6-11. *See also infra* n. 77.

²⁴ Complaint at 3.

²⁵ *Id.* at 4.

²⁶ *Id.*

²⁷ *Id.* at 6; Comcast Answer to Program Carriage Complaint, MB Docket No. 16-121, File No. CSR-8922-P, at 86 (filed June 7, 2016) (Answer).

²⁸ Complaint at 6-7; Answer at 86.

²⁹ Complaint at 7; Answer at 86. Before Comcast launched NBC Universo, the network had been known as mun2. *See* Complaint at 7, n.19.

³⁰ Answer at 7.

³¹ *Id.* at 8.

³² Complaint at 23.

³³ Answer at 8.

³⁴ Complaint at 23.

[owned and operated] stations”;³⁵ (ii) “carriage in markets where non-owned Estrella TV broadcast affiliates not otherwise carried by Comcast operate”;³⁶ and (iii) “carriage and compensation in ‘white areas,’ markets where there is neither an EstrellaTV [owned and operated station] nor an Estrella TV affiliate.”³⁷ Comcast states that it analyzed Estrella TV and concluded that it “was not a particularly popular network among Hispanic audiences.”³⁸ The parties engaged in retransmission consent negotiations until February 2015,³⁹ but Comcast was unwilling to expand its carriage of Estrella TV programming or to compensate LBI for that carriage.⁴⁰ On February 19, 2015, extensions governing the Houston, Denver, and Salt Lake City markets at issue expired, and Comcast ceased carrying Estrella TV in those markets.⁴¹ As required by the program carriage rules,⁴² LBI provided Comcast with written notice of its intention to file this Complaint on February 9, 2016.⁴³ Comcast responded to LBI on February 18, 2016,⁴⁴ and LBI replied to Comcast on February 26, 2016.⁴⁵ LBI subsequently filed the Complaint. Comcast characterizes LBI as seeking a Commission order compelling Comcast to carry Estrella TV “on a nationwide basis, in multiple formats, and for fees that no other MVPD pays.”⁴⁶

III. DISCUSSION

9. Based on our review of the Complaint, we conclude that LBI has failed to establish a *prima facie* case of a program carriage violation under section 616 of the Act and its implementing rules.⁴⁷ When filing a program carriage complaint, the video programming vendor carries the burden of

³⁵ *Id.*

³⁶ *Id.* We note that this LBI request is for carriage of Estrella TV affiliates that are not owned by LBI, rather than carriage of any non-broadcast programming in markets where Comcast does not carry an Estrella TV affiliate. *See infra* n. 60.

³⁷ Complaint at 23. *See also* Declaration of Michael Nissenblatt, Senior Vice President, Content Acquisition, Comcast, at 5, n.1 (att. to Comcast Answer) (asserting that “[a]lthough broadcast networks largely rely on TV antennas (and retransmission by cable operators) for their distribution, some broadcast networks also make a satellite feed of their signal available to cable operators. If a cable operator elects to transmit the satellite signal, it can then distribute the network to customers in so-called ‘white areas’ where the network does not have a broadcast antenna”).

³⁸ Answer at 10.

³⁹ *Id.* at 14.

⁴⁰ Complaint at 23-24.

⁴¹ *Id.* at 24. Comcast agreed to continue carrying Estrella TV multicast streams in standard definition in New York City and Chicago for the time being. *Id.* at 43. Comcast also continued to carry Estrella TV in certain markets where Estrella TV affiliates not owned by LBI have secured carriage through must-carry or retransmission consent. *Id.* at 44.

⁴² *See* 47 CFR § 76.1302(b).

⁴³ Complaint at 8; Answer at 22-23.

⁴⁴ Complaint at 8. *See also* Complaint, Exh. 8 (Comcast asserted, among other things, that “[a]s a broadcaster whose arrangements with MVPDs are governed by broadcaster-specific statutory and regulatory rights and obligations, LBI has no legal standing to bring a program carriage complaint pursuant to the Commission’s program carriage rules”).

⁴⁵ Complaint at 8.

⁴⁶ Answer at 82-83.

⁴⁷ 47 U.S.C. § 536; 47 CFR §§ 76.1300-1302.

proof to establish a *prima facie* case that the defendant MVPD has engaged in unlawful behavior.⁴⁸ In order to establish a *prima facie* case of a program carriage violation, the complaint must contain, among other things, evidence that the complainant is a “video programming vendor” as defined in section 76.1300(e) of the Commission’s rules.⁴⁹ A complainant can establish a *prima facie* case of a violation of section 616 and its implementing rules through documentary or testimonial evidence that supports the alleged violation.⁵⁰

10. As discussed below, we conclude that LBI has failed to establish a *prima facie* case of a program carriage violation because it has failed to prove that it is a “video programming vendor” within the meaning of section 616, its implementing rules, and the *Comcast-NBCU Order* and conditions. We, therefore, find that LBI lacks standing to bring a program carriage complaint. Because LBI has failed to make this threshold showing, we need not address Comcast’s argument that the Complaint was untimely filed under the program carriage rules. Accordingly, we dismiss the Complaint without prejudice.

A. Standing under Section 616 and its Implementing Rules

11. Section 616(a)(4) of the Act directs the Commission to establish rules that provide for the “review of any complaints made by a video programming vendor pursuant to [section 616].”⁵¹ In implementing that statutory provision, the Commission adopted section 76.1302(a) of its rules, which provides that “[a]ny video programming vendor . . . aggrieved by conduct that it believes constitute[s] a violation of the [program carriage rules] may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint.”⁵² For the purpose of applying these provisions, the Act and the Commission’s rules define the term “video programming vendor” as “a person engaged in the production, creation, or wholesale distribution of video programming for sale.”⁵³

12. Based on our review of the Complaint, we find that LBI’s claims are based on its status as a broadcast licensee and therefore it does not qualify as a video programming vendor within the meaning of section 616 and its implementing rules. LBI asserts that, as a broadcast licensee, it comes within the scope of this definition.⁵⁴ Although the language of section 616 does not expressly exclude broadcast licensees, such as LBI, from the term “video programming vendor,”⁵⁵ we find that the better reading of that term excludes broadcast licensees. As an initial matter, we question whether LBI engages in the “production, creation, or wholesale distribution of video programming for sale” with regard to its television broadcast stations. In its capacity as a broadcaster, LBI is engaged in the retail distribution of

⁴⁸ See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2654, para. 29 (1993) (“*Program Carriage Second Report and Order*”).

⁴⁹ 47 CFR § 76.1300(e).

⁵⁰ See *id.* § 76.1302(d)(3)(i), (ii), (iii)(B)(1).

⁵¹ 47 U.S.C. § 536(a)(4).

⁵² 47 CFR § 76.1302(a).

⁵³ 47 U.S.C. § 616(b); 47 CFR § 76.1300(e).

⁵⁴ Complaint at iii; *id.* at 5 (asserting that “[a]s the owner of television broadcast stations which produces a majority of its own programming and seeks to market that programming to a wide range of distributors, LBI is the quintessential [video programming vendor]”).

⁵⁵ We note, for example, that the term “video programming vendor” uses the statutorily-defined term “video programming,” and that the Act defines the latter term as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(20).

programming to viewers for free, not the “wholesale distribution of video programming for sale.” While it could be argued that LBI is engaged in the “production, creation, or wholesale distribution of video programming for sale” to the extent it seeks compensation from Comcast for carriage of its television broadcast stations, it is in fact negotiating compensation for the retransmission of its television broadcast “signal” rather than carriage of the “video programming” contained within that signal.⁵⁶ Compensation for cable carriage of the video programming content transmitted by television broadcast stations is governed by the compulsory copyright license.⁵⁷ Because section 616 applies to “*program carriage agreements*,”⁵⁸ negotiations between a broadcast station and an MVPD for carriage of the station’s *signal* do not appear to be covered under the terms of that provision.⁵⁹

13. We find that section 616, when read in the context of the statute as a whole, was not intended to serve as a vehicle by which broadcast licensees, such as LBI, can seek relief for MVPD practices by which they are aggrieved. Rather, we find that the design and legislative history of the statute indicate that Congress intended for provisions other than section 616 -- in particular, sections 614 and 325 (relating to must carry and retransmission consent, respectively) -- to govern the relationship between cable operators and broadcasters seeking carriage of broadcast signals on MVPD systems.

14. The statutory structure evinces Congress’s intent to establish separate and mutually exclusive regulatory regimes to govern the relationships between: (i) broadcasters and MVPDs; and (ii) non-broadcast programming networks and MVPDs.⁶⁰ Section 614 defines the rights and obligations of cable operators vis-à-vis certain classes of television broadcast stations,⁶¹ thus making clear the

⁵⁶ See, e.g., 47 U.S.C. § 325(b)(1) (“No cable system or other [MVPD] shall retransmit *the signal* of a broadcast station, or any part thereof, except...” (emphasis added); 47 CFR § 76.64(a) (“[N]o [MVPD] shall retransmit *the signal* of any commercial broadcasting station without the express authority of the originating station, except as provided in paragraph (b) of this section.”) (emphasis added). See also *Broadcast Signal Carriage Order*, 8 FCC Rcd at 3005, para. 173 (“The legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster’s signal, completely separate from the programming contained in the signal.”); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 7882, para. 107 (1994) (“We continue to interpret retransmission consent as a new right given to the broadcaster under the terms of the 1992 Cable Act and as a right separate from the right of the underlying copyright holder.”).

⁵⁷ See 17 U.S.C. § 111. We are not persuaded that the government’s brief in a program carriage case before the D.C. Circuit, which included a statement that “[p]rogramming vendors, such as broadcast stations or cable networks, produce the video programming that consumers receive on a given channel,” reflects the Commission’s view that broadcasters are video programming vendors within the meaning of section 616. See Complaint at 5-6, citing Brief for Respondents in *The Tennis Channel, Inc. v. FCC*, Case No. 15-1067 at 4 (footnotes omitted). Contrary to LBI’s suggestion, the referenced statement was not summarizing prior Commission interpretations of the term “video programming vendor” as used in section 616.

⁵⁸ 47 U.S.C. § 536(a) (emphasis added).

⁵⁹ While it might be argued that LBI is engaged in the “production, creation, or wholesale distribution of video programming for sale” to the extent it sells programming to its owned and non-owned Estrella TV network-affiliated television stations, section 616 applies to program carriage agreements between video programming vendors and MVPDs, not between broadcast networks and their television station affiliates. 47 U.S.C. § 536(a).

⁶⁰ We note that the LBI Complaint seeks carriage not only for television stations it owns, but also for its non-owned Estrella TV network-affiliated television stations. See Complaint at 44 n.100 and 49. The mutually exclusive regulatory regimes discussed herein apply with no less force to carriage of LBI’s non-owned Estrella TV network-affiliated television stations.

⁶¹ 47 U.S.C. § 534(h)(1) (defining “local commercial television station” for purposes of applying section 614); *id.* § 534(h)(2) (defining “qualified low power station” for purposes of applying section 614).

provision's application to broadcast stations. Similarly, section 325(b) defines the rights and obligations of cable systems or other MVPDs vis-à-vis commercial "television broadcast stations" seeking "retransmission [of] the signal of a broadcasting station."⁶² By contrast, section 616, which governs "program carriage agreements and related practices between [MVPDs] and video programming vendors," contains no reference to "broadcast stations," "television stations," "broadcast signals" or any variation of those terms.⁶³

15. In addition, sections 325 and 614 together establish a comprehensive set of rights and obligations for the broadcasters and MVPDs to which those provisions apply. In particular, section 325 directs the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under [section 325(b)] and of the right to signal carriage under section 614."⁶⁴ Such regulations, among other things, must "require that television stations . . . make an election between the right to grant retransmission consent [under section 325] and the right to signal carriage under section 614."⁶⁵ Where a broadcaster has elected mandatory carriage pursuant to section 614, a cable operator providing such carriage must satisfy the obligations set forth in section 614, and may not "accept or request monetary payment or other valuable consideration in exchange . . . for [such carriage]," with certain exceptions.⁶⁶ Where a broadcaster has elected retransmission consent pursuant to section 325, both the broadcaster and MVPD must negotiate for carriage in good faith, and the MVPD may not retransmit the broadcaster's signal without "the express authority of the originating station."⁶⁷ There is no indication in the statute that broadcast stations have a third carriage option.

16. The legislative history further supports our conclusion that LBI is not acting as a video programming vendor when it engages in retransmission consent negotiations with Comcast. The retransmission consent, must carry and program carriage frameworks that are codified in sections 325, 614 and 616, respectively, all were adopted as part of the 1992 Cable Act. Had Congress intended to afford broadcast television stations rights under both the must carry and program carriage provisions, it likely would have expressly acknowledged the relationship between those provisions. In the Conference Committee's discussion with regard to program carriage, the committee did not discuss broadcast television stations.⁶⁸ In addition, when Congress amended the Cable Act in 2004 to apply the good faith retransmission consent negotiation requirement to MVPDs, it did so without reference to section 616, which would have been relevant if that section also impacted the negotiations between cable operators and television broadcasters.⁶⁹ For these reasons, we find that the structure and legislative history of the Act evince Congress's intent that the must carry and retransmission consent regimes, and not the program carriage regime, govern carriage arrangements between MVPDs and commercial broadcast licensees.

17. Our finding that the must carry/retransmission consent and program carriage provisions establish distinct and mutually exclusive regulatory regimes is consistent with previous Commission

⁶² *Id.* § 325(b)(1). *See also id.* § 615 (governing cable carriage of noncommercial educational stations).

⁶³ *See generally id.* § 536.

⁶⁴ *Id.* § 325(b)(3)(A).

⁶⁵ *Id.* § 325(b)(3)(B).

⁶⁶ *Id.* § 534(b)(10).

⁶⁷ *Id.* § 325(b)(1)(A).

⁶⁸ *Id.* § 2(a)(5), 106 Stat. at 1460-61.

⁶⁹ Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, § 207, 118 Stat. 2809, 3393 (2004).

interpretations. Although the Commission, in its first order implementing the must carry and retransmission consent provisions, suggested that “it is possible” that section 616 could apply to retransmission agreements,⁷⁰ since that time, it has consistently treated sections 614 and 325, operating in tandem, as an independent and self-contained framework that governs carriage arrangements between cable operators and broadcasters.⁷¹ For example, in a 2005 decision implementing section 325’s good faith provisions, the Commission stated:

Congress created the mandatory carriage/retransmission consent framework as part of the 1992 Cable Act. Through this framework, a broadcaster has the option to elect mandatory carriage and forgo compensation for carriage of its signal or pursue retransmission consent and risk the failure to agree and non-carriage.⁷²

By contrast, in its initial order implementing section 616, the Commission made no reference to carriage of broadcast programming.⁷³ This is evidence of the Commission’s longstanding view that the regulatory framework applicable to carriage negotiations between MVPDs and broadcasters is section 325, not section 616.

18. A finding here that a broadcaster could elect retransmission consent rather than must carry, and then seek compelled carriage pursuant to section 616 as a “video programming vendor” if its retransmission consent negotiation is unsuccessful, would conflict with and significantly undercut the must carry/retransmission consent election process set forth in sections 325 and 614.⁷⁴ LBI’s business decision to pursue retransmission consent in certain markets bore the risk of failing to reach agreement and a resulting lack of carriage. Given that LBI assumed this risk, it cannot now invoke the section 616 program carriage process as an alternative vehicle for securing carriage of its broadcast programming.

19. For the foregoing reasons, we conclude that LBI, as a broadcast licensee, is not entitled to seek compelled carriage under the program carriage framework, including section 616(a)(1) (financial

⁷⁰ See *Broadcast Signal Carriage Order*, 8 FCC Rcd at 3006, n.452 (1993) (stating only that “it is possible that Section 616 may apply separately to retransmission consent agreements”) (emphasis added).

⁷¹ See, e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994) (addressing petitions for reconsideration of the *Broadcast Signal Carriage Order* implementing the Commission’s must carry and retransmission consent regimes); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918 (2000) (discussing the retransmission consent and must carry requirements applicable to satellite pursuant to sections 325 and 338 of the Act); *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) (proposing revisions to the Commission’s retransmission consent regime, and discussing the history of the must carry and retransmission consent requirements). Not one of these orders references section 616 of the Act. See also *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 10339, 10353-54, para. 27 (2005) (stating 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”).

⁷² *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 10339, 10353-54, para. 29 (2005).

⁷³ *Program Carriage Second Report and Order*, 9 FCC Rcd at 2648, para. 14.

⁷⁴ We disagree with LBI’s assertion that “[o]nce a full power TV broadcaster elects retransmission consent in lieu of must carry, it is identically situated to cable-only channels seeking distribution by an MVPD.” Complaint at 6, n.11. Under the existing regulatory framework, for example, broadcast stations and MVPDs must negotiate for retransmission consent in good faith, and the circumstances under which broadcasters may compel carriage are different from those contemplated for video programming vendors under section 616.

interest) and section 616(a)(3) (discrimination). Affording LBI the relief it requests would be inconsistent with the well-ordered statutory frameworks established by Congress in sections 614 and 325 governing broadcaster and MVPD carriage issues and section 616 governing cable programmer and MVPD carriage issues. Moreover, our decision does not leave LBI without recourse. If it wishes to compel carriage, LBI may elect must carry pursuant to section 614 in the next election cycle beginning January 1, 2018.⁷⁵ If LBI believes that Comcast has failed to negotiate retransmission consent in good faith, it can bring a complaint pursuant to section 76.65 of the Commission's rules.⁷⁶ Because we find that LBI lacks standing to bring a complaint pertaining to carriage of its broadcast television stations under section 616 of the Act and its implementing rules,⁷⁷ we need not address Comcast's argument that LBI's complaint was not timely filed under the program carriage rules.⁷⁸

B. Standing under the *Comcast-NBCU Order*

20. Because LBI lacks standing to bring a program carriage complaint under section 616 and its implementing rules, we find that it also lacks standing to bring a complaint for an alleged violation of the *Comcast-NBCU Order* and conditions. In the *Comcast-NBCU Order*, the Commission imposed, among other things, a non-discrimination requirement on the combined entity (C-NBCU) that was intended to address the potential harms arising from C-NBCU's "increase[d] . . . ability and incentive . . . to discriminate against or foreclose unaffiliated programming."⁷⁹ The Commission explained:

[W]e condition the approval of this transaction on the requirement that Comcast not discriminate in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection of, or terms or conditions for, carriage, including in decisions regarding tiering and channel placement. If program carriage disputes arise based on this non-discrimination condition, it will be sufficient for the aggrieved vendor to show that it was discriminated against on the basis of its affiliation or non-affiliation. A vendor proceeding under this condition will not need to also prove that it was unreasonably restrained from competing, as it would under our program carriage rules. This non-discrimination requirement will be binding on Comcast

⁷⁵ As noted above, Comcast historically has carried Estrella TV in the markets at issue pursuant to the must carry provisions of section 614. *See supra* para. 8 & n. 31.

⁷⁶ 47 CFR § 76.65.

⁷⁷ As noted above, because LBI, as a broadcaster, lacks standing to bring a program carriage complaint, it has failed to meet one of the elements needed to establish a *prima facie* case of program carriage discrimination. Although LBI has made brief references to its distribution of Estrella TV programming in white areas, *see, e.g.*, Complaint at 23, Reply at 9, n.8, it does not argue that its satellite feed constitutes a "video programming vendor" as the Commission has defined that term. Contrary to LBI's suggestion, our finding that LBI lacks standing is not based on the fact that LBI "happen[s] to hold broadcast licenses," Complaint at 45, but rather, that the relief LBI seeks relates to carriage of its broadcast stations. Because we dismiss LBI's program carriage complaint without prejudice, it may file another program carriage complaint in its capacity as a non-broadcast network, to the extent that it is operating as such a network. We note that Comcast has asserted that the fact that "LBI makes Estrella TV's satellite feed available for purchase as a fill-in service for areas outside of its extensive broadcast distribution footprint does not . . . mean that Estrella TV is a cable network eligible to file a program carriage complaint." Comcast Answer at 26, n.94. We offer no opinion herein on the merits of a potential LBI claim that Estrella TV is a non-broadcast network by virtue of its provision of a satellite feed to Comcast for distribution of its programming to white areas.

⁷⁸ *See* Comcast Answer at 3, 45-50.

⁷⁹ *Comcast-NBCU Order*, 26 FCC Rcd at 4282, para. 110 and App. A, Section III.1.

independent of the Commission's rules. . . .⁸⁰

21. For the purpose of applying this condition, the Commission adopted a definition of "video programming vendor" that is identical to that contained in section 616(b) and its implementing rules.⁸¹ Thus, we use the same interpretation of that definition, discussed above, for purposes of applying the merger order and conditions.⁸² In addition, the *Comcast-NBCU Order* directs aggrieved video programming vendors to bring alleged violations of the program carriage conditions to the Commission pursuant to the program carriage complaint process established under section 616.⁸³

22. The fact that the Commission, in the *Comcast-NBCU Order*, discussed program carriage issues (and associated conditions) separately from its discussion of broadcast-related issues (and associated conditions) supports our conclusion that LBI, as a broadcaster, lacks standing to bring a program carriage claim under that order and its conditions.⁸⁴ As shown by the excerpt above, the relevant condition was intended to relieve a valid program carriage complainant from demonstrating that the alleged discrimination unreasonably restrained it from competing; it was not intended to broaden the category of entities entitled to bring a program carriage complaint. We also note that the Commission, in its discussion of broadcast-related issues, rejected a proposal to apply the non-discrimination provisions applicable to certain broadcast stations (per Comcast agreement)⁸⁵ to all broadcast stations that were unaffiliated with Comcast.⁸⁶ Had independent broadcasters, such as LBI, already been covered by the *Comcast-NBCU Order*'s program carriage nondiscrimination condition, the Commission would have noted that in declining to adopt an additional nondiscrimination provision. Based on this reasoning, we conclude that LBI lacks standing to bring a program carriage complaint alleging that C-NBCU violated the *Comcast-NBCU Order* and conditions.

IV. ORDERING CLAUSE

23. Accordingly, **IT IS ORDERED**, that pursuant to sections 4(i), 4(j) and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 536, and section 76.1302(g) of the Commission's Rules, 47 CFR § 76.1302(g), the above captioned program carriage complaint is **DISMISSED** without prejudice. This action is taken pursuant to the authority delegated in sections 0.283 and 76.1302(g) of the Commission's rules.

⁸⁰ *Id.*, 26 FCC Rcd at 4287, para. 121.

⁸¹ *Id.*, App. A, Section I.

⁸² Because we interpret the term "video programming vendor" in the same way as we do above, *see supra* para. 12, we reject LBI's assertion that the term, which uses the statutorily defined phrase "video programming," includes television broadcast stations. *See* Complaint at 5 (arguing that the term "video programming" is defined in the merger conditions as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network" and that, therefore, for purposes of the merger conditions, the term "video programming vendor" encompasses broadcast stations).

⁸³ *Comcast-NBCU Order*, App. A, Section III.4.

⁸⁴ *Id.*, 26 FCC Rcd at 4282-4289, paras. 110-124 & App. A, Section III (discussing program carriage issues); *id.* at 4304-4312, paras. 155-178 & App. A, Section IX (discussing broadcast-related issues).

⁸⁵ *Id.* at 4309, para. 168 (imposing as a condition certain non-discrimination provisions set forth in a separate agreement between C-NBCU and ABC, CBS and Fox affiliates).

⁸⁶ *Id.* at 4311 (concluding that it "will not extend the conditions . . . impose[d] arising from the ABC, CBS, and Fox Affiliates Agreement to independent stations that are not affiliated with ABC, CBS, Fox or NBC. The record does not reflect the licensee of any such station requesting such Commission action, and we see no independent need to take such action, absent a demonstrated need for us to do so").

FEDERAL COMMUNICATIONS COMMISSION

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