

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

In the Matter of)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	MB Docket No. 08-214
Complainant)	File No. CSR-7709-P
v.)	
Time Warner Cable Inc.)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7822-P
Complainant)	
v.)	
Bright House Networks, LLC,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7829-P
Complainant)	
v.)	
Cox Communications, Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7907-P
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	
)	
NFL Enterprises LLC,)	File No. CSR-7876-P
Complainant)	
v.)	
Comcast Cable Communications, LLC,)	
Defendant)	
)	
TCR Sports Broadcasting Holding, L.L.P.,)	File No. CSR-8001-P
d/b/a Mid-Atlantic Sports Network,)	
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	

MEMORANDUM OPINION AND HEARING DESIGNATION ORDER

Adopted: October 10, 2008

Released: October 10, 2008

By the Chief, Media Bureau

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I. INTRODUCTION

1. Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) has filed program carriage complaints against Time Warner Cable Inc. (“TWC”), Bright House Networks, LLC (“BHN”), Cox Communications, Inc. (“Cox”), and Comcast Corporation (“Comcast”).¹ WealthTV, a video programming vendor, alleges that TWC, BHN, Cox, and Comcast, all multichannel video programming distributors (“MVPDs”), discriminated against WealthTV’s programming in favor of a similarly situated video

¹ See Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against TWC, File No. CSR-7709-P (filed December 20, 2007) (“WealthTV Complaint Against TWC”); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against BHN, File No. CSR-7822-P (filed March 13, 2008) (“WealthTV Complaint Against BHN”); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Cox, File No. CSR-7829-P (filed March 27, 2008) (“WealthTV Complaint Against Cox”); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast, File No. CSR-7907-P (filed April 21, 2008) (“WealthTV Complaint Against Comcast”).

programming vendor, MOJO, which is affiliated with TWC, BHN, Cox, and Comcast,² in violation of Section 76.1301(c) of the Commission's rules.³ As discussed below, we direct these matters to an Administrative Law Judge ("ALJ") and order that the ALJ return Recommended Decisions in these matters to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Memorandum Opinion and Hearing Designation Order* ("Order").

2. NFL Enterprises LLC ("NFL") has filed a program carriage complaint against Comcast Cable Communications, LLC, a subsidiary of Comcast.⁴ The NFL owns the NFL Network, a video programming vendor. The NFL alleges that Comcast, an MVPD, has (i) discriminated against the NFL Network in favor of its affiliated video programming vendors in violation of Section 76.1301(c) of the Commission's rules;⁵ and (ii) required a financial interest in the NFL's programming as a condition for carriage of the NFL Network, in violation of Section 76.1301(a) of the Commission's rules.⁶ As discussed below, we direct this matter to an ALJ and order that the ALJ return Recommended Decisions in these matters to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Order*.

3. TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network ("MASN") has filed a program carriage complaint against Comcast.⁷ MASN alleges that Comcast, an MVPD, has discriminated against MASN in favor of its affiliated video programming vendors in violation of Section 76.1301(c) of the Commission's rules.⁸ As discussed below, we direct this matter to an ALJ and order that the ALJ return a Recommended Decision in this matters to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Order*.

II. BACKGROUND

4. Section 616 of the Communications Act of 1934, as amended (the "Communications Act"), directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."⁹ Among other things, Congress directed that the regulations:

(1) include provisions designed to prevent a cable operator or other [MVPD] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;¹⁰ [and]

² MOJO is owned by iN DEMAND L.L.C., which is owned 54.1% by Comcast iN DEMAND Holdings, Inc.; 15.6% by Cox Communications Holdings, Inc.; and 30.3% by Time Warner Entertainment-Advance/Newhouse Partnership ("TWE-A/N"). *See infra* n. 34.

³ 47 C.F.R. § 76.1301(c).

⁴ *See* NFL Enterprises LLC, Program Carriage Complaint, File No. CSR-7876-P (filed May 6, 2008) ("NFL Complaint Against Comcast").

⁵ 47 C.F.R. § 76.1301(c).

⁶ 47 C.F.R. § 76.1301(a).

⁷ *See* TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Program Carriage Complaint, File No. CSR-8001-P (filed July 1, 2008) ("MASN Complaint Against Comcast").

⁸ 47 C.F.R. § 76.1301(c).

⁹ 47 U.S.C. § 536. Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹⁰ 47 U.S.C. § 536(a)(1); *see* 47 C.F.R. § 76.1301(a) (implementing financial interest provision).

* * *

(3) contain provisions designed to prevent a [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.¹¹

5. The Commission adopted rules in 1993 to implement Section 616.¹² Specifically, Sections 76.1301(a) and (c) were added to the Commission's rules to prohibit a cable operator or other MVPD from requiring a financial interest in any program service as a condition for carriage of such service¹³ or engaging in conduct that unreasonably restrains the ability of an unaffiliated programming vendor to compete fairly by discriminating against such vendor on the basis of its nonaffiliation.¹⁴

6. In addition to establishing rules governing program carriage, the *Second Report and Order* also established procedures for the review of program carriage complaints and appropriate penalties and remedies. The Commission adopted procedures by which cases would be resolved on the basis of a complaint, answer and reply.¹⁵ Additional pleadings are generally not considered unless specifically requested by reviewing staff.¹⁶ The Commission recognized that "resolution of Section 616 complaints [would] necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred."¹⁷ The Commission anticipated that the "staff would be unable to resolve most carriage agreement complaints on the sole basis of a written record...."¹⁸ In such cases, if the staff determines that the complainant has established a *prima facie* case but that "disposition of the complaint would require the resolution of factual disputes or other extensive discovery," the staff is to notify the parties that they have the option of choosing Alternative Dispute Resolution ("ADR") or an adjudicatory hearing before an Administrative Law Judge.¹⁹ The Commission stated that the appropriate relief for program carriage violations would be determined on a case-by-case basis, and that appropriate remedies and sanctions would include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.²⁰

III. DISCUSSION

7. When filing a program carriage complaint, the burden of proof is on the video programming vendor to establish a *prima facie* case that the defendant MVPD has engaged in behavior

¹¹ 47 U.S.C. § 536(a)(3); see 47 C.F.R. § 76.1301(c) (implementing discrimination provision).

¹² See 47 C.F.R. §§ 76.1300 – 76.1302; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642 (1993) ("*Second Report and Order*").

¹³ 47 C.F.R. § 76.1301(a).

¹⁴ 47 C.F.R. § 76.1301(c).

¹⁵ See 47 C.F.R. § 76.1302(c), (d), (e).

¹⁶ See 47 C.F.R. § 76.7(e)(2); see also 47 C.F.R. 76.1302(a).

¹⁷ *Second Report and Order*, 9 FCC Rcd at 2648.

¹⁸ *Id.* at 2652.

¹⁹ *Id.* at 2656.

²⁰ *Id.* at 2653.

that is prohibited by Section 616 and the Commission's program carriage rules.²¹ After reviewing the pleadings and supporting documentation filed by the parties in each case, we find that the complainants have established a *prima facie* showing of a violation of the program carriage rules in each case. We also find that the pleadings and supporting documentation present several factual disputes, such that we are unable to determine on the basis of the existing records whether we can grant relief based on these claims.²²

A. WealthTV

8. WealthTV is a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's rules.²³ WealthTV focuses on "inspirational and aspirational programming about prosperous and fulfilling lifestyles."²⁴ WealthTV states that it is a "truly independent stand-alone programming service" and is not supported by or affiliated with any MVPD, telephone company, or broadcaster.²⁵ WealthTV is currently carried by over 75 MVPDs.²⁶

9. As discussed below, WealthTV had filed program carriage complaints against TWC, BHN, Cox, and Comcast. WealthTV asks the Commission to order TWC, BHN, Cox, and Comcast to provide WealthTV carriage on all TWC, BHN, Cox, and Comcast systems without delay, pursuant to the terms of a carriage agreement similar to that accorded to MOJO.²⁷ To the extent one or more of the

²¹ See *id.* at 2654.

²² See *id.* at 2655.

²³ See 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e); see also WealthTV Complaint Against TWC at ¶ 3; WealthTV Complaint Against BHN at ¶ 4; WealthTV Complaint Against Cox at ¶ 4; WealthTV Complaint Against Comcast at ¶ 4.

²⁴ See WealthTV Complaint Against TWC at ¶ 8; WealthTV Complaint Against BHN at ¶ 9; WealthTV Complaint Against Cox at ¶ 9; WealthTV Complaint Against Comcast at ¶ 9.

²⁵ See WealthTV Complaint Against TWC at ¶ 9; WealthTV Complaint Against BHN at ¶ 10; WealthTV Complaint Against Cox at ¶ 10; WealthTV Complaint Against Comcast at ¶ 10.

²⁶ These MVPDs include GCI, Charter Communications, Verizon, WideOpenWest, Qwest, Armstrong Cable, SureWest, Metrocast, Grande Communications, Service Electric, Sunflower Cable, Western Broadband, AT&T U-Verse, and OEN Fision. See WealthTV Complaint Against TWC at ¶¶ 9, 16; WealthTV Complaint Against BHN at ¶¶ 10, 16; WealthTV Complaint Against Cox at ¶¶ 10, 16; WealthTV Complaint Against Comcast at ¶¶ 10, 15. TWC, BHN, and Comcast state that this represents a modest number of the 6,600 cable systems nationwide and only one of the top-ten cable multiple system operators ("MSOs") (Charter). See Time Warner Cable Inc., Answer, File No. CSR-7709-P (February 5, 2008), at 12 ("TWC Answer"); Bright House Networks, LLC, Answer, File No. CSR-7822-P (April 14, 2008), at 17 ("BHN Answer"); Comcast Corporation, Answer, File No. CSR-7907-P (May 21, 2008), at 22 ("Comcast Answer to WealthTV").

²⁷ See WealthTV Complaint Against TWC at 28; WealthTV Complaint Against BHN at 23; WealthTV Complaint Against Cox at 25; WealthTV Complaint Against Comcast at 25. We note that, at the time WealthTV requested carriage, the defendants carried MOJO in the relevant cable systems. Although iN DEMAND recently announced that MOJO will cease operations on December 1, 2008, this does not render moot or discredit WealthTV's discrimination claim. See Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, File No. CSR-7907-P (filed October 10, 2008); Letter from Arthur H. Harding, Counsel for TWC, to Marlene H. Dortch, Secretary, FCC, File No. CSR-7709-P (filed October 10, 2008). The fact that MOJO will cease operations in the future is not relevant to the issue of whether the defendants engaged in unlawful discrimination during the period that WealthTV sought carriage. Our conclusion is consistent with the Commission's finding in other contexts that steps taken by a licensee following a violation do not eliminate the licensee's responsibility for the period during which the violation occurred. See *SBC Communications, Inc.*, Order of Forfeiture, 16 FCC Rcd 5535, 5542, ¶ 18; see also *Coleman Enters., Inc. d/b/a Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24388, ¶ 8 (2000); *America's Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22350, 22355, ¶ 15 (continued....)

systems claim to lack capacity to add an additional channel, WealthTV asks the Commission to order the system to delete an affiliated programming service to accommodate the addition of WealthTV.²⁸ WealthTV also urges the Commission to order TWC, BHN, Cox, and Comcast to comply with any documentary and interrogatory discovery that may be reasonably necessary to resolve the issues in dispute.²⁹ Moreover, WealthTV requests the Commission to order the ALJ to use “baseball style arbitration” rules to resolve the complaints.³⁰

1. WealthTV v. TWC

10. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). TWC is an MVPD and the second largest cable operator in the nation as measured by number of subscribers.³¹ As of September 30, 2007, TWC operated cable systems that pass approximately 26 million homes and provided service to 13.3 million basic video subscribers in 33 states.³² TWC operates the largest cable systems as measured by number of subscribers in the nation’s two largest cities, New York City and Los Angeles.³³ TWC is affiliated with MOJO, a video programming vendor.³⁴ According to TWC, MOJO’s orientation is “exclusively male” and its principal programming consists of sports, movies, music concerts, and reality series.³⁵ On May 7, 2007, WealthTV provided TWC with a pre-filing notice pursuant to Section 76.1302(b) of the Commission’s rules informing TWC of its intent to file a program carriage complaint.³⁶ On December 20, 2007, WealthTV filed its complaint, alleging that TWC violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.³⁷

(Continued from previous page) _____

(2001). In addition, if carriage of WealthTV is ultimately required, the fact that the defendants will no longer be carrying MOJO on the relevant cable systems indicates that they will have a vacant channel on which to accommodate WealthTV.

²⁸ See WealthTV Complaint Against TWC at 28; WealthTV Complaint Against BHN at 23; WealthTV Complaint Against Cox at 26; WealthTV Complaint Against Comcast at 25.

²⁹ See WealthTV Complaint Against TWC at 28; WealthTV Complaint Against BHN at 24; WealthTV Complaint Against Cox at 26; WealthTV Complaint Against Comcast at 26.

³⁰ See WealthTV Complaint Against TWC at 29; WealthTV Complaint Against BHN at 24; WealthTV Complaint Against Cox at 27; WealthTV Complaint Against Comcast at 26.

³¹ See TWC Answer at 42.

³² See *id.*

³³ See WealthTV Complaint Against TWC at ¶ 10; TWC Answer at 42.

³⁴ MOJO is distributed by iN DEMAND L.L.C., which is owned 54.1% by Comcast iN DEMAND Holdings, Inc.; 15.6% by Cox Communications Holdings, Inc.; and 30.3% by Time Warner Entertainment-Advance/Newhouse Partnership. See TWC Answer at 9 n.13. Due to the structure of the TWE-A/N partnership, TWC claims that its actual interest in MOJO is less than 25.9%. See *id.*

³⁵ See *id.* at 9 n.13, 20, and 42.

³⁶ See WealthTV Complaint Against TWC, Exhibit 1.

³⁷ See *id.* at ¶ 69.

a. Background

11. WealthTV states that it has been seeking carriage on TWC systems since prior to its launch in June 2004.³⁸ WealthTV explains that it proposed to provide its high definition (“HD”) video on demand (“VOD”) service to TWC free of charge provided that TWC grant it a “hunting license”³⁹ and commit to launch WealthTV in its linear line-up in one TWC system.⁴⁰ TWC rejected this proposal because it was unwilling to commit to a linear launch on even one system.⁴¹ In December 2007, TWC offered a compromise whereby it agreed not to launch WealthTV’s free HD VOD service until after it launched WealthTV in its linear line-up in one system.⁴² According to TWC, this proposal was meant to address WealthTV’s concern that TWC could launch its free HD VOD service without ever launching WealthTV on a linear basis.⁴³ WealthTV rejected this proposal because it still did not guarantee a linear launch in even one system.⁴⁴ TWC contends that it offered WealthTV a hunting license that was similar to the deals it has offered to dozens of other programmers, including some of its affiliated programmers, and that WealthTV has accepted a hunting license from other MVPDs that have no ownership interest in

³⁸ See *id.* at ¶¶ 12-15, 38-53, 69. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits from Charles Herring, WealthTV’s President, and Robert Herring, Sr., WealthTV’s Chairman and Chief Executive Officer. See *id.*, Exhibits 2 and 3.

On March 11, 2008, TWC filed a Motion to Strike WealthTV’s Reply, alleging that WealthTV’s Reply contained “new matters” in violation of the Commission rules. See Time Warner Cable Inc., Motion to Strike, File No. CSR-7709-P (March 11, 2008) (“TWC Motion to Strike”); see also 47 C.F.R. § 76.1302(e) (stating that a reply “shall be responsive to matters contained in the answer and shall not contain new matters”). On March 17, 2008, WealthTV filed a Motion seeking leave to file an Opposition and Response to TWC’s Motion to Strike. See Herring Broadcasting, Inc. d/b/a WealthTV, Motion in Response to TWC Motion to Strike, File No. CSR-7709-P (March 17, 2008) (“WealthTV Motion in Response to TWC Motion to Strike”). In its Motion, WealthTV argues that TWC’s Motion to Strike is an additional pleading that is not permitted by the Commission’s rules. See WealthTV Motion In Response to TWC Motion to Strike at 1; see also *Second Report and Order*, 9 FCC Rcd at 2652 (“Given the statute’s explicit direction to the Commission to handle program carriage complaints expeditiously, additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff.”). We grant WealthTV’s Motion and consider its Opposition and Response herein. We agree with WealthTV that its Reply does not raise “new matters.” See WealthTV Motion in Response to TWC Motion to Strike at 2-3. Rather, the information contained in WealthTV’s Reply is directly responsive to matters contained in TWC’s Answer, such as the number of subscribers needed to make a network attractive to advertisers, the similarity between WealthTV and MOJO, and the offers made by TWC during carriage negotiations prior to the filing of WealthTV’s Complaint. Although we agree with WealthTV that TWC’s Motion to Strike is an impermissible additional pleading, we nonetheless consider the arguments made in TWC’s Motion to Strike in the interest of a complete record.

³⁹ A “hunting license” refers to an agreement that specifies basic carriage terms and gives the programmer the right to seek carriage by individual cable systems owned by a cable MSO, as opposed to a nationwide carriage agreement which provides the programming service with carriage on all systems owned by the MSO. See WealthTV Complaint Against TWC at ¶ 44; TWC Answer at 12 n.19; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶ 7.

⁴⁰ See WealthTV Complaint Against TWC at ¶ 52; Herring Broadcasting, Inc. d/b/a WealthTV, Reply to TWC, File No. CSR-7709-P (filed February 25, 2008), at 11 (“WealthTV Reply to TWC”); see also TWC Answer at 49 (¶ 52).

⁴¹ See WealthTV Reply to TWC at 11; see also TWC Answer at 31, 49 (¶ 52).

⁴² See TWC Answer at 13-14, 31; TWC Motion to Strike at 11-12; see also WealthTV Reply to TWC at 11.

⁴³ See TWC Answer at 14; TWC Motion to Strike at 12.

⁴⁴ See WealthTV Reply to TWC at 11.

MOJO, such as Charter.⁴⁵ As WealthTV explains, however, its agreement with Charter guarantees a linear launch in a set number of systems, whereas TWC refused to commit to linear carriage in even one system.⁴⁶ Moreover, WealthTV states that TWC has launched MOJO on a nationwide basis while it has offered WealthTV only a hunting license, thereby demonstrating TWC's discriminatory treatment.⁴⁷ WealthTV also states that a hunting license with TWC is meaningless given the reluctance of TWC's corporate programming group to agree to carriage of WealthTV even if individual systems desire to carry the network.⁴⁸ In its Motion to Strike, TWC states that, after the filing of the WealthTV complaint, it acceded to WealthTV's demands and proposed a hunting license coupled with a firm commitment for linear carriage of WealthTV on TWC's San Antonio system.⁴⁹ In its Reply, WealthTV admits that discussions between TWC and WealthTV have continued after the filing of the Complaint, but states that it cannot address these discussions because the Commission's rules require a Reply to be responsive to matters contained in the Answer and not contain new matters.⁵⁰

b. Similarly Situated

12. As discussed below, WealthTV has provided the following evidence that MOJO is "substantially similar to WealthTV" with respect to programming, target demographic (affluent males aged 25 to 49), target audience, look and feel, targeted programming theme, and target advertisers.⁵¹

13. *Similar programming.* WealthTV provides examples of similar programming that both WealthTV and MOJO offer, regarding topics such as wine, automobiles, sports interviews, food, and electronics.⁵² For example, in June 2004, WealthTV launched *Taste! The Beverage Show*, which focuses on educating viewers about wine and spirits; in April 2007, MOJO launched *Uncorked*, which focuses on the same subject matter.⁵³ In June 2004, WealthTV launched *Wealth on Wheels*, which focuses on the latest trends in automotive technology; in August 2007, MOJO launched *Test Drive*, which focuses on the same subject matter.⁵⁴ In June 2004, WealthTV launched *Charlie Jones, Live to Tape*, which features interviews of sports figures; MOJO shows *Timeless*, which also features interviews of sports figures.⁵⁵ In June 2004, WealthTV launched *Taste of Life*, which educates viewers about behind the scenes experiences with travel, spirits, and food; in June 2006, MOJO launched *After Hours*, which focuses on a behind the scenes look at Los Angeles restaurants.⁵⁶ In April 2005, WealthTV launched *Innov8*, which educates viewers about new "gadgets and gizmos"; in December 2006, MOJO launched *Geared Up*, which focuses on high-end electronics and technology.⁵⁷ WealthTV also provides an affidavit from Jedd

⁴⁵ See TWC Answer at 2, 4-5, 13, 27-28, 30; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 8, 16; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶ 12; TWC Motion to Strike at 11.

⁴⁶ See WealthTV Reply to TWC at 13.

⁴⁷ See *id.* at 12.

⁴⁸ See *id.*

⁴⁹ See TWC Motion to Strike at 13.

⁵⁰ See WealthTV Reply to TWC at 13 n.11.

⁵¹ See WealthTV Complaint Against TWC at ¶¶ 22, 28-36; see also WealthTV Reply to TWC at 13-15.

⁵² See WealthTV Complaint Against TWC at ¶ 29.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

Palmer, a consultant with more than twenty-five years of experience in the cable industry, who reviewed the programming schedules of MOJO and WealthTV and concludes that “the overwhelming majority of the programming on both networks is the same, or very, very similar, in subject, type, feel, look and target audience.”⁵⁸

14. *Similar target demographics.* WealthTV provides evidence that WealthTV and MOJO both are focused on the same target demographic -- affluent males aged 25 to 49. WealthTV provides the results of a survey demonstrating that the demographics of WealthTV’s viewers are affluent males aged 25 to 49.⁵⁹ The results of the survey indicate that 71 percent of WealthTV’s audience is male and 55 percent have incomes greater than \$75,000.⁶⁰ TWC provides similar results for MOJO -- 72 percent of its audience is male and 61 percent have incomes greater than \$75,000.⁶¹ WealthTV also provides an excerpt from a 2004 presentation where WealthTV described its programming as geared towards males 25 to 49.⁶² WealthTV notes that the CEO of iN DEMAND has stated that MOJO is for “men making more than \$100,000 per year.”⁶³ MOJO has also used the term “active affluents” to describe its target audience.⁶⁴ In his declaration, Jedd Palmer concludes that WealthTV targets the same audience as MOJO based on his review of marketing materials, press releases, and the networks’ schedules and programming.⁶⁵ Descriptions of WealthTV and MOJO’s programming found on their respective websites further suggests the two networks offer similar programming.⁶⁶

15. *Similar focus on a targeted audience rather than on general entertainment.* WealthTV explains that iN DEMAND announced the launch of MOJO in March 2007, almost three years after the launch of WealthTV.⁶⁷ WealthTV notes that, upon the launch of MOJO, TWC agreed to offer the

⁵⁸ See WealthTV Reply to TWC, Exhibit 4, Declaration of Jedd Palmer, at ¶¶ 7-10. TWC argues that the Commission cannot rely on the information provided in the Palmer Declaration because it fails to identify the programming reviewed or provide any analysis to support the conclusions. See TWC Motion to Strike at 9. We conclude that the Palmer Declaration adequately sets forth the basis for its conclusions. See WealthTV Reply to TWC, Exhibit 4, Declaration of Jedd Palmer, at ¶¶ 7-10.

⁵⁹ See WealthTV Reply to TWC, Exhibit 3, Declaration of Mark Kersey. TWC argues that the Commission cannot rely on the survey results provided in the Kersey Declaration because it fails to provide the methodology, sample size, and other factors needed to test the validity of the conclusions. See TWC Motion to Strike at 8-9. We find that the Kersey Declaration adequately sets forth the basis for its conclusions. See WealthTV Reply to TWC, Exhibit 3, Declaration of Mark Kersey, at ¶ 3.

⁶⁰ See WealthTV Reply to TWC, Exhibit 3, Declaration of Mark Kersey.

⁶¹ See TWC Answer, Exhibit 9, Declaration of Stacie Gray, at ¶ 5.

⁶² See WealthTV Complaint Against TWC at ¶ 30 and Exhibit 12.

⁶³ See *id.* at ¶¶ 30, 35 and Exhibit 11.

⁶⁴ See *id.* at ¶ 34.

⁶⁵ See WealthTV Reply to TWC, Exhibit 4, Declaration of Jedd Palmer, ¶ 8.

⁶⁶ Compare <http://www.wealthtv.net/programming.html> (stating that WealthTV provides “fresh and compelling landmark exclusive programming in high definition. From programs on private jets and exotic first-class travel to the intellectual discussion of money and philanthropy, WealthTV showcases a wide range of programming designed to have a broad appeal”) with <http://www.mojohd.com/about/> (describing the MOJO network as “the new 100% hi-def channel [that] is tailored to fit your interests from exceptional food to extreme locales, from high tech toys to high stake antics, from Wall Street to easy street and the best of sports, music, movies and more. It’s 180° from ordinary and 100% high definition, because life is how you see it”).

⁶⁷ See WealthTV Complaint Against TWC at ¶ 22.

channel across all of its systems carrying HD.⁶⁸ While TWC claims that the service now known as MOJO was originally launched in 2003 under the name INHD, before the launch of WealthTV,⁶⁹ WealthTV provides evidence that MOJO did not result from merely a name change⁷⁰ and that MOJO is a targeted programming service whereas INHD was a general entertainment service.⁷¹ WealthTV notes that the CEO of iN DEMAND stated that INHD could not survive as “general entertainment programming,” thus INHD was converted into a targeted programming service with similar programming to WealthTV.⁷² In his declaration, Jedd Palmer concludes that “MOJO is not a general entertainment service, but rather a highly targeted niche programming service.”⁷³

16. *Similar target advertisers.* WealthTV explains that it targets the same advertisers as MOJO.⁷⁴ WealthTV explains that both WealthTV and MOJO feature programming on wine and spirits and both networks have targeted the same advertising agency for Grey Goose Vodka.⁷⁵

17. TWC disputes that WealthTV and MOJO are similar programming services or that they have similar target demographics.⁷⁶ TWC appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

c. Differential Treatment

18. WealthTV argues that TWC has treated WealthTV differently than MOJO by carrying MOJO on its systems but refusing to carry WealthTV on those same systems. While TWC claims that it recently offered WealthTV a hunting license coupled with a firm commitment for linear carriage of WealthTV on TWC’s San Antonio system,⁷⁷ the salient issue for our analysis is that TWC has launched its affiliated MOJO network on a nationwide basis but it has refused to carry WealthTV on the same terms.

⁶⁸ See *id.* at ¶ 25.

⁶⁹ See TWC Answer at 22-25; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶¶ 5-7, 14; *id.* at Exhibit 9, Declaration of Stacie Gray, at ¶¶ 3, 6, 8.

⁷⁰ See WealthTV Reply to TWC at 15.

⁷¹ See *id.* at 15; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 7.

⁷² See WealthTV Complaint Against TWC at ¶ 32.

⁷³ See WealthTV Reply to TWC at 15; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 7.

⁷⁴ See WealthTV Complaint Against TWC at ¶ 36.

⁷⁵ See *id.*

⁷⁶ For example, TWC contends that MOJO’s orientation is exclusively males aged 18 to 49, whereas WealthTV’s website describes its programming as appealing to a broad audience. See TWC Answer at 3, 18-24; *id.* at Exhibit 3, Declaration of Michael Egan, at ¶¶ 7-11; *id.* at Exhibit 9, Declaration of Stacie Gray, at ¶¶ 3, 7-8; *id.* at Exhibit 10 (comparing programs identified in WealthTV’s Complaint); *id.* at Exhibit 11 (chart providing categories of programming shown on WealthTV and MOJO); *id.* at Exhibits 12-15 (providing programming schedules for WealthTV and MOJO for sample weeks in July 2007 and January 2008); TWC Motion to Strike at 8-11.

⁷⁷ See TWC Motion to Strike at 13.

d. Harm to Ability to Compete

19. As required by the program carriage statute and our rules, WealthTV has provided evidence that TWC's refusal to carry WealthTV restrains its ability to compete fairly.⁷⁸ WealthTV provides evidence that advertisers are not interested in placing advertisements on programming services that are available to fewer than 20 million households.⁷⁹ Absent carriage on one or both of the largest cable MSOs, such as TWC or Comcast, a programmer's ability to attract advertisers is impeded and its long-term financial viability is limited.⁸⁰ In addition, WealthTV provides evidence that TWC has "quasi monopolies" in key markets, such as New York and Los Angeles, that are essential to WealthTV's long-term viability.⁸¹ WealthTV also notes that many MVPDs refuse to carry a programming service that has been denied carriage by TWC.⁸² WealthTV explains further that TWC's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.⁸³ TWC argues that WealthTV could meet a 20 million subscriber benchmark through carriage agreements with other large MVPDs, including MVPDs with no affiliation with MOJO, such as DIRECTV and DISH Network, but that WealthTV has failed to reach carriage agreements with these MVPDs as well.⁸⁴ We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces.

e. Alleged Business and Editorial Justifications for TWC's Refusal to Carry WealthTV

20. TWC offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, TWC claims that its minority stake in MOJO does not provide a sufficient basis to influence its decision regarding carriage of WealthTV.⁸⁵ A determination whether the program carriage rules have been violated does not turn on whether or not TWC has a minority stake in the affiliated programmer, but rather it focuses on the factors we have identified above. Indeed, TWC admits that its interest in MOJO satisfies the attribution threshold, thus the program carriage rules apply to its conduct regarding carriage of MOJO.⁸⁶

21. Second, TWC claims that the video marketplace is competitive and that no MVPD can afford to keep "a programming service with attractive pricing and content off its systems based on

⁷⁸ See WealthTV Complaint Against TWC at ¶ 1; WealthTV Reply to TWC at 7-8, 17-20; *id.* at Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶¶ 2-5; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 11; *see also* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

⁷⁹ See WealthTV Complaint Against TWC at ¶ 62; WealthTV Reply to TWC, Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶ 3.

⁸⁰ See WealthTV Complaint Against TWC at ¶ 62; WealthTV Reply to TWC, Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶¶ 2-3.

⁸¹ See WealthTV Complaint Against TWC at ¶ 10; WealthTV Reply to TWC, Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶ 5; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 11.

⁸² See WealthTV Reply to TWC at 19.

⁸³ See *id.*

⁸⁴ See TWC Answer at 5, 34; TWC Motion to Strike at 6 n.15.

⁸⁵ See TWC Answer at 17; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 20, 22; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶ 15.

⁸⁶ See WealthTV Reply to TWC at 7; *see also* TWC Answer at 9 n.13.

ownership if doing so would cost it subscribers.”⁸⁷ We reject this claim because it would effectively require a program carriage complainant to demonstrate that an MVPD’s failure to carry its service will cause subscribers to switch to other MVPDs that do carry the service.⁸⁸ This is not a requirement of the program carriage statute or our rules. In addition, because TWC carries an affiliated programming service, MOJO, that provides programming that is substantially similar to WealthTV, there is even less reason for TWC’s subscribers to switch to a competitor that carries WealthTV.⁸⁹

22. Third, TWC states that its decision to carry a channel depends on capacity constraints; the proven track record of success of the channel; the experience of the channel’s management team; the subscriber interest in the channel; input from TWC’s division management; and the terms offered by the channel.⁹⁰ TWC argues that WealthTV has no proven audience demand and is led by individuals with no experience in creating a national cable network.⁹¹ WealthTV, on its behalf, has provided evidence demonstrating that it is an established channel with experienced management⁹² and proven consumer appeal, as demonstrated by: (i) its linear carriage on 75 MVPDs to date;⁹³ (ii) a sampling of e-mails from viewers reflecting their support for the channel;⁹⁴ (iii) the interest in the channel expressed by representatives of individual TWC systems;⁹⁵ and (iv) the decision of TWC’s San Antonio system to launch WealthTV’s HD VOD service in March 2007.⁹⁶

23. Fourth, TWC states that it made the same business decision as many other MVPDs, including Direct Broadcast Satellite (“DBS”) operators DIRECTV and DISH Network, that WealthTV did not warrant carriage given the terms it was demanding.⁹⁷ WealthTV explains, however, that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either.⁹⁸

f. Conclusion

24. We conclude that WealthTV has established a *prima facie* showing that TWC has discriminated against WealthTV in violation of the program carriage rules.

2. WealthTV v. BHN

25. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). BHN

⁸⁷ See TWC Answer at 17; see also *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 14, 18, 21; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶ 15; TWC Motion to Strike at 15-16.

⁸⁸ See WealthTV Reply to TWC at 16.

⁸⁹ See *id.* at 17.

⁹⁰ See TWC Answer at 16-17; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 3-5, 12-14.

⁹¹ See TWC Answer at 17 n.32, 29; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶ 16.

⁹² See WealthTV Reply to TWC, Exhibit 4, Affidavit of Jedd Palmer, at ¶ 12.

⁹³ See WealthTV Complaint Against TWC at ¶ 16.

⁹⁴ See *id.*, Exhibit 20.

⁹⁵ See *id.* at ¶ 17 and Exhibits 5-6.

⁹⁶ See *id.* at ¶ 20 and Exhibits 7-9.

⁹⁷ See TWC Answer at 18, 28-29.

⁹⁸ See WealthTV Reply to TWC at 20.

is an MVPD and the sixth largest cable operator in the nation as measured by number of subscribers.⁹⁹ BHN is a subsidiary of Time Warner Entertainment – Advance/Newhouse Partnership, a general partnership whose interests are held by subsidiaries of TWC and by Advance/Newhouse.¹⁰⁰ As of March 2008, BHN owned, managed, or controlled cable systems that serve 2,312,000 basic video subscribers in various regions, including Indianapolis, Central Florida (Orlando area), Daytona Beach area, Tampa Bay area, Birmingham-Hoover area, west suburban Detroit, and Bakersfield.¹⁰¹ BHN is affiliated with MOJO, a video programming vendor.¹⁰² According to BHN, MOJO’s orientation is “exclusively male” and its principal programming consists of sports, movies, music concerts, and reality series.¹⁰³ On May 15, 2007, WealthTV provided BHN with a pre-filing notice pursuant to Section 76.1302(b) of the Commission’s rules informing BHN of its intent to file a program carriage complaint.¹⁰⁴ As discussed further below, on March 13, 2008, WealthTV filed its complaint, alleging that BHN violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.¹⁰⁵

a. Background

26. WealthTV states that it has been seeking carriage on BHN systems since the summer of 2004.¹⁰⁶ WealthTV describes its visits with BHN representatives in leading markets and claims that representatives of several BHN systems, including those in the Tampa Bay market, expressed an interest in carrying WealthTV, especially because Verizon FIOS TV offered WealthTV in both standard digital and HD formats in Tampa Bay.¹⁰⁷ WealthTV claims that Anne Stith, formerly BHN’s Director of Product Marketing for the Tampa Division, told WealthTV’s President in July 2006 that BHN would like to launch WealthTV as soon as WealthTV completed a deal with TWC.¹⁰⁸ WealthTV also notes that it was making its service available for free through 2008.¹⁰⁹ BHN and Ms. Stith, however, state that Ms. Stith had no authority to make programming commitments on behalf of BHN and that most programmers understood that BHN was covered by the programming agreements negotiated by TWC.¹¹⁰ Moreover,

⁹⁹ See BHN Answer at 33.

¹⁰⁰ See *id.*, Exhibit 1, Declaration of Steve Miron, at ¶ 2.

¹⁰¹ See WealthTV Complaint Against BHN at ¶ 11; BHN Answer at 33-34; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 4.

¹⁰² BHN is a wholly owned subsidiary of the TWE-A/N partnership and does not have a direct ownership stake in MOJO. See BHN Answer at 18. Due to the structure of the TWE-A/N partnership, BHN claims that its actual economic interest in MOJO is about 5%. See *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 3.

¹⁰³ See BHN Answer at 24, 25 n.61, 38; *id.* at Exhibit 6, Declaration of Stacie Gray, at ¶¶ 3, 6.

¹⁰⁴ See WealthTV Complaint Against BHN, Exhibit 1.

¹⁰⁵ See *id.* at ¶¶ 46-47.

¹⁰⁶ See *id.* at ¶ 12. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits or declarations from Charles Herring, WealthTV’s President; Robert Herring, Sr., WealthTV’s Chairman and Chief Executive Officer; Jedd Palmer, principal of Jedd Palmer Consulting; and Mark Kersey, President of Kersey Research Strategies. See *id.*, Exhibits 2, 3, 7, 11, and 13.

¹⁰⁷ See *id.* at ¶¶ 12-15; Herring Broadcasting, Inc. d/b/a WealthTV, Reply to BHN, File No. CSR-7822-P (filed May 5, 2008), at 13, 16-17 (“WealthTV Reply to BHN”); *id.* at Exhibit 2, Supplemental Affidavit of Charles Herring, at ¶ 2.

¹⁰⁸ See WealthTV Complaint Against BHN at ¶ 13; WealthTV Reply to BHN, Exhibit 2, Supplemental Affidavit of Charles Herring, at ¶ 2.

¹⁰⁹ See WealthTV Reply to BHN at 16.

¹¹⁰ See BHN Answer at 13 n.16; *id.* at Exhibit 2, Declaration of Anne Stith, at ¶ 2.

Ms. Stith states that her inquiries of WealthTV were purely for purposes of research and that she never made statements indicating that BHN would be interested in carrying WealthTV.¹¹¹ When WealthTV's Vice President of Affiliate Relations, John Scaro, contacted BHN's President, Steve Miron, Mr. Miron informed Mr. Scaro that BHN is covered by the programming agreements that TWC negotiates with national networks and that further direct negotiations with BHN would not be an efficient use of time.¹¹² Based on this, WealthTV concludes that BHN was prepared to carry WealthTV but for the absence of a carriage agreement with TWC.¹¹³ WealthTV states that BHN thus completely refused to negotiate with WealthTV.¹¹⁴ WealthTV states the BHN is required to comply with the program carriage rules and cannot use its reliance on TWC to negotiate programming agreements as a defense.¹¹⁵

b. Similarly Situated

27. WealthTV provides similar evidence submitted in connection with its complaint against TWC purporting to demonstrate that WealthTV and MOJO are similarly situated.¹¹⁶ BHN notes some general dissimilarities between specific programming on WealthTV and MOJO.¹¹⁷ BHN appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

c. Differential Treatment

28. WealthTV argues that BHN has treated WealthTV differently by carrying MOJO on its systems but refusing to carry WealthTV on those same systems.

¹¹¹ See BHN Answer at 13-15; *id.* at Exhibit 2, Declaration of Anne Stith, at ¶¶ 5-7.

¹¹² See WealthTV Complaint Against BHN at ¶ 15; WealthTV Reply to BHN at 14; BHN Answer at 15; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 12. BHN states that while it is covered by programming contracts that TWC negotiates for national networks, it consults with TWC on programming needs and often meets with programmers. See BHN Answer at 14 n.17; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 7. BHN notes that the WealthTV Complaint is not supported by an affidavit from Mr. Scaro. See BHN Answer at 12-13. WealthTV explains that Mr. Scaro no longer works for WealthTV and that all contacts discussed in its pleadings, including those involving Mr. Scaro, have been verified through affidavits of Charles Herring and Robert Herring. See WealthTV Reply to BHN at 21 n.19.

¹¹³ See WealthTV Reply to BHN at 5.

¹¹⁴ See WealthTV Complaint Against BHN at ¶¶ 2, 15.

¹¹⁵ See WealthTV Reply to BHN at 6, 23-24.

¹¹⁶ See *supra* ¶¶ 12-16; see also WealthTV Complaint Against BHN at ¶¶ 17, 23-32; *id.* at Exhibit 7, Affidavit of Jedd Palmer, at ¶¶ 8-10 (discussing similarity of WealthTV and MOJO); *id.* at Exhibit 11, Declaration of Mark Kersey (providing survey results demonstrating the demographics of WealthTV's viewers); WealthTV Reply to BHN at 9, 14-15.

¹¹⁷ For example, BHN states that MOJO's orientation is exclusively males aged 18 to 49, whereas WealthTV's website describes its programming as appealing to a broad audience. See BHN Answer at 4, 20-26; *id.* at Exhibit 6, Declaration of Stacie Gray, at ¶¶ 3, 7-9; *id.* at Exhibit 7 (comparing programs identified in WealthTV complaint); *id.* at Exhibit 8 (chart providing categories of programming shown on WealthTV and MOJO); *id.* at Exhibits 9-12 (providing programming schedules for WealthTV and MOJO for sample weeks in July 2007 and January 2008).

d. Harm to Ability to Compete

29. As required by the program carriage statute and our rules, WealthTV has provided evidence that BHN's refusal to carry WealthTV restrains its ability to compete fairly.¹¹⁸ WealthTV notes that BHN's decision to carry MOJO but to deny carriage to WealthTV provides MOJO with a first mover advantage with respect to the viewers and advertisers each network targets.¹¹⁹ WealthTV also explains that an independent channel must be available to at least 20 million subscribers in order to attract national advertisers and to achieve financial viability.¹²⁰ WealthTV states that the inability to obtain carriage on BHN systems makes it more difficult for independent programmers to reach this level of subscribership.¹²¹ WealthTV also alleges that obtaining carriage in major markets where BHN owns cable systems, such as Tampa and Orlando, is essential for attracting advertisers.¹²² According to WealthTV, many MVPDs refuse to carry a programming service that has been denied carriage by TWC and BHN.¹²³ In addition, WealthTV states that BHN's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.¹²⁴

30. In response, BHN argues that carriage on its systems is not necessary in order to reach the 20 million subscriber benchmark.¹²⁵ The program carriage rules, however, apply to all MVPDs, regardless of their subscriber base.¹²⁶ BHN claims that WealthTV could meet this benchmark through carriage agreements with other MVPDs, including MVPDs with no affiliation with MOJO, such as DIRECTV and DISH Network, but that WealthTV has failed to reach carriage agreements with these MVPDs as well.¹²⁷ We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces. While BHN asserts that the 20 million subscriber benchmark cannot apply to an HD network such as WealthTV because there are fewer than 20 million HD customers nationwide,¹²⁸ WealthTV responds that its HD feed is also available as a downconverted standard definition ("SD") feed that can be viewed by all subscribers.¹²⁹ While BHN notes that WealthTV has been operational for four years despite the lack of a carriage agreement with BHN,¹³⁰ we

¹¹⁸ See WealthTV Complaint Against BHN at ¶ 2; *id.* at Exhibit 7, Affidavit of Jedd Palmer, at ¶ 11; *id.* at Exhibit 13, Supplemental Affidavit of Charles Herring, at ¶¶ 2-5; WealthTV Reply to BHN at 10, 19-23; *see also* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹¹⁹ See WealthTV Complaint Against BHN at ¶ 2; WealthTV Reply to BHN at 10.

¹²⁰ See WealthTV Complaint Against BHN at ¶ 39; *id.* at Exhibit 13, Supplemental Affidavit of Charles Herring, at ¶¶ 2-3.

¹²¹ See WealthTV Complaint Against BHN at ¶¶ 2, 39.

¹²² See *id.* at ¶¶ 11, 38.

¹²³ See WealthTV Reply to BHN at 10, 21.

¹²⁴ See *id.* at 21.

¹²⁵ See BHN Answer at 6, 30.

¹²⁶ See WealthTV Reply to BHN at 4-5.

¹²⁷ See BHN Answer at 6, 18, 31.

¹²⁸ See *id.* at 29-30.

¹²⁹ See WealthTV Reply to BHN at 28.

¹³⁰ See BHN Answer at 31.

agree with WealthTV that the more pertinent consideration is its ability to compete over the long term absent a carriage agreement with BHN.¹³¹

e. Alleged Business and Editorial Justifications for BHN's Refusal to Carry WealthTV

31. BHN offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, BHN claims that its five percent economic interest in MOJO does not provide a sufficient basis to influence its decision regarding carriage of WealthTV.¹³² BHN admits, however, that its interest in MOJO satisfies the attribution threshold, thus the program carriage rules apply to its conduct regarding carriage of MOJO.¹³³

32. Second, BHN claims that the video marketplace is competitive and that "customers will take their business elsewhere if BHN fails to offer them desirable services at a fair price."¹³⁴ We reject this claim because it would effectively require a program carriage complainant to demonstrate that an MVPD's failure to carry the service will cause subscribers to switch to other MVPDs that do carry the service.¹³⁵ In addition, because BHN carries its affiliated programming service, MOJO, that provides programming that is substantially similar to WealthTV, there is even less reason for BHN's subscribers to switch to a competitor that carries WealthTV.¹³⁶

33. Third, BHN claims that its negotiations reflect "sound business and editorial judgment."¹³⁷ Specifically, BHN states that its decision to carry a channel depends on capacity constraints; whether the channel is carried by competitors; the experience of the channel's management team; the overall product mix of the BHN system; subscriber demand for the channel; input from BHN's division management; and the terms offered by the channel.¹³⁸ BHN contends that WealthTV has no proven consumer demand and is managed by individuals with no experience in launching successful networks.¹³⁹ WealthTV, for its part, has provided evidence demonstrating that it is an established channel with experienced management¹⁴⁰ and proven consumer appeal, as demonstrated by: (i) its linear carriage on 75 MVPDs to date;¹⁴¹ (ii) a sampling of e-mails from viewers reflecting their support for the channel;¹⁴² and (iii) the interest in the channel expressed by representatives of individual BHN systems.¹⁴³

¹³¹ See WealthTV Reply to BHN at 28.

¹³² See BHN Answer at 18-19, 20; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 3.

¹³³ See WealthTV Reply to BHN at 9-10; *see also* BHN Answer at 18-19 (admitting that BHN's interest in iN DEMAND satisfies the attribution threshold).

¹³⁴ See BHN Answer at 19; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 11.

¹³⁵ See WealthTV Reply to BHN at 18.

¹³⁶ See *id.* at 17-18.

¹³⁷ See BHN Answer at 5; *see also id.* 3-4, 19.

¹³⁸ See *id.* at 20; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 8.

¹³⁹ See BHN Answer at 4, 14, 16-17, 20 n.35, 21; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶¶ 9-10; *id.* at Exhibit 2, Declaration of Anne Stith, at ¶ 8.

¹⁴⁰ See WealthTV Complaint Against BHN, Exhibit 4, Affidavit of Jedd Palmer, at ¶ 12.

¹⁴¹ See WealthTV Complaint Against BHN at ¶ 16.

¹⁴² See WealthTV Complaint Against BHN, Exhibit 6.

¹⁴³ See WealthTV Complaint Against BHN at ¶¶ 13-15; WealthTV Reply to BHN at 13; *id.* at Exhibit 2, Supplemental Affidavit of Charles Herring, at ¶ 2.

WealthTV also provides the results of an independent survey which reports that WealthTV's HD VOD product ranked fourth out of twenty HD services.¹⁴⁴

34. Fourth, BHN contends that virtually all of the MVPDs that do not carry WealthTV are not affiliated with MOJO, again demonstrating that decisions regarding carriage of WealthTV are not based on affiliation.¹⁴⁵ For example, BHN notes that DBS operators, DIRECTV and DISH Network, do not carry WealthTV.¹⁴⁶ WealthTV explains that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either.¹⁴⁷ Moreover, WealthTV notes that Verizon, BHN's wireline competitor in Tampa, carries WealthTV but not MOJO.¹⁴⁸ In any event, we agree with WealthTV that the salient fact is that each owner of the cable-affiliated MOJO network has refused to carry WealthTV, and a discrimination claim requires the Commission to assess why these cable operators have refused to carry WealthTV but have decided to carry MOJO.¹⁴⁹

f. Conclusion

35. We conclude that WealthTV has established a *prima facie* that BHN has discriminated against WealthTV in violation of the program carriage rules.

3. WealthTV v. Cox

36. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV established a *prima facie* showing of discrimination under Section 76.1301(c). Cox is an MVPD and the third largest cable operator in the nation.¹⁵⁰ Cox provides cable services to over six million customers in numerous regions across the United States, including Southern California, New England, Arizona, Las Vegas, Oklahoma, Kansas, Hampton Roads, and Central Florida.¹⁵¹ Cox is affiliated with MOJO, a video programming vendor.¹⁵² According to Cox, MOJO's orientation is "exclusively male" and its principal programming consists of sports, movies, music concerts, and reality series.¹⁵³ On May 7, 2007, WealthTV provided Cox with a pre-filing notice pursuant to Section

¹⁴⁴ See WealthTV Reply to BHN at 18-19; *id.* at Exhibit 1. While BHN provides the results of a July 2007 customer survey in which WealthTV was ranked next-to-last among HD networks in terms of subscriber interest (*see* BHN Answer, Exhibit 5; *see also* BHN Answer at 4, 16-17, 21; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 10), WealthTV notes that this survey is irrelevant because it was conducted after BHN ceased discussions with WealthTV, thereby providing no probative value as to BHN's decision making process in refusing to carry WealthTV. *See* WealthTV Reply to BHN at 18.

¹⁴⁵ *See* BHN Answer at 18.

¹⁴⁶ *See id.*

¹⁴⁷ *See* WealthTV Reply to BHN at 22.

¹⁴⁸ *See id.* WealthTV claims that MOJO is only made available to MVPDs that do not compete with the owners of MOJO (BHN, Comcast, Cox, and TWC). *See id.* at 22-23. IN DEMAND, the owner of MOJO, states that MOJO is available to any MVPD and notes that MOJO is currently carried by competitors such as RCN, Knology, Atlantic Telephone Cable, and Grande Communications. *See* Letter from Michael S. Berman, iN DEMAND L.L.C., to Ms. Marlene H. Dortch, FCC, File No. CSR-7822-P (June 12, 2008).

¹⁴⁹ *See* WealthTV Reply to BHN at 5.

¹⁵⁰ *See* WealthTV Complaint Against Cox at ¶¶ 3, 12; Cox Communications, Inc., Answer, File No. CSR-7829-P (May 5, 2008), at 43 (¶ 3), 44 (¶ 12) ("Cox Answer").

¹⁵¹ *See* WealthTV Complaint Against Cox at ¶ 12; Cox Answer at 44 (¶ 12).

¹⁵² Cox has a 15.6% interest in iN DEMAND and MOJO. *See* WealthTV Complaint Against Cox at ¶ 1; Cox Answer at 43 (¶ 1).

¹⁵³ *See* Cox Answer at 29-30; *id.* at Exhibit 2, Declaration of Stacie Gray, at ¶¶ 3, 6.

76.1302(b) of the Commission's rules informing Cox of its intent to file a program carriage complaint.¹⁵⁴ As discussed further below, on March 27, 2008, WealthTV filed its complaint, alleging that Cox violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.¹⁵⁵

a. Background

37. WealthTV states that it has been seeking carriage on Cox systems since the summer of 2004, but that Cox has refused to negotiate in good faith.¹⁵⁶ WealthTV discusses its visits with representatives of individual Cox systems in leading markets during 2004 and 2005 and claims that some of these systems expressed a strong desire to carry WealthTV.¹⁵⁷ Cox states that its programming negotiations are conducted at the corporate level and provides declarations from representatives of individual Cox systems stating that they informed WealthTV that all carriage decisions are made by Cox's corporate programming department.¹⁵⁸ Cox states that it informed WealthTV at a May 2005 meeting that the interest expressed by a few individual systems was insufficient to justify carriage of WealthTV and that it was denying carriage to WealthTV.¹⁵⁹ WealthTV states that it considered Cox's comments to be a form of bargaining and that Cox did not state that a final decision had been made to deny carriage to WealthTV.¹⁶⁰

¹⁵⁴ See WealthTV Complaint Against Cox, Exhibit 1.

¹⁵⁵ See WealthTV Complaint Against Cox at ¶¶ 48-49.

¹⁵⁶ See *id.* at ¶ 13. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits or declarations from Charles Herring, WealthTV's President; Robert Herring, Sr., WealthTV's Chairman and Chief Executive Officer; Jedd Palmer, principal of Jedd Palmer Consulting; and Mark Kersey, President of Kersey Research Strategies. See *id.*, Exhibits 2, 3, 6, 10, and 12.

¹⁵⁷ See *id.* at ¶¶ 13-15. WealthTV states that Mark Cameron of Cox-New England in July 2004 stated that he was interested in carrying WealthTV and offered to assist in obtaining corporate approval. See *id.* at ¶ 13; Herring Broadcasting, Inc. d/b/a WealthTV, Reply to Cox, File No. CSR-7829-P (filed May 27, 2008) ("WealthTV Reply to Cox") at Exhibit 3, Declaration of Charles Herring, at ¶ 4. WealthTV claims that in a subsequent meeting held in May 2005, Mr. Cameron confirmed that he would launch WealthTV once a corporate agreement was concluded. See *id.*, Exhibit 3, Declaration of Charles Herring, at ¶ 5. Cox notes that Mr. Cameron is now deceased. See Cox Answer at 14 n.35. In addition, WealthTV claims that representatives from Cox-Wichita confirmed that they were responsible for programming choices for their system and that they offered to carry WealthTV. See WealthTV Complaint Against Cox at ¶¶ 13-14; WealthTV Reply to Cox at Exhibit 3, Declaration of Charles Herring, at ¶¶ 7-11. According to WealthTV, in May 2005, the General Manager of Cox-Wichita called Cox's Senior Vice President of Programming to ask that an agreement with WealthTV be concluded. See WealthTV Complaint Against Cox at ¶ 15.

¹⁵⁸ See Cox Answer at Exhibit 1, Declaration of Robert C. Wilson, at ¶¶ 1-2. For example, two of Mr. Cameron's former employees claim that WealthTV was informed that programming decisions were made by Cox's corporate programming group. See Cox Answer at 14-15; *id.* at Exhibit 5, Declaration of Mike Patrie, at ¶ 2; *id.* at Exhibit 6, Declaration of Joyce Arcand, at ¶ 2. They also state that Mr. Cameron previously expressed to them that he had no intention of following up with WealthTV regarding carriage. See Cox Answer at Exhibit 5, Declaration of Mike Patrie, at ¶ 2; *id.* at Exhibit 6, Declaration of Joyce Arcand, at ¶ 2. Cox provides an affidavit from one of the Cox-Wichita representatives denying that he offered to launch WealthTV and stating that he informed WealthTV's representatives that a carriage agreement could not be concluded without corporate approval. See Cox Answer at 15 n.36, 44-45 (¶ 13); *id.* at Exhibit 3, Declaration of Tony Matthews, at ¶¶ 2-3.

¹⁵⁹ See Cox Answer at 6-7, 10-11, 19; *id.* at Exhibit 1, Declaration of Robert C. Wilson, at ¶ 8.

¹⁶⁰ See WealthTV Reply to Cox at 3; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2, 12, 15.

b. Procedural Issues

38. Cox contends that the WealthTV complaint is barred by the program carriage statute of limitations because the complaint does not allege any act by Cox occurring within one year of the Complaint or the pre-filing notice.¹⁶¹ Rather, according to Cox, the last formal contact between WealthTV and Cox alleged in the complaint occurred no later than a June 7, 2005 letter; thus, Cox claims that the statute of limitations required WealthTV to file its complaint no later than June 7, 2006.¹⁶² We reject Cox's claim for the following reasons. First, WealthTV states that Cox never expressed a final decision to deny carriage to WealthTV and provides evidence that communications between Cox and WealthTV continued after June 2005.¹⁶³ Second, WealthTV states that it was not until the launch of MOJO in March 2007 and the failure of subsequent carriage discussions when it became obvious to WealthTV that Cox intended to favor its affiliated MOJO service.¹⁶⁴ Third, the plain language of the Commission's rules provides that the statute of limitations is satisfied if the program carriage complaint is filed within one year of the pre-filing notice, which WealthTV has done in this case.¹⁶⁵

c. Similarly Situated

39. WealthTV provides similar evidence submitted in connection with its complaint against TWC purporting to demonstrate that WealthTV and MOJO are similarly situated.¹⁶⁶ Cox notes some general dissimilarities between specific programming on WealthTV and MOJO.¹⁶⁷ Cox appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

d. Differential Treatment

40. WealthTV argues that Cox has treated WealthTV differently by carrying MOJO on its systems but refusing to carry WealthTV on those same systems.

¹⁶¹ See Cox Answer at 3, 5-6.

¹⁶² See *id.* at 7-8, 11.

¹⁶³ See WealthTV Reply to Cox at 3; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2, 12, 15-16; *id.* at Exhibits 4-7 (providing emails exchanged between WealthTV and Cox after June 2005). To further support its claim that the Complaint was filed in accordance with the statute of limitations, WealthTV explains that it was not until May 2006, one year prior to the pre-filing notice, when Cox refused to carry the multicast stream of a Las Vegas CBS affiliate that proposed to broadcast WealthTV programming. See WealthTV Reply to Cox at 4; *see also* WealthTV Complaint Against Cox at ¶ 18. Cox argues, however, that this incident did not involve direct communication between Cox and WealthTV. See Cox Answer at 6 n.4; *id.* at Exhibit 11, Declaration of Leo Brennan, at ¶ 4. WealthTV, however, claims that Leo Brennan of Cox-Las Vegas informed WealthTV of this decision in mid-May 2006. See WealthTV Reply to Cox at 4; *id.* at Exhibit 8 (e-mail from Charles Herring, WealthTV, to Leo Brennan, Cox-Las Vegas).

¹⁶⁴ See WealthTV Reply to Cox at 3-4; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2, 16.

¹⁶⁵ See 47 C.F.R. § 76.1302(f)(3); WealthTV Reply to Cox at 3-4.

¹⁶⁶ See *supra* ¶¶ 12-16; *see also* WealthTV Complaint Against Cox at ¶¶ 1, 2, 24, 25-34; *id.* at Exhibit 6, Affidavit of Jedd Palmer, at ¶¶ 8-10 (discussing similarity of WealthTV and MOJO); *id.* at Exhibit 10, Declaration of Mark Kersey (providing survey results demonstrating the demographics of WealthTV's viewers); WealthTV Reply to Cox at 8-9, 17-18.

¹⁶⁷ For example, Cox states that MOJO's orientation is exclusively males aged 18 to 49, whereas WealthTV's website describes its programming as appealing to a broad audience. See Cox Answer at 2-3, 23-30, 44 (¶ 9), 48-50 (¶¶ 25-34); *id.* at Exhibit 2, Declaration of Stacie Gray, at ¶¶ 3, 7-10; *id.* at Exhibits 9-10 (providing programming schedules for WealthTV and MOJO for a week in April 2008).

e. Harm to Ability to Compete

41. As required by the program carriage statute and our rules, WealthTV has provided evidence that Cox's refusal to carry WealthTV restrains its ability to compete fairly.¹⁶⁸ WealthTV explains that Cox's decision to carry MOJO but to deny carriage to WealthTV provides MOJO with a first mover advantage with respect to the viewers and advertisers each network targets.¹⁶⁹ WealthTV also submits that an independent channel must be available to at least 20 million subscribers in order to attract national advertisers and to achieve financial viability.¹⁷⁰ WealthTV states that the inability to obtain carriage on Cox systems makes it more difficult for independent programmers to reach this level of subscribership.¹⁷¹ In addition, WealthTV explains that obtaining carriage in major markets where Cox owns or operates systems, such as Central Florida, New England, Phoenix, and San Diego, is essential for attracting advertisers.¹⁷² According to WealthTV, many MVPDs refuse to carry a programming service that has been denied carriage by Cox.¹⁷³ In addition, Cox's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.¹⁷⁴

42. In response, Cox does not dispute that 20 million subscribers are needed for a channel to achieve long-term viability,¹⁷⁵ but states that it serves approximately six million MVPD households, thereby making carriage on its systems not necessary in order to reach the 20 million subscriber benchmark.¹⁷⁶ The program carriage rules, however, apply to all MVPDs, regardless of their subscriber base.¹⁷⁷ Cox also claims that WealthTV could meet this benchmark through carriage agreements with other MVPDs, including MVPDs with no affiliation with MOJO, such as DIRECTV and DISH Network, but that WealthTV has failed to reach carriage agreements with these MVPDs as well.¹⁷⁸ We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces. Cox also asserts that the 20 million subscriber benchmark cannot apply to an HD network such as WealthTV because there are fewer than 20 million HD customers nationwide.¹⁷⁹ WealthTV explains, however, that its HD feed is also available as a downconverted SD feed that can be viewed by all subscribers.¹⁸⁰ While Cox notes that WealthTV has obtained carriage on a number of MVPDs despite

¹⁶⁸ See WealthTV Complaint Against Cox at ¶¶ 2, 40-41; *id.* at Exhibit 12, Supplemental Affidavit of Charles Herring, at ¶¶ 2-5; *id.* at Exhibit 6, Affidavit of Jedd Palmer, at ¶ 11; WealthTV Reply to Cox at 9, 19-20, 22-23; *see also* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹⁶⁹ See WealthTV Complaint Against Cox at ¶ 2.

¹⁷⁰ See *id.* at ¶ 41; *id.* at Exhibit 12, Supplemental Affidavit of Charles Herring, at ¶¶ 2-3; WealthTV Reply to Cox at 20.

¹⁷¹ See WealthTV Complaint Against Cox at ¶¶ 2, 41; WealthTV Reply to Cox at 19.

¹⁷² See WealthTV Complaint Against Cox at ¶¶ 12, 40.

¹⁷³ See WealthTV Reply to Cox at 9, 19-20; *see also* WealthTV Complaint Against Cox at Exhibit 12, Supplemental Affidavit of Charles Herring, at ¶ 4.

¹⁷⁴ See WealthTV Reply to Cox at 19-20.

¹⁷⁵ See Cox Answer at 34 n.118.

¹⁷⁶ See *id.* at 34.

¹⁷⁷ See WealthTV Reply to Cox at iii.

¹⁷⁸ See Cox Answer at 34-35.

¹⁷⁹ See *id.* at 33-34.

the lack of a carriage agreement with Cox,¹⁸¹ we agree with WealthTV that the more pertinent consideration is its ability to compete over the long term absent a carriage agreement with Cox.¹⁸²

f. Alleged Business and Editorial Justifications for Cox’s Refusal to Carry WealthTV

43. Cox offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, Cox claims that its minority interest in MOJO does not provide a sufficient basis for Cox to decline to carry WealthTV.¹⁸³ Cox admits, however, that its interest in MOJO satisfies the attribution threshold, thus the program carriage rules apply to its conduct regarding carriage of MOJO.¹⁸⁴

44. Second, Cox claims that it declined to carry WealthTV based on “sound business considerations and reasonable editorial judgment.”¹⁸⁵ Specifically, Cox states that its decision to carry a channel depends on the following criteria: likely viewer appeal; the quality of the programming; whether the channel has a proven track record of attracting viewers or is associated with an established brand; the likelihood of the channel’s success considering its management team and business plan; bandwidth management; proposed terms of carriage; the local needs of Cox’s cable systems; and whether the channel has a regional appeal that might be attractive to certain systems. Cox claims that WealthTV does not justify carriage based on these criteria.¹⁸⁶ WealthTV argues that it satisfies Cox’s selection criteria.¹⁸⁷ For example, WealthTV asserts that it is an established channel with experienced management;¹⁸⁸ offered very favorable terms for carriage;¹⁸⁹ and that Cox’s alleged concern regarding bandwidth constraints from carrying an HD channel are not a valid concern because WealthTV was offering SD digital and VOD products in addition to HD.¹⁹⁰ WealthTV also provides evidence that it has proven viewer appeal, as demonstrated by: (i) its linear carriage on 75 MVPDs to date;¹⁹¹ (ii) a sampling of e-mails from viewers reflecting their support for the channel;¹⁹² (iii) the interest in the channel expressed by representatives of various Cox systems;¹⁹³ (iv) the interest expressed by Cox-San Diego and a Cox programming network in

(Continued from previous page) _____

¹⁸⁰ See WealthTV Reply to Cox at 22-23.

¹⁸¹ See Cox Answer at 31.

¹⁸² See WealthTV Reply to Cox at 28.

¹⁸³ See Cox Answer at 22.

¹⁸⁴ See WealthTV Reply to Cox at 9; see also Cox Answer at 43 (¶ 1) (admitting that Cox’s interest in iN DEMAND is 15.6 percent, thereby making MOJO an affiliated programming service).

¹⁸⁵ See Cox Answer at 14; see also *id.* at 2, 14-20.

¹⁸⁶ See *id.* at 16-20; *id.* at Exhibit 1, Declaration of Robert C. Wilson, at ¶¶ 3-8.

¹⁸⁷ See WealthTV Reply to Cox at 12-14.

¹⁸⁸ See *id.* at 13; see also WealthTV Complaint Against Cox at Exhibit 6, Affidavit of Jedd Palmer, at ¶ 12.

¹⁸⁹ See WealthTV Reply to Cox at 13-14.

¹⁹⁰ See *id.* at 14, 23.

¹⁹¹ See WealthTV Complaint Against Cox at ¶ 10; WealthTV Reply to Cox at 13.

¹⁹² See WealthTV Complaint Against Cox at Exhibit 5.

¹⁹³ See WealthTV Complaint Against Cox at ¶¶ 13-15; WealthTV Reply to Cox at 13; *id.* at Exhibit 3, Declaration of Charles Herring (providing chart indicating support for WealthTV expressed by individual Cox systems).

San Diego (4SD – High Definition) in carrying WealthTV-produced content,¹⁹⁴ and (v) the interest expressed by a CBS affiliate in Las Vegas in carrying WealthTV as a multicast channel, which the General Manager of Cox-Las Vegas refused to carry because of the potential for negative customer reaction if the CBS affiliate were to drop the WealthTV programming.¹⁹⁵

45. Third, Cox contends that most of the MVPDs that do not carry WealthTV are not affiliated with MOJO, thus demonstrating that decisions to refrain from carrying WealthTV are not based on affiliation.¹⁹⁶ For example, Cox notes that DBS operators, DIRECTV and DISH Network, do not carry WealthTV.¹⁹⁷ WealthTV explains, however, that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either.¹⁹⁸ In any event, we agree with WealthTV that the salient fact is that each owner of the cable-affiliated MOJO network has refused to carry WealthTV, and a discrimination claim requires the Commission to assess why these cable operators have decided to refuse carriage to WealthTV.¹⁹⁹

g. Conclusion

46. We conclude that WealthTV has established a *prima facie* showing that Cox has discriminated against WealthTV in violation of the program carriage rules.

4. WealthTV v. Comcast

47. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). Comcast is an MVPD and the largest cable operator in the nation as measured by number of subscribers.²⁰⁰ Comcast serves over 24 million basic video subscribers in thirty-nine states and the District of Columbia.²⁰¹ Comcast operates the largest cable systems in Philadelphia, Chicago, Boston, San Francisco, Washington, D.C., and Houston.²⁰² Comcast is affiliated with MOJO, a video

¹⁹⁴ See WealthTV Complaint Against Cox at ¶ 17; WealthTV Reply to Cox at Exhibit 3, Declaration of Charles Herring, at ¶¶ 17-18. Cox states that it decided not to carry the WealthTV programming because it has no local or regional appeal for San Diego viewers. See Cox Answer at 18, 46 (¶ 17); *id.* at Exhibit 4, Declaration of William K. Geppert, at ¶ 3; *id.* at Exhibit 8, Declaration of Dennis Morgigno, at ¶¶ 3-4. WealthTV claims that the parties never reached an agreement because WealthTV was unwilling to agree to Cox's demand that its programming be branded under the Cox San Diego name. See WealthTV Reply to Cox at Exhibit 3, Declaration of Charles Herring, at ¶¶ 17-18.

¹⁹⁵ See WealthTV Complaint Against Cox at ¶ 18. Cox states that it was unwilling to carry WealthTV as a multicast stream because of the terms of the parties' retransmission consent agreement. See Cox Answer at 6 n.4; *id.* at Exhibit 11, Declaration of Leo Brennan, at ¶ 3.

¹⁹⁶ See Cox Answer at 2, 21.

¹⁹⁷ See *id.* at 21, 34.

¹⁹⁸ See WealthTV Reply to Cox at 21. WealthTV claims that MOJO is only made available to MVPDs that do not compete with the owners of MOJO (BHN, Comcast, Cox, and TWC). See *id.* IN DEMAND, the owner of MOJO, states that MOJO is available to any MVPD and notes that MOJO is currently carried by competitors such as RCN, Knology, Atlantic Telephone Cable, and Grande Communications. See Letter from Michael S. Berman, in DEMAND L.L.C., to Ms. Marlene H. Dortch, FCC, File No. CSR-7829-P (June 12, 2008).

¹⁹⁹ See WealthTV Reply to Cox at iii.

²⁰⁰ See WealthTV Complaint Against Comcast at ¶ 11; Comcast Answer to WealthTV at 31 (¶ 11).

²⁰¹ See WealthTV Complaint Against Comcast at ¶ 11; Comcast Answer to WealthTV at 31 (¶ 11).

²⁰² See WealthTV Complaint Against Comcast at ¶ 11; Comcast Answer to WealthTV at 31 (¶ 11).

programming vendor.²⁰³ According to Comcast, MOJO is aimed at 18-to-49-year-old males and its principal programming consists of sports, movies, and concerts.²⁰⁴ On May 3, 2007, WealthTV provided Comcast with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing Comcast of its intent to file a program carriage complaint.²⁰⁵ As discussed further below, on April 21, 2008, WealthTV filed its complaint, alleging that Comcast violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.²⁰⁶

a. Background

48. WealthTV states that it has been seeking carriage on Comcast systems since early to mid-2004.²⁰⁷ WealthTV discusses its visits with Comcast representatives in leading markets and claims that systems in Comcast's Atlantic Division, San Francisco, Washington DC/Virginia, Chicago, Washington state, and Florida all expressed interest in carrying WealthTV.²⁰⁸ According to WealthTV, in the summer of 2004, Comcast's corporate programming group acknowledged the interest among Comcast systems in carrying WealthTV but Comcast refused to engage in meaningful negotiations.²⁰⁹ WealthTV alleges that Alan Dannenbaum, Comcast's Corporate Senior Vice President of Programming, stated in the second half of 2004 that a draft carriage agreement would be forthcoming but blamed "scarce resources" for the failure to produce a draft.²¹⁰ Comcast states that neither its corporate management nor any individual Comcast system expressed an interest in carrying WealthTV.²¹¹

²⁰³ Comcast has a 54.1% interest in iN DEMAND and MOJO. *See* Comcast Answer to WealthTV at 30 (¶ 1).

²⁰⁴ *See id.* at 3 (¶ 6), 18 (¶ 36), 19 (¶ 38), 21 (¶ 42); *id.* at Exhibit 6, Declaration of Stacie Gray, at ¶¶ 4, 9-10.

²⁰⁵ *See* WealthTV Complaint Against Comcast, Exhibit 1.

²⁰⁶ *See* WealthTV Complaint Against Comcast at ¶¶ 44-45.

²⁰⁷ *See id.* at ¶¶ 6, 12, 33; Herring Broadcasting, Inc. d/b/a WealthTV, Reply to Comcast, File No. CSR-7907-P (filed June 9, 2008), at 15-16 ("WealthTV Reply to Comcast"); *id.* at Exhibit 3, Declaration of Charles Herring, at ¶ 16. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits or declarations from Charles Herring, WealthTV's President; Robert Herring, Sr., WealthTV's Chairman and Chief Executive Officer; Jedd Palmer, principal of Jedd Palmer Consulting; and Mark Kersey, President of Kersey Research Strategies. *See* WealthTV Complaint Against Comcast at Exhibits 2, 3, 6, 10, and 12.

On June 30, 2008, Comcast filed a Motion to Dismiss WealthTV's Complaint. *See* Comcast Corporation, Motion to Dismiss, File No. CSR-7907-P (June 30, 2008) ("Comcast Motion to Dismiss"). On July 7, 2008, WealthTV filed a Motion seeking leave to file an Opposition to Comcast's Motion to Dismiss. *See* Herring Broadcasting, Inc. d/b/a WealthTV, Motion, File No. CSR-7907-P (July 7, 2008) ("WealthTV Opposition to Comcast Motion to Dismiss"). In its Motion, WealthTV argues that Comcast's Motion to Dismiss is an additional pleading that is not permitted by the Commission's rules. *See* WealthTV Opposition to Comcast Motion to Dismiss at ¶ 1; *see also Second Report and Order*, 9 FCC Rcd at 2652. We grant WealthTV's Motion and consider its Opposition to Comcast's Motion to Dismiss herein. Although we agree with WealthTV that Comcast's Motion to Dismiss is an impermissible additional pleading, we nonetheless consider the arguments made in Comcast's Motion to Dismiss in the interest of a complete record.

²⁰⁸ *See* WealthTV Complaint Against Comcast at ¶¶ 12, 15.

²⁰⁹ *See id.* at ¶ 12.

²¹⁰ *See id.* at ¶ 13 and Exhibit 4.

²¹¹ *See* Comcast Answer to WealthTV at 6-7 (¶ 14), 14 (¶ 28); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 16; *id.* at Exhibit 3, Declaration of Alan Dannenbaum, at ¶¶ 4-6.

49. In August 2006, WealthTV representatives, including WealthTV's President, Charles Herring, met with Mr. Dannenbaum.²¹² According to WealthTV, Mr. Dannenbaum stated that "Comcast will not allow another MTV to be made on Comcast's back without owning it."²¹³ WealthTV states that it understood this to mean that Comcast would not allow a non-affiliated network to become successful without owning it.²¹⁴ WealthTV states that this is direct evidence of discrimination in Comcast's carriage decisions.²¹⁵ Comcast provides a declaration from Mr. Dannenbaum in which he denies making this statement.²¹⁶

50. Comcast states that it made two offers to carry WealthTV in April 2008, after WealthTV sent its pre-filing notice but prior to the filing of the Complaint.²¹⁷ WealthTV counters that Comcast never made a firm offer for carriage during these discussions and that none of the proposals was remotely comparable to the terms and conditions offered to MOJO.²¹⁸

b. Similarly Situated

51. WealthTV provides similar evidence submitted in connection with its complaint against TWC purporting to demonstrate that WealthTV and MOJO are similarly situated.²¹⁹ Comcast notes some

²¹² See WealthTV Complaint Against Comcast at ¶ 14.

²¹³ See *id.*; see also WealthTV Reply to Comcast at 17; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2-4, 20; *id.* at Exhibit 6, Declaration of John Ghiorzi, at ¶¶ 1-3.

²¹⁴ See WealthTV Complaint Against Comcast at ¶ 14; see WealthTV Reply to Comcast at 17; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2-4; *id.* at Exhibit 6, Declaration of John Ghiorzi, at ¶¶ 1-3.

²¹⁵ See WealthTV Reply to Comcast at 17.

²¹⁶ See Comcast Answer to WealthTV at 16 (¶ 32); *id.* at Exhibit 3, Declaration of Alan Dannenbaum, at ¶ 9.

²¹⁷ See *id.* at 1-2 (¶¶ 2-3); 5-9 (¶¶ 11-19); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶¶ 6-10; Comcast Motion to Dismiss at 1-2. Comcast explains that its first carriage offer was made on April 14, 2008 when Mr. Bond proposed a hunting license which would enable WealthTV to seek carriage directly from individual Comcast systems. See Comcast Answer to WealthTV at 1-2 (¶ 2); 6 (¶ 13); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 6; Comcast Motion to Dismiss at 1-2. WealthTV states that the hunting license proposed by Comcast was not an offer for carriage but merely an invitation to talk to individual Comcast systems. See WealthTV Reply to Comcast at 5, 9. In addition, WealthTV explains that it has never agreed to a hunting license with other MVPDs without a commitment for scheduled launches over a period of time. See WealthTV Reply to Comcast at 14 n.12. Comcast states that its second carriage offer was made on April 17, 2008 when Mr. Bond proposed that, in addition to providing WealthTV with a hunting license, Comcast would pay to launch WealthTV on the digital basic tier on a system in Chicago for a guaranteed period of time and would also carry WealthTV in Comcast's VOD service. See Comcast Answer to WealthTV at 1-2 (¶ 2), 7-8 (¶ 16); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 8; Comcast Motion to Dismiss at 2-4. Comcast explains that its offer would provide WealthTV with an opportunity to demonstrate whether there is consumer interest in the channel. See Comcast Answer to WealthTV at 7-8 (¶ 16); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 8. WealthTV states that Comcast's desire to test the appeal of WealthTV is unwarranted because WealthTV has been operating for over three years and has thousands of subscribers on other MVPDs in Chicago. See WealthTV Reply to Comcast at 15 n.13. WealthTV states that Comcast never offered specific terms and that the discussions with Mr. Bond never constituted an offer for carriage. See *id.* at 16; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶ 18.

²¹⁸ See WealthTV Reply to Comcast at 9-10, 12-13; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 13, 18, 20; WealthTV Opposition to Comcast Motion to Dismiss at ¶¶ 2-3, 6.

²¹⁹ See *supra* ¶¶ 12-16; see also WealthTV Complaint Against Comcast at ¶¶ 1, 2, 22, 23-32; *id.* at Exhibit 8, Affidavit of Jedd Palmer, at ¶¶ 8-10 (discussing similarity of WealthTV and MOJO); *id.* at Exhibit 12, Declaration of Mark Kersey (providing survey results demonstrating the demographics of WealthTV's viewers); WealthTV Reply to Comcast at 5, 17-19.

general dissimilarities between specific programming on WealthTV and MOJO.²²⁰ Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

c. Differential Treatment

52. WealthTV argues that Comcast has treated WealthTV differently by carrying MOJO on its systems but refusing to carry WealthTV on those same systems. While Comcast claims that it recently offered WealthTV a hunting license coupled with a firm commitment for linear carriage of WealthTV on a system in the Chicago DMA,²²¹ the salient issue for our analysis is that Comcast has launched its affiliated MOJO network on a nationwide basis but it has refused to carry WealthTV on the same terms.

d. Harm to Ability to Compete

53. As required by the program carriage statute and our rules, WealthTV has provided evidence that Comcast's refusal to carry WealthTV restrains its ability to compete fairly.²²² WealthTV explains that Comcast's decision to carry MOJO while denying carriage to WealthTV provides MOJO with a first mover advantage with respect to the viewers and advertisers each network targets.²²³ WealthTV also claims that an independent channel must be available to at least 20 million subscribers in order to attract national advertisers and to achieve financial viability.²²⁴ WealthTV states that the inability to obtain carriage on Comcast systems makes it more difficult for independent programmers to reach this level of subscribership.²²⁵ WealthTV also explains that obtaining carriage in major markets where Comcast owns or operates cable systems, such as Philadelphia, Chicago, San Francisco, Boston, Washington, and Houston, is essential for attracting advertisers.²²⁶ According to WealthTV, cable systems and satellite companies look to Comcast in making programming decisions, thereby making Comcast's refusal to carry WealthTV particularly harmful.²²⁷ In addition, Comcast's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.²²⁸

²²⁰ For example, Comcast states that MOJO's orientation is exclusively males aged 18 to 49, whereas WealthTV's executives as well as its own website describe its programming as appealing to a broad audience. *See* Comcast Answer at 3-4 (¶¶ 6-7), 17 (¶ 34), 21-26 (¶¶ 41-48), 34-37 (¶¶ 23-32); *id.* at Exhibit 6, Declaration of Stacie Gray, at ¶¶ 4, 7-14; *id.* at Exhibits 7 and 10 (providing programming schedules for WealthTV and MOJO for one week in May 2008).

²²¹ *See* Comcast Answer to WealthTV at 1-2 (¶ 2), 7-8 (¶ 16); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 8; Comcast Motion to Dismiss at 2-4.

²²² *See* WealthTV Complaint Against Comcast at ¶¶ 2, 36-37; *id.* at Exhibit 8, Affidavit of Jedd Palmer, at ¶ 11; *id.* at Exhibit 14, Supplemental Affidavit of Charles Herring, at ¶¶ 2-5; WealthTV Reply to Comcast at 5-6, 23-26; *see also* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

²²³ *See* WealthTV Complaint Against Comcast at ¶ 2; WealthTV Reply to Comcast at 23, 25.

²²⁴ *See* WealthTV Complaint Against Comcast at ¶ 37; *id.* at Exhibit 14, Supplemental Affidavit of Charles Herring, ¶¶ 2-3.

²²⁵ *See* WealthTV Complaint Against Comcast at ¶¶ 2, 37.

²²⁶ *See id.* at ¶ 36.

²²⁷ *See id.*; *id.* at Exhibit 14, Supplemental Affidavit of Charles Herring, ¶ 4; *see also* WealthTV Reply to Comcast at 24.

²²⁸ *See* WealthTV Reply to Comcast at 23, 25.

54. In response, Comcast claims that carriage on its competitors, such as DIRECTV, DISH Network, AT&T, and Verizon, would allow WealthTV to reach its subscriber goals.²²⁹ We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs.²³⁰ Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces.²³¹ Comcast also states that WealthTV could distribute its programming on alternative distribution platforms, such as VOD or the Internet.²³² The program carriage statute, however, does not excuse an MVPD's discriminatory conduct based on the possibility of alternative distribution platforms.²³³

e. Alleged Business and Editorial Justifications for Comcast's Refusal to Carry WealthTV

55. Comcast offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, Comcast states that it declined to carry WealthTV on terms similar to MOJO based on its business and editorial judgment.²³⁴ Specifically, Comcast states that its decision to carry a channel depends on capacity constraints; the type and quality of the programming; the channel's track record of producing programming; evidence of consumer appeal for the channel; the experience of the channel's management team; and the terms offered by the channel.²³⁵ Based on these factors, Comcast contends that it determined that WealthTV does not warrant extensive carriage.²³⁶ WealthTV argues that it meets Comcast's carriage criteria, explaining that it is an established channel with experienced management²³⁷ and proven consumer appeal, as demonstrated by: (i) its linear carriage on 75 MVPDs to date;²³⁸ (ii) a sampling of e-mails from viewers reflecting their support for the channel;²³⁹ (iii) the interest in the channel expressed by representatives of various Comcast systems as well as favorable comments about WealthTV made by Madison Bond, Comcast's Executive Vice President for Content Acquisition;²⁴⁰ and (iv) the results of an independent survey which reports that

²²⁹ See Comcast Answer to WealthTV at 4 (¶ 9), 26-27 (¶ 49).

²³⁰ See WealthTV Reply to Comcast at 26.

²³¹ See *id.*

²³² See Comcast Answer to WealthTV at 26-27 (¶ 49).

²³³ See WealthTV Reply to Comcast at 25.

²³⁴ See Comcast Answer to WealthTV at 2 (¶ 4), 4 (¶ 8), 10 (¶ 21); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 12.

²³⁵ See Comcast Answer to WealthTV at 9-10 (¶ 20); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 11.

²³⁶ See Comcast Answer to WealthTV at 10 (¶ 21), 11-12 (¶ 23), 12 (¶ 24); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶¶ 13-14.

²³⁷ See WealthTV Complaint Against Comcast at Exhibit 8, Affidavit of Jedd Palmer, at ¶ 12.

²³⁸ See WealthTV Complaint Against Comcast at ¶ 10.

²³⁹ See WealthTV Complaint Against Comcast at Exhibit 5.

²⁴⁰ See WealthTV Complaint Against Comcast at ¶¶ 12, 15, 16. Mr. Bond states that any encouraging statements he may have made to WealthTV did not constitute a commitment for carriage. See Comcast Answer to WealthTV at 17 n.55; *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 15.

WealthTV's HD VOD product ranked fourth out of twenty HD services.²⁴¹ WealthTV also notes that it offered very favorable terms for carriage.²⁴²

56. Second, Comcast contends that most MVPDs do not carry WealthTV, including those that have no affiliation with MOJO, again demonstrating that decisions regarding carriage of WealthTV are not based on affiliation.²⁴³ For example, Comcast notes that DBS operators, DIRECTV and DISH Network, do not carry WealthTV.²⁴⁴ WealthTV explains, however, that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either.²⁴⁵ Moreover, WealthTV notes that AT&T, Verizon, and other Comcast competitors carry WealthTV but not MOJO.²⁴⁶

f. Conclusion

57. We conclude that WealthTV has established a *prima facie* showing that Comcast has discriminated against WealthTV in violation of the program carriage rules.

5. Conclusion

58. In the *Second Report and Order*, the Commission stated that it would identify specific behavior that constitutes discrimination on a case-by-case basis “because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.”²⁴⁷ Any complainant alleging a violation of the prohibition in Section 616(a)(3) on discrimination must demonstrate that the alleged discrimination is “on the basis of affiliation or nonaffiliation” of a vendor, and that “the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.”²⁴⁸ After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* case in the above-referenced cases under Section 76.1301(c). We also find that the pleadings and supporting documentation present several factual disputes as to whether TWC, BHN, Cox, and Comcast discriminated against WealthTV in favor of their affiliated MOJO service. Accordingly, we direct the ALJ to make and return a Recommended Decision to the Commission pursuant to the procedures set forth below within 60 days after release of this *Order*.

B. NFL Enterprises v. Comcast

59. After reviewing the pleadings and supporting documentation filed by the parties, we find that the NFL has established a *prima facie* case that Comcast (i) discriminated against the NFL Network in violation of Section 76.1301(c) of our rules; and (ii) required a financial interest in the NFL's

²⁴¹ See WealthTV Reply to Comcast at 21.

²⁴² See *id.*

²⁴³ See Comcast Answer to WealthTV at 2-3 (¶ 4), 10-11 (¶ 22); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 12.

²⁴⁴ See Comcast Answer to WealthTV at 10-11 (¶ 22); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 12.

²⁴⁵ See WealthTV Reply to Comcast at 23.

²⁴⁶ See *id.* at 20-21. WealthTV claims that MOJO is only made available to MVPDs that do not compete with the owners of MOJO (BHN, Comcast, Cox, and TWC). See *id.* at 23. IN DEMAND, the owner of MOJO, states that MOJO is available to any MVPD and notes that MOJO is currently carried by competitors such as RCN, Knology, Atlantic Telephone Cable, and Grande Communications. See Letter from Michael S. Berman, iN DEMAND L.L.C., to Ms. Marlene H. Dortch, FCC, File No. CSR-7907-P (June 12, 2008).

²⁴⁷ *Second Report and Order*, 9 FCC Rcd at 2648.

²⁴⁸ *Id.*; 47 C.F.R. § 76.1302(c)(3).

programming as a condition for carriage of the NFL Network, in violation of Section 76.1301(a) of the Commission's rules. The NFL owns the NFL Network, a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's rules.²⁴⁹ The NFL Network was launched in 2003 as a fan development vehicle to offer football-related programming.²⁵⁰ In addition to offering eight live NFL regular season games, the NFL Network offers pre-season live and tape-delayed games as well as coverage of the NFL Scouting Combine, the NFL Draft, team training camps, and other programming.²⁵¹ The NFL states that the NFL Network is an independent network that is not owned by any cable or satellite operator.²⁵² The NFL Network is currently carried by over 240 MVPDs to 36 million subscribers nationwide.²⁵³ Comcast is the largest MVPD in the nation, with approximately 24.7 million subscribers.²⁵⁴ Comcast is affiliated with Versus (previously named the Outdoor Life Network ("OLN")), the Golf Channel, as well as other video programming vendors.²⁵⁵

1. Background

60. On April 17, 2008, the NFL provided Comcast with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing Comcast of its intent to file a program carriage complaint.²⁵⁶ As discussed further below, on May 6, 2008, the NFL filed its complaint, alleging that Comcast (i) discriminated against the NFL Network in favor of its affiliated video programming vendors, including Versus and the Golf Channel, in violation of Section 76.1301(c) of the Commission's rules;²⁵⁷ and (ii) required a financial interest in the NFL's programming as a condition for carriage of the NFL Network, in violation of Section 76.1301(a) of the Commission's rules.²⁵⁸ In its Complaint, the NFL requests the Commission to (i) find Comcast in violation of Sections 76.1301(a) and (c) of the Commission's rules; (ii) enjoin Comcast from further program carriage discrimination; (iii) order Comcast to carry the NFL Network on equitable terms that do not unreasonably restrict its ability to compete fairly, as determined by the Media Bureau; and (iv) order any other relief that may be appropriate.²⁵⁹ In its Reply, the NFL specifies further that the Commission should require Comcast to carry the NFL Network on the same tier as its affiliated national sports networks, Versus and the Golf Channel, beginning with the commencement of the fall 2008 football season.²⁶⁰ The NFL also contends that an extensive evidentiary

²⁴⁹ See 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e); see also NFL Complaint Against Comcast at ¶ 12.

²⁵⁰ See NFL Complaint Against Comcast at ¶ 25; *id.* at Exhibit 10, Declaration of Frank Hawkins, at ¶ 2 ("Hawkins Decl.").

²⁵¹ See NFL Complaint Against Comcast at ¶¶ 25-26 and Hawkins Decl. at ¶ 2; NFL Enterprises LLC, Reply, File No. CSR-7876-P (filed July 10, 2008), at ¶ 23 ("NFL Reply to Comcast").

²⁵² See NFL Complaint Against Comcast at ¶ 12.

²⁵³ See *id.* at ¶ 26.

²⁵⁴ See Comcast Answer to NFL at 55 (¶ 2), 62 (¶ 28); see also Complaint at ¶ 2.

²⁵⁵ See Comcast Answer to NFL at 62 (¶ 29); see also NFL Complaint Against Comcast at ¶ 29.

²⁵⁶ See NFL Complaint Against Comcast, Exhibit 8.

²⁵⁷ 47 C.F.R. § 76.1301(c).

²⁵⁸ 47 C.F.R. § 76.1301(a).

²⁵⁹ See NFL Complaint Against Comcast at 31-32.

²⁶⁰ See NFL Reply to Comcast at ¶¶ 8, 50. The NFL states that, if Comcast changes the terms by which it carries its national sports networks, then the appropriate relief might change. See *id.* at ¶ 51.

investigation is not needed and that the Commission should promptly enter an Order providing its requested relief.²⁶¹

61. According to Comcast, the NFL approached Comcast regarding carriage of the NFL Network in 2003.²⁶² Comcast claims that it was not interested in carrying the NFL Network because consumer interest in a football-only network without any live NFL games appeared weak; Comcast had bandwidth constraints; and Comcast was concerned about the soaring costs of sports programming.²⁶³ Comcast claims that around the time the NFL was seeking carriage for the NFL Network, it was also seeking to make available to MVPDs its NFL Sunday Ticket package²⁶⁴ and a package of eight live NFL regular season games (the “Eight-Game Package”).²⁶⁵ Comcast states that it was interested in acquiring the rights to telecast the NFL Sunday Ticket because it had lost subscribers to DIRECTV which had exclusive rights to NFL Sunday Ticket.²⁶⁶ Comcast states that it was also interested in licensing the Eight-Game Package for its Versus network.²⁶⁷ According to Comcast, the NFL sought to make carriage of the NFL Network more attractive by coupling carriage of the NFL Network on a widely distributed tier with an opportunity for Comcast to bid on NFL Sunday Ticket and the Eight-Game Package.²⁶⁸ Comcast was concerned, however, that it might be forced to carry the NFL Network on a widely distributed tier even if it did not acquire the licensing rights to NFL Sunday Ticket and the Eight-Game Package.²⁶⁹

62. In August 2004, the NFL and Comcast entered into a Negotiating Agreement regarding the NFL Sunday Ticket and the Eight-Game Package and an Affiliation Agreement regarding carriage of the NFL Network.²⁷⁰ In the Affiliation Agreement, Comcast agreed to carry the NFL Network on its digital basic tier (called the “D2” tier).²⁷¹ The Affiliation Agreement provided that, with one exception, no Comcast system could distribute the NFL Network solely in a sports tier.²⁷² The exception provided that Comcast would have the right to move the NFL Network from the digital basic tier to any tier (including a premium sports tier) if Comcast and the NFL did not reach an agreement by July 31, 2006 concerning carriage of the NFL Sunday Ticket or the Eight-Game Package (the “Conditional Tiering Provision”).²⁷³

²⁶¹ See *id.* at ¶ 71.

²⁶² See Comcast Answer to NFL at ¶ 8; see *id.* at Exhibit 1, Declaration of Stephen B. Burke, at ¶ 3 (“Burke Decl.”).

²⁶³ See Comcast Answer to NFL at ¶¶ 8-9 and Burke Decl. at ¶ 6; *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 19 (“Bond Decl.”); *id.* at Exhibit 3, Declaration of Brian L. Roberts, at ¶ 4 (“Roberts Decl.”).

²⁶⁴ See Comcast Answer to NFL at ¶ 9. NFL Sunday Ticket is a package of approximately 200 out-of-market live NFL games. See *id.* at ¶ 10. At the time, DIRECTV’s exclusive rights to NFL Sunday Ticket were set to expire at the end of the 2005 season. See *id.*, Roberts Decl. at ¶ 4.

²⁶⁵ See Comcast Answer to NFL at ¶ 9. The NFL states that making the Eight-Game Package available to a cable channel would increase the number of NFL games available to a national audience. See NFL Complaint Against Comcast at ¶ 70 and Hawkins Decl. at ¶ 6.

²⁶⁶ See Comcast Answer to NFL at ¶ 10 and Roberts Decl. at ¶ 4.

²⁶⁷ See Comcast Answer to NFL at ¶ 74 (¶ 67) and Roberts Decl. at ¶ 6.

²⁶⁸ See Comcast Answer to NFL at ¶ 9.

²⁶⁹ See *id.* at ¶ 11.

²⁷⁰ See NFL Complaint Against Comcast at ¶ 64; Comcast Answer to NFL at ¶ 12 and Bond Decl. at ¶ 6.

²⁷¹ See Comcast Answer to NFL at ¶ 12.

²⁷² See NFL Complaint Against Comcast at 25 n.15.

²⁷³ See NFL Complaint Against Comcast at 2 n.3 and 25 n.15; Comcast Answer to NFL at ¶ 12, Bond Decl. at ¶ 7, Burke Decl. at ¶ 10, Roberts Decl. at ¶ 5.

The NFL alleges that Comcast “forced” it to agree to the Conditional Tiering Provision.²⁷⁴ Comcast states that this provision was meant to address its concern that it might be forced to carry the NFL Network on a widely distributed tier even if it did not acquire the licensing rights to NFL Sunday Ticket or the Eight-Game Package.²⁷⁵ Comcast claims that the Conditional Tiering Provision was a fundamental part of the parties’ agreement and that it would not have agreed to carry the NFL Network without this provision.²⁷⁶ Pursuant to this Affiliation Agreement, Comcast began to carry the NFL Network on its digital basic tier in 2004.²⁷⁷ According to the NFL, from 2004 until the summer of 2007, approximately 8.6 million Comcast customers received the NFL Network on the digital basic tier.²⁷⁸

63. In November 2004, the NFL renewed its exclusive contract with DIRECTV for the NFL Sunday Ticket through 2010, but Comcast and the NFL continued negotiations regarding the Eight-Game Package.²⁷⁹ During the negotiations regarding the Eight-Game Package, Comcast claims that it reminded the NFL on more than one occasion that the Conditional Tiering Provision would provide Comcast with the right to move the NFL Network to a sports tier if Comcast did not obtain the rights to the Eight-Game Package for its Versus network.²⁸⁰

64. On January 24, 2006, Comcast’s Chief Executive Officer Brian Roberts met with then-NFL Commissioner Paul Tagliabue and others from the NFL.²⁸¹ The NFL states that Mr. Tagliabue told Mr. Roberts that the NFL’s then-current thinking was that it would not license the Eight-Game Package to Comcast.²⁸² According to the NFL, Mr. Roberts “threatened that if the NFL did not license the package to Versus, Comcast would drop the NFL Network from the ‘D2’ tier and shift it to an undesirable premium sports tier. . . .”²⁸³ According to Comcast, Mr. Roberts was simply reminding the NFL of Comcast’s rights under the Conditional Tiering Provision.²⁸⁴ Following this meeting, the NFL awarded the Eight-Game Package to the NFL Network.²⁸⁵

65. According to the NFL, on January 27, 2006, Mr. Roberts “warned” Mr. Tagliabue that, because of the NFL’s failure to license the Eight-Game Package to Comcast, the NFL’s “relationships with

²⁷⁴ See NFL Complaint Against Comcast at ¶ 64.

²⁷⁵ See Comcast Answer to NFL at ¶¶ 50-52.

²⁷⁶ See *id.* at ¶¶ 50-52, Bond Decl. at ¶ 7, Burke Decl. at ¶ 10, Roberts Decl. at ¶ 5.

²⁷⁷ See NFL Complaint Against Comcast at ¶ 35 and Hawkins Decl. at ¶ 4.

²⁷⁸ See NFL Complaint Against Comcast at ¶ 35 and Hawkins Decl. at ¶ 4.

²⁷⁹ See Comcast Answer to NFL at ¶¶ 13-14, Roberts Decl. at ¶ 6; *see also* Complaint at ¶ 66. According to the NFL, Comcast demanded that the NFL provide it with exclusivity with respect to the Eight-Game Package, such that no local broadcasters in the competing teams’ home markets could televise the games. See Complaint at ¶ 72 and Hawkins Decl. at ¶ 10. The NFL rejected this demand, because it violated the NFL’s policy of showing games on free, over-the-air broadcast television in the competing teams’ home markets. See *id.* Comcast disputes that it made such a demand. See Comcast Answer to NFL at 10 n.27, 75 (¶ 72), Burke Decl. at ¶ 15.

²⁸⁰ See Comcast Answer to NFL at ¶ 14, 76 (¶ 73), Burke Decl. at ¶ 14, Roberts Decl. at ¶ 11.

²⁸¹ See NFL Complaint Against Comcast at ¶ 73, Hawkins Decl. at ¶ 11; Comcast Answer to NFL at 75 (¶ 73).

²⁸² See NFL Complaint Against Comcast, Hawkins Decl. at ¶ 11.

²⁸³ See *id.*

²⁸⁴ See Comcast Answer to NFL at 75 (¶ 73).

²⁸⁵ See NFL Complaint Against Comcast, Hawkins Decl. at ¶ 12; Comcast Answer to NFL at ¶ 15.

the cable industry are going to get very interesting.”²⁸⁶ Mr. Tagliabue states that he believes that this statement foreshadowed Comcast’s retaliation against the NFL for refusing to license the Eight-Game Package to Comcast.²⁸⁷ Mr. Roberts states that he has no recollection of making this statement.²⁸⁸ Rather, Mr. Roberts states that he expressed his disappointment about the NFL’s decision and said that he foresaw that the NFL would continue to face difficulties persuading cable operators to provide the NFL Network with broad distribution given that the Eight-Game Package would add significantly to the price of the network but would not improve the overall appeal of the content.²⁸⁹

66. Pursuant to the Affiliation Agreement, Comcast would have the right to show the Eight-Game Package on the NFL Network on its cable systems only if Comcast agreed to an increase in the license fee for the NFL Network of up to \$0.55 per subscriber per month.²⁹⁰ If Comcast did not agree to pay this increase in the license fee, then the NFL Network would show alternate programming on Comcast’s systems at the times these games would be shown.²⁹¹ On July 27, 2006, Comcast agreed to the fee increase.²⁹² Comcast claims that it agreed to this fee increase only after confirming with the NFL that the Conditional Tiering Provision was mutually understood to remain in effect.²⁹³

67. On September 24, 2006, Comcast announced its plans to launch the NFL Network on a premium sports tier on systems it had acquired from Time Warner.²⁹⁴ In October 2006, the NFL sued Comcast in New York state court claiming that Comcast did not have the right under the parties’ agreements to carry the NFL Network on a premium sports tier.²⁹⁵ In the NFL’s view, the Conditional Tiering Provision in the Affiliation Agreement was not triggered because Comcast and the NFL reached an agreement concerning carriage of the Eight-Game Package when Comcast agreed to pay an additional \$0.55 per subscriber per month to deliver the NFL Network’s broadcast of the Eight-Game Package via Comcast’s cable systems.²⁹⁶ In Comcast’s view, Comcast and the NFL did not reach an agreement concerning carriage of the Eight-Game Package because the games were awarded to the NFL Network and not to Comcast’s affiliated Versus network.²⁹⁷ In May 2007, the trial court granted Comcast’s motion for summary judgment.²⁹⁸ Following release of the trial court’s order, Comcast formally notified the NFL of

²⁸⁶ See NFL Complaint Against Comcast at ¶ 75; *id.* at Exhibit 9, Declaration of Paul Tagliabue, at ¶ 3 (“Tagliabue Decl.”).

²⁸⁷ See NFL Complaint Against Comcast, Tagliabue Decl. at ¶ 4.

²⁸⁸ See Comcast Answer to NFL, Roberts Decl. at ¶ 12.

²⁸⁹ See *id.*; see also Comcast Answer to NFL at ¶ 15.

²⁹⁰ See Comcast Answer to NFL at 8 n.17.

²⁹¹ See *id.*; see also NFL Complaint Against Comcast, Hawkins Decl. at ¶ 13.

²⁹² See Comcast Answer to NFL at ¶ 16, 77 (¶ 76); see also NFL Complaint Against Comcast at ¶ 76 and Hawkins Decl. at ¶ 13.

²⁹³ See Comcast Answer to NFL at ¶ 16, 77 (¶ 76).

²⁹⁴ See *id.* at 77 (¶ 76); see also NFL Complaint Against Comcast at ¶¶ 34, 76 and Hawkins Decl. at ¶ 14.

²⁹⁵ See NFL Complaint Against Comcast, Hawkins Decl. at ¶ 15; Comcast Answer to NFL at ¶ 17, Bond Decl. at ¶ 13; *id.* at Exhibit 6, Declaration of Michael P. Carroll, at ¶ 2 (“Carroll Decl.”).

²⁹⁶ See NFL Complaint Against Comcast at 2 n.3 and 25 n.15.

²⁹⁷ See Comcast Answer to NFL at 11 n.31.

²⁹⁸ See Comcast Answer to NFL at ¶ 17, Bond Decl. at ¶ 14, Carroll Decl. at ¶ 14.

its intent to shift NFL Network to a sports tier in most of its systems.²⁹⁹ The NFL states that Comcast's action to shift the NFL Network from a digital basic tier to a premium sports tier reduced the number of Comcast subscribers that received the NFL Network from 8.6 million to 1.4 million.³⁰⁰ On February 26, 2008, a New York appellate court reversed the lower court's ruling and found that the parties' agreement was sufficiently ambiguous to create a triable issue of fact.³⁰¹ In May 2008, the parties agreed to pursue non-binding mediation at the request of the court.³⁰²

2. Procedural Issues

68. Comcast argues that the NFL complaint should be dismissed on any of the following procedural grounds.³⁰³ For the reasons discussed below, we decline to dismiss the complaint on any of these grounds.

a. Program Carriage Statute of Limitations

69. Comcast argues that the NFL complaint is barred by the program carriage statute of limitations.³⁰⁴ Comcast contends that, of the events that trigger the running of the program carriage statute of limitations, only the date on which the parties entered into a carriage agreement for the NFL Network is applicable in this case.³⁰⁵ Comcast states that the Affiliation Agreement was executed on August 11, 2004, thereby causing the statute of limitations to expire on August 11, 2005.³⁰⁶ Comcast asserts that its exercise of its contractual right to retier the NFL Network cannot be the triggering event because that is a decision made under the Affiliation Agreement and any disagreement regarding the terms of the agreement must be addressed in state court.³⁰⁷ In response, the NFL states that its complaint does not allege that the Affiliation Agreement violates the program carriage rules.³⁰⁸ Rather, the NFL claims that the issue is the legality of Comcast's act of retying the NFL Network to a premium sports tier between June 1, 2007 and July 15, 2007.³⁰⁹ The NFL states that it filed its complaint within days after its pre-filing notice and less than a year after Comcast's action to retier the NFL Network, in compliance with the statute of limitations in Section 76.1302(f)(3).³¹⁰ Comcast argues that the statute of limitations period cannot run from the date

²⁹⁹ See NFL Complaint Against Comcast at ¶ 77 and Hawkins Decl. at ¶ 16; Comcast Answer to NFL at ¶ 17 and Bond Decl. at ¶ 14.

³⁰⁰ See NFL Complaint Against Comcast, Hawkins Decl. at ¶ 18.

³⁰¹ See Comcast Answer to NFL at ¶ 18, Carroll Decl. at ¶ 13.

³⁰² See NFL Enterprises LLC, Update of Record, File No. CSR-7876-P (filed June 17, 2008), at 2; Answer, Carroll Decl. at ¶ 21.

³⁰³ See Comcast Answer to NFL at ¶¶ 2, 22-36.

³⁰⁴ See *id.* at ¶¶ 23-27.

³⁰⁵ See *id.* at ¶ 24 (citing 47 C.F.R. § 76.1302(f)(1)-(3) and 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules, Order on Reconsideration, 14 FCC Rcd 16433, ¶ 5 (1999)). Comcast states that it has made no effort to carry the NFL Network that is unrelated to any existing contract between Comcast and the NFL and that it has not refused to deal with the NFL. See *id.* at ¶ 25. Accordingly, Comcast states that these triggering events are not relevant. See *id.*

³⁰⁶ See *id.* at ¶ 24.

³⁰⁷ See *id.* at 16 n.52.

³⁰⁸ See NFL Reply to Comcast at ¶ 43.

³⁰⁹ See *id.* at ¶¶ 40, 43.

³¹⁰ See *id.* at ¶ 39.

of the NFL Network's pre-filing notice.³¹¹ Comcast alleges that such an interpretation would allow a programmer to bring a program carriage complaint simply by sending a "trigger" letter at any time.³¹² The NFL contends, however, that the statute of limitations cannot be interpreted to run only from the date an existing agreement was executed because that would preclude a programmer from seeking relief regarding discriminatory acts that occurred greater than one year after the agreement was executed.³¹³

70. We conclude that the NFL filed its program carriage complaint in compliance with the program carriage statute of limitations.³¹⁴ The alleged act of discrimination about which the NFL complains is Comcast's act of moving the NFL Network from a digital basic tier to a premium sports tier. This act occurred no earlier than June 2007.³¹⁵ The NFL filed its program carriage complaint within one year of this act and within one year of its pre-filing notice. Accordingly, the NFL filed its complaint in compliance with the statute of limitations. We reject Comcast's argument that the one-year statute of limitations is triggered by the execution of the agreement because that act did not give rise to the discrimination claim and treating that act as the triggering event here would render Section 76.1302(f)(3) of our rules superfluous and frustrate enforcement of the statute and rules.

b. Dismissal Pending Litigation

71. Comcast argues that the NFL complaint should be dismissed pending the outcome of the state court litigation.³¹⁶ Comcast states that the NFL and Comcast are involved in contract litigation involving the same set of operative facts that underlie the complaint, and the resolution of which is inextricably intertwined with the resolution of the complaint.³¹⁷ Comcast contends that, if the court rules that the Conditional Tiering Provision was triggered, then it would be difficult if not impossible for the Commission to decide that Comcast violated the program carriage rules by exercising a right granted to it by the NFL.³¹⁸ According to the NFL, however, the issue of the interpretation of the contract is irrelevant to the program carriage dispute.³¹⁹ In the NFL's view, even if the court finds that the Conditional Tiering Provision was triggered and Comcast had the "right" to retier the NFL Network, Comcast could not exercise that right in a discriminatory manner that violates the program carriage rules.³²⁰ According to the NFL, Section 616 protects independent programmers and the public regardless of the terms of a private agreement.³²¹ Comcast asserts that dismissal of the complaint pending litigation is consistent with

³¹¹ See Comcast Answer to NFL at 16 n.52.

³¹² See *id.*

³¹³ See NFL Reply to Comcast at ¶¶ 44-45.

³¹⁴ See 47 C.F.R. § 76.1302(f).

³¹⁵ See NFL Complaint Against Comcast, Hawkins Decl. at ¶ 17 (stating that Comcast moved the NFL Network from the digital basic tier to a premium sports tier between June 1, 2007 and July 15, 2007); Comcast Answer to NFL at 77 (¶ 77) (stating that Comcast dropped the NFL Network from the digital basic tier in mid-2007); NFL Reply to Comcast at ¶¶ 40, 43-44 (stating that Comcast moved the NFL Network from the digital basic tier to a premium sports tier between June 1, 2007 and July 15, 2007).

³¹⁶ See Comcast Answer to NFL at ¶¶ 28-34.

³¹⁷ See *id.* at ¶ 28.

³¹⁸ See *id.* at ¶ 30.

³¹⁹ See NFL Complaint Against Comcast at ¶ 65; NFL Reply to Comcast at ¶¶ 4, 17, 33-35.

³²⁰ See NFL Complaint Against Comcast at ¶ 65; NFL Reply to Comcast at ¶¶ 4, 17, 35.

³²¹ See NFL Reply to Comcast at ¶ 34.

Commission precedent.³²² The NFL disputes this and notes that the Commission addressed a program carriage complaint filed by TCR Sports Broadcasting Holding, L.L.P. against Comcast despite the pendency of related litigation in state court.³²³ Comcast also claims that it would be a waste of resources for the Commission to consider the complaint because the parties have already decided to mediate the issues in dispute.³²⁴ According to Comcast, the NFL agreed to a broad mediation that would encompass all issues between the parties, including those in the program carriage complaint proceeding.³²⁵ According to the NFL, the state court litigation does not address the issues of program carriage discrimination addressed in the program carriage complaint proceeding.³²⁶ The NFL also states that, even if the court were to address program carriage discrimination, it would not be ripe for resolution until after the next football season and likely the one that follows (2009-2010).³²⁷ The NFL also notes that the parties have not agreed to seek a stay of the program carriage proceeding pending the outcome of the mediation.³²⁸ Thus, the NFL argues that the mediation should not affect the Commission's consideration of the program carriage issues in this proceeding.³²⁹

72. We decline to dismiss the NFL complaint pending the outcome of the state court litigation. The act of alleged discrimination about which the NFL complains is Comcast's act of moving the NFL Network from a digital basic tier to a premium sports tier. Whether or not Comcast had the right to retier 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. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules. Because the state court litigation will not resolve the NFL's program carriage claim, we conclude that we can proceed with the program carriage complaint despite the pendency of the litigation. Moreover, the parties have not agreed to stay this proceeding pending the outcome of mediation, and we find no cause to do so on our own motion.

³²² See Comcast Answer to NFL at ¶ 28 (citing *EchoStar Communications Corp. v. Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C.*, Memorandum Opinion & Order, 14 FCC Rcd 9327 (CSB, 1999), *aff'd*, *EchoStar Communications Corp. v. Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C.*, Memorandum Opinion & Order, 16 FCC Rcd 4949 (2001)).

³²³ See NFL Reply to Comcast at ¶ 36 (citing *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, MB Docket No. 06-148, File No. CSR-6911-N, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8991 nn. 21-22 (2006)). The NFL claims that *Speedvision* is distinguishable because in that case the defendants refused to provide programming to an MVPD based on their claim that the MVPD breached a contract; thus, the Commission could not determine whether there had been a program access violation unless it was first determined whether the MVPD had breached the contract. See *id.* at ¶ 37. In this case, however, the interpretation of the contract has no bearing on a determination of whether Comcast discriminated against the NFL Network. See *id.*

³²⁴ See Comcast Answer to NFL at ¶ 34.

³²⁵ See Comcast Answer to NFL, Carroll Decl. at ¶ 24.

³²⁶ See NFL Update of Record at 2.

³²⁷ See *id.*

³²⁸ See *id.*

³²⁹ See *id.*

c. Specificity of Requested Relief

73. Comcast argues that the NFL complaint should be dismissed because the complaint failed to state “with specificity” the relief requested.³³⁰ Comcast states that the NFL’s requested relief does not include specific proposals regarding price, tier placement, and other carriage terms.³³¹ The NFL argues that its complaint was sufficiently specific in seeking carriage by Comcast on non-discriminatory terms, *i.e.*, on the same terms and conditions as Comcast’s affiliated national sports networks, Versus and the Golf Channel, including carriage on the expanded basic tier.³³² We conclude that the NFL’s requested relief was sufficiently specific under our rules³³³ and did not deprive Comcast of an adequate opportunity to respond in its Answer.

d. Signature and Verification Requirements

74. Comcast states that the NFL complaint does not comply with the signature³³⁴ and verification requirements applicable to program carriage complaints.³³⁵ The NFL does not dispute these claims, but argues that other program carriage complaints that did not comply with the signature requirement have been accepted by the Commission and that its complaint included a Declaration of an NFL executive certifying the accuracy of the factual statements in the complaint.³³⁶ We agree with Comcast that these instances of non-compliance are of “limited consequence.”³³⁷ Accordingly, on our own motion, we waive these requirements in the interests of resolving the important issues raised in the complaint in an expeditious manner and due to the presence of the Declaration of an NFL executive referenced above.

2. Discrimination Claim

a. Similarly Situated

75. The NFL alleges that Comcast has discriminated against the NFL Network in favor of its affiliated video programming vendors, including Versus and the Golf Channel, in violation of Section 76.1301(c) of the Commission’s rules. The NFL argues that the NFL Network is a national sports network and therefore is similarly situated to the national sports networks that Comcast owns (Versus and the Golf

³³⁰ See Comcast Answer to NFL at ¶ 35, 58 (¶ 11); see 47 C.F.R. § 76.6(a)(1) (“A pleading must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity.”); *Second Report and Order*, 9 FCC Rcd at 2653, ¶ 27 (“If a complainant seeks mandatory carriage, it should propose specific terms for such carriage, as well as an explanation of its rationale for proposing those terms, such as the existence of comparable terms in other program carriage agreements to which either the complainant or the defendant is a party, or comparable terms that have been approved by the Commission in other program carriage complaint cases.”).

³³¹ See Comcast Answer to NFL at ¶ 35.

³³² See NFL Reply to Comcast at ¶¶ 50-51.

³³³ See 47 C.F.R. § 76.1302(c).

³³⁴ See Comcast Answer to NFL at 23 n.79 (citing 47 C.F.R. § 76.6(a)(4)). Comcast notes that the complaint was signed by only the NFL’s outside counsel, which violates the requirement that complaints be signed by the complainant. See *id.*

³³⁵ See *id.* (citing 47 C.F.R. § 76.6(a)(4)). Comcast notes that the complaint does not comply with the requirement that submissions include a written statement signed by the complainant verifying that the complaint is grounded in fact and law, is filed in good faith, and is not interposed for any improper purpose. See *id.*

³³⁶ See NFL Reply to Comcast at 21 n.14; see also NFL Complaint Against Comcast, Hawkins Decl. at ¶ 23.

³³⁷ See Comcast Answer to NFL at 23 n.79.

Channel).³³⁸ The NFL also argues that the NFL Network, Versus, and the Golf Channel compete for programming, advertising, or target viewers.³³⁹ Comcast claims that the NFL Network is not a direct competitor to Versus or the Golf Channel in terms of programming, advertising, or target viewers.³⁴⁰ Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

b. Differential Treatment

76. The NFL alleges that Comcast has discriminated against the NFL Network in violation of Section 76.1301(c) by carrying the NFL Network on a premium sports tier (which costs subscribers an additional \$5-7 per month³⁴¹ and is subscribed to by approximately 2 million Comcast subscribers³⁴²) while Comcast carries the national sports networks that it owns (Versus and Golf Channel) on an expanded basic tier which has approximately 24 million subscribers.³⁴³ Comcast admits that it carries the NFL Network on a premium sports tier but carries Versus and the Golf Channel on its expanded basic tier.³⁴⁴

c. Harm to Ability to Compete

77. As required by the program carriage statute and our rules, the NFL Network has provided evidence purporting to demonstrate that Comcast's refusal to carry the NFL Network on an expanded basic tier restrains its ability to compete fairly. The NFL explains how Comcast's decision to exclude the NFL Network from a basic tier has prevented the network from achieving economies of scale and has blocked the network from the most efficient distribution channel for the provision of national sports programming and the sale of advertising.³⁴⁵ The NFL explains that carriage of the NFL Network on a widely distributed tier is better for the network, viewers, and advertisers than carriage on a premium tier and that carriage on a premium tier unreasonably impedes the NFL Network's ability to compete fairly.³⁴⁶ With respect to the benefits for the network, the NFL discusses how basic tier carriage results in more subscribers which results in greater advertising revenues,³⁴⁷ greater license revenues,³⁴⁸ and a greater ability to compete for

³³⁸ See NFL Complaint Against Comcast at ¶ 81; NFL Reply to Comcast at ¶¶ 9-11.

³³⁹ See NFL Complaint Against Comcast at ¶¶ 5, 41-42, 46-47, 49-51, 55; NFL Reply to Comcast at ¶ 16.

³⁴⁰ See Comcast Answer to NFL at ¶ 58, 69 (¶ 51), *id.* at Exhibit 8, Declaration of Jonathan Orszag and Jay Ezrielev, at ¶ 38 ("Orszag Decl."); *id.* at Exhibit 9, Declaration of Jeff Shell, at ¶ 9 ("Shell Decl."). Accordingly, Comcast submits that Versus and the Golf Channel do not benefit from any actions that hinder the ability of the NFL Network to compete. See Comcast Answer to NFL, Orszag Decl. at ¶¶ 38-40.

³⁴¹ See NFL Complaint Against Comcast, Hawkins Decl. at ¶ 18; Comcast Answer to NFL at 68 (¶ 49), Bond Decl. at ¶ 14.

³⁴² See NFL Complaint Against Comcast, Hawkins Decl. at ¶ 18; Comcast Answer to NFL, Bond Decl. at ¶ 14.

³⁴³ See NFL Complaint Against Comcast at ¶ 3; Comcast Answer to NFL at 55 (¶ 3), 62 (¶ 8), 63-64 (¶ 35); NFL Reply to Comcast at ¶¶ 1-2.

³⁴⁴ See Comcast Answer to NFL at 55 (¶ 3).

³⁴⁵ See NFL Complaint Against Comcast at ¶ 39, *id.* at Exhibit 12, Declaration of Hal Singer, at ¶¶ 1, 14-15, 23-29 ("Singer Decl."); NFL Reply to Comcast at ¶ 26.

³⁴⁶ See NFL Complaint Against Comcast at ¶¶ 38-55.

³⁴⁷ The NFL states that carriage on a premium tier results in less subscribers which reduces advertising rates and revenues. See NFL Complaint Against Comcast at ¶ 47, Singer Decl. at ¶ 31; *id.* at Exhibit 4, Declaration of Ronald Furman, at ¶¶ 8-9 ("Furman Reply Decl.").

³⁴⁸ The NFL states that the NFL Network has lost over \$4 million per month in license revenues after being shifted to Comcast's premium sports tier. See NFL Complaint Against Comcast at ¶ 48, Singer Decl. at ¶ 32.

national advertisers and for content,³⁴⁹ and relieves the network from having to incur promotional expenses to convince consumers to subscribe to the premium tier.³⁵⁰ Moreover, the NFL explains that basic tier carriage maximizes a network's subscribership and, thus, advertising revenues, which allows for reduced license fees.³⁵¹ The NFL also submits that carriage of a network on a basic tier benefits consumers by allowing the network to discipline the license fees of rival networks.³⁵² In addition, the NFL claims that basic tier carriage benefits advertisers by enabling the NFL Network to discipline advertising rates of rival networks.³⁵³ The NFL explains that Comcast's affiliated national sports networks, Versus and the Golf Channel, benefit from Comcast's decision to carry the NFL Network on a premium tier.³⁵⁴ Specifically, placing the NFL Network in a premium sports tier harms its ability to compete with Comcast's affiliated national sports networks by (i) increasing the NFL Network's promotional costs and by reducing its advertising revenues; and (ii) providing Comcast's affiliated national sports networks with a competitive advantage in attracting advertisers and obtaining new content because these networks have greater distribution than their rival the NFL Network.³⁵⁵ The NFL also notes that Comcast's behavior to favor its affiliated national sports networks is similar to behavior that has been found to be a violation of the program carriage rules in another case.³⁵⁶

³⁴⁹ See NFL Complaint Against Comcast, Hawkins Decl. at ¶¶ 20-22, Singer Decl. at ¶ 33; NFL Reply to Comcast, Furman Reply Decl. at ¶¶ 10-12. The NFL provides evidence that (i) national advertisers have reduced their advertising spending on the NFL Network as a result of its placement on a premium tier (NFL Complaint Against Comcast, Hawkins Decl. at ¶ 22; NFL Reply to Comcast, Furman Reply Decl. at ¶¶ 11-12); and (ii) the NFL Network lost a deal to license college football games because it did not have as many subscribers as Versus. See NFL Complaint Against Comcast at ¶ 46, Hawkins Decl. at ¶ 20, Singer Decl. at ¶ 33. The NFL claims that less popular networks that receive greater distribution than the NFL Network, such as Versus and the Golf Channel, have an advantage in attracting advertisers and content. See NFL Complaint Against Comcast at ¶ 48, Hawkins Decl. at ¶ 19. The NFL states that advertisers seeking to purchase time on a "national" cable channel seek 50-60 million subscribers. See NFL Complaint Against Comcast at ¶ 47, Hawkins Decl. at ¶ 21; NFL Reply to Comcast, Furman Reply Decl. at ¶ 2. The NFL explains that Comcast's decision to place the NFL Network on a premium sports tier that is subscribed to by only a fraction of Comcast's 24 million customers has obstructed its ability to reach this subscriber threshold. See NFL Complaint Against Comcast at ¶ 47.

³⁵⁰ See NFL Complaint Against Comcast at ¶ 5.

³⁵¹ The NFL states that carriage on a premium tier reduces subscribership which reduces advertising revenues which leads to an increase in license fees. See NFL Complaint Against Comcast, Singer Decl. at ¶ 40.

³⁵² See NFL Complaint Against Comcast at ¶¶ 50-51, Singer Decl. at ¶ 38; NFL Reply to Comcast, Singer Reply Decl. at ¶¶ 34-35.

³⁵³ See NFL Complaint Against Comcast, Singer Decl. at ¶ 45.

³⁵⁴ See NFL Complaint Against Comcast at ¶ 60.

³⁵⁵ See *id.* at ¶¶ 5, 46-47, 50-51, 55, 60.

³⁵⁶ See *id.* at ¶ 8 (citing *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable*, AAA Case No. 71 472 E 00697 07 (2008)). The NFL notes that the arbitrator in *TCR v. Time Warner* found that Time Warner's refusal to carry MASN on the same tier as a competing Time Warner-owned sports channel impaired MASN's ability to reach its intended audience. See *id.*; NFL Update of Record at 1-2. The arbitrator found that Time Warner was motivated to squeeze MASN out of business through unfavorable tier placement so that Time Warner could obtain the rights to Washington Nationals games carried on MASN. See NFL Complaint Against Comcast at ¶ 8; NFL Update of Record at 1-2. Similarly, the NFL contends that, by demanding a Conditional Tiering Right and then moving the NFL Network to a premium sports tier after it failed to win the rights to the Eight-Game Package, Comcast impaired the ability of the NFL Network to compete and enhanced its own ability to acquire the Eight-Game Package. See NFL Complaint Against Comcast at ¶ 8.

78. Comcast argues that the NFL Network can achieve a critical mass of subscribers without carriage on Comcast.³⁵⁷ Comcast claims that there are multiple competing MVPDs that offer the NFL Network in all areas served by Comcast, such as DIRECTV, DISH Network, RCN, Verizon, and AT&T.³⁵⁸ According to Comcast, if its subscribers do not like Comcast's decision to place the NFL Network on a premium sports tier, they can switch to an MVPD that provides the NFL Network with wider carriage.³⁵⁹ Comcast also argues that the fact that it already makes the NFL Network available to 24 million households undermines the NFL's claim that Comcast is unreasonably restraining the ability of the NFL Network to compete fairly.³⁶⁰

d. Alleged Business and Editorial Justifications for Comcast's Refusal to Carry NFL Network on an Expanded Basic Tier

79. Comcast offers a number of alleged business and editorial justifications for its decision to place the NFL Network on a premium sports tier while placing Versus and the Golf Channel on an expanded basic tier.³⁶¹ First, Comcast notes that the license fee for Versus is approximately \$0.25 per subscriber per month and the license fee for the Golf Channel is less than \$0.35 per subscriber per month, whereas the license fee for the NFL Network with the Eight-Game Package is \$0.70 per subscriber per month.³⁶² The NFL contends that Comcast has failed to consider the record evidence that the NFL Network receives substantially higher ratings than Versus and the Golf Channel, despite the fact that the NFL Network is carried on a premium tier.³⁶³ The NFL notes that the relatively lower license fees for Versus and the Golf Channel reflect their lower popularity.³⁶⁴ Moreover, NFL provides evidence that the NFL Network is less expensive than some other sports networks, such as ESPN and some RSNs.³⁶⁵ While Comcast argues that it acted to protect its customers by placing expensive programming such as the NFL

³⁵⁷ See Comcast Answer to NFL at ¶ 66, Orszag Decl. at ¶ 41.

³⁵⁸ See Comcast Answer to NFL at ¶ 67, Orszag Decl. at ¶¶ 11, 41, 52.

³⁵⁹ See Comcast Answer to NFL at ¶ 67, Orszag Decl. at ¶¶ 11, 41, 52.

³⁶⁰ See Comcast Answer to NFL at ¶ 65, 62 (¶ 30), Orszag Decl. at ¶¶ 11, 41, 52.

³⁶¹ Comcast argues that an MVPD's decision regarding whether and on what tier to carry a network involves a balancing of numerous factors, including the consumer appeal of the network, the cost and other terms of carriage, and whether the MVPD already carries similar programming. See Comcast Answer to NFL at ¶¶ 49-50, Bond Decl. at ¶¶ 3-4, Orszag Decl. at ¶¶ 14, 23, 31. Comcast contends that Section 616 does not give the Commission general authority to review outcomes of marketplace negotiations and argues that deference to the marketplace is even more appropriate now given that the cable industry is far less vertically integrated than in 1992. See *id.* at ¶¶ 39-41. In response, the NFL notes that Section 616 is still in effect and that the Commission has recently determined that vertically integrated cable operators still possess sufficient market power to engage in anticompetitive abuses. See NFL Reply to Comcast at ¶¶ 53-54. Comcast argues that its editorial discretion is broadly protected by the First Amendment from government interference. See Comcast Answer to NFL at ¶ 43. Comcast also claims that the NFL is asking the Commission to engage in a content-based analysis comparing the NFL Network with Versus and the Golf Channel. See *id.* at ¶ 44. In response, the NFL notes that Section 616 prohibits discrimination based on ownership, not content, and is thus content-neutral. See NFL Reply to Comcast at ¶¶ 55-58.

³⁶² See Comcast Answer to NFL at ¶ 59, Orszag Decl. at ¶¶ 19-20, *see id.* at Exhibit 9, Declaration of Jeff Shell, at ¶ 4 ("Shell Decl."); *see also* NFL Complaint Against Comcast at ¶ 67; NFL Reply to Comcast at ¶ 24.

³⁶³ See NFL Reply to Comcast at ¶¶ 5, 19, Singer Reply Decl. at ¶ 14; *see also* NFL Complaint Against Comcast at ¶ 32 and Hawkins Decl. at ¶ 5.

³⁶⁴ See NFL Reply to Comcast at ¶ 24.

³⁶⁵ See NFL Reply to Comcast at ¶ 24.

Network on a premium sports tier,³⁶⁶ the NFL alleges that Comcast's decision to move the NFL Network to a premium sports tier did not result in a reduction in the monthly fees for its digital basic service, thereby undermining its claim that its decision to re-tier the NFL Network was intended to protect consumers.³⁶⁷

80. Second, Comcast claims that Versus and the Golf Channel offer far more live and same-day event programming than the NFL Network.³⁶⁸ The NFL responds that the record evidence demonstrates that the NFL Network receives substantially higher ratings than Versus and the Golf Channel, despite the amount of live sports programming on Versus and the Golf Channel.³⁶⁹

81. Third, Comcast argues that different carriage histories justify wide distribution for Versus and the Golf Channel and more limited distribution for the NFL Network.³⁷⁰ Specifically, Comcast notes that Versus and the Golf Channel launched in 1995 when there were greater opportunities for launch of a network, even on expanded basic.³⁷¹ The NFL argues, however, that basing carriage decisions on carriage histories unfairly favors affiliated networks that have enjoyed a history of preferential treatment from vertically integrated MVPDs and does not serve to distinguish discriminatory from nondiscriminatory treatment, as the Act and our rules require.³⁷²

82. Fourth, Comcast contends that cable subscribers already have access to a substantial quantity of live NFL programming on broadcast television and ESPN.³⁷³ Moreover, Comcast notes that the out-of-market games offered by the NFL Network are available on local broadcast channels in the home markets of the participating teams.³⁷⁴ The NFL submits that the consistently high ratings for the NFL Network refute Comcast's claim that there is a lack of demand for football programming.³⁷⁵ The NFL also notes that Comcast's previous decision to place the NFL Network on its digital basic tier demonstrates Comcast's view that the programming on the NFL Network has broad appeal.³⁷⁶

83. Fifth, Comcast notes that some MVPDs, such as Charter, Time Warner, Cablevision, Bright House, Suddenlink, and Mediacom, do not carry the NFL Network at all, while others, such as Cox, carry the NFL Network on a sports tier.³⁷⁷ According to Comcast, the fact that other MVPDs that are not vertically integrated with national sports networks have decided to carry the NFL Network on a premium sports tier (or not at all) demonstrates that Comcast's decision to place the NFL Network on a premium

³⁶⁶ See Comcast Answer to NFL at ¶¶ 54-55, Bond Decl. at ¶ 18, Orszag Decl. at ¶ 25.

³⁶⁷ See NFL Reply to Comcast at ¶ 20; *id.* at Exhibit 3, Declaration of Frank Hawkins, at ¶ 8 ("Hawkins Reply Decl.").

³⁶⁸ See Comcast Answer to NFL at ¶ 58, Shell Decl. at ¶¶ 3-4, 6-7.

³⁶⁹ See *supra* n.365.

³⁷⁰ See Comcast Answer to NFL at ¶ 61, Orszag Decl. at ¶ 30, Shell Decl. at ¶¶ 5, 10.

³⁷¹ See Comcast Answer to NFL ¶ 61, Orszag Decl. at ¶ 30.

³⁷² See NFL Reply to Comcast, Singer Reply Decl. at ¶ 39.

³⁷³ See Comcast Answer to NFL at 33 n.108, 70 (¶ 57), Bond Decl. at ¶ 18.

³⁷⁴ See Comcast Answer to NFL, Orszag Decl. at ¶ 25.

³⁷⁵ See NFL Reply to Comcast at ¶ 19, Singer Reply Decl. at ¶ 14; *see also* NFL Complaint Against Comcast at ¶ 32 and Hawkins Decl. at ¶ 5.

³⁷⁶ See NFL Reply to Comcast at 9 n.6, Hawkins Reply Decl. at ¶ 4.

³⁷⁷ See Comcast Answer to NFL at ¶ 56.

sports tier was based on legitimate business reasons.³⁷⁸ The NFL contends that this claim is rebutted by the record evidence that demonstrates substantial carriage of NFL Network by various MVPDs on widely distributed tiers. The NFL notes that all of Comcast's major competitors – DIRECTV, DISH Network, Verizon, and AT&T – carry the NFL Network on a more widely distributed tier than the digital basic tier that Comcast formerly carried the NFL Network on before it was shifted to a premium sports tier.³⁷⁹ Moreover, the NFL states that most of the approximately 240 MVPDs that carry the NFL Network carry it on widely distributed tiers that are available in at least 70 percent of the households served by these MVPDs.³⁸⁰ In addition, the NFL claims that Comcast is the only MVPD that carries the NFL Network on a tier taken by less than ten percent of subscribers.³⁸¹

84. Finally, Comcast argues that Versus and the Golf Channel are carried on widely distributed tiers of virtually every major MVPD, even though these MVPDs have no ownership interest in either network.³⁸² The NFL argues that the conduct of other cable operators is irrelevant to the issue of whether Comcast carries its affiliated programmers on more favorable terms than the NFL Network, an unaffiliated programmer.³⁸³

e. Conclusion

85. In the *Second Report and Order*, the Commission stated that it would identify specific behavior that constitutes discrimination on a case-by-case basis “because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.”³⁸⁴ Any complainant alleging a violation of the prohibition in Section 616(a)(3) on discrimination must demonstrate that the alleged discrimination is “on the basis of affiliation or nonaffiliation” of a vendor, and that “the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.”³⁸⁵ After reviewing the pleadings and supporting documentation filed by the parties, we find that the NFL has established a *prima facie* case in the above-referenced case under Section 76.1301(c). We also find that the pleadings and supporting documentation present several factual disputes as to whether Comcast discriminated against the NFL in favor of its affiliated services. Accordingly, we direct the ALJ to make and return a Recommended Decision to the Commission pursuant to the procedures set forth below within 60 days after release of this *Order*.

3. Financial Interest Claim

86. The NFL claims that Comcast retaliated against the NFL by dropping the NFL Network from the digital basic tier to a premium sports tier after the NFL refused to grant Comcast rights to the Eight-Game Package for Comcast's Versus network.³⁸⁶ The NFL alleges that this amounts to a violation

³⁷⁸ See *id.* at ¶¶ 57, 62, Orszag Decl. at ¶ 33.

³⁷⁹ See NFL Complaint Against Comcast at ¶ 58; NFL Reply to Comcast, Singer Reply Decl. at ¶¶ 36-37.

³⁸⁰ See NFL Reply to Comcast, Hawkins Reply Decl. at ¶ 2.

³⁸¹ See NFL Reply to Comcast, Hawkins Reply Decl. at ¶ 3.

³⁸² See Comcast Answer to NFL at ¶ 62, Orszag Decl. at ¶¶ 15, 33, Shell Decl. at ¶ 8. Versus has 64 million and the Golf Channel has 67 million subscribers, compared to 36 million for the NFL Network. See Comcast Answer to NFL at ¶ 62, Shell Decl. at ¶ 8.

³⁸³ See NFL Reply to Comcast at 8 n.4.

³⁸⁴ *Second Report and Order*, 9 FCC Rcd at 2648.

³⁸⁵ *Id.*; 47 C.F.R. § 76.1302(c)(3).

³⁸⁶ See NFL Complaint Against Comcast at ¶¶ 4, 63, 77, 79, 83; NFL Reply to Comcast at ¶¶ 9, 59-60.

of Section 76.1301(a) because Comcast has required a financial interest in the NFL's programming as a condition for program carriage.³⁸⁷ The NFL argues that Comcast's behavior here is similar to behavior that has been found to present a *prima facie* case of a violation of the program carriage rules in another proceeding.³⁸⁸

87. Comcast states that it never required or even requested an equity interest in the NFL Network.³⁸⁹ Comcast states that Section 76.1301(a) does not prohibit an MVPD from seeking licensing rights in programming as a condition for carriage.³⁹⁰ Rather, Comcast states that this rule only prohibits an MVPD from requiring a financial interest in a "program service" as a condition for carriage.³⁹¹ According to Comcast, the NFL incorrectly conflates Comcast's interest in acquiring the licensing rights to the Eight-Game Package with a demand for equity in the NFL Network.³⁹² Comcast notes that it has no financial interest in the NFL Network or the NFL and yet it still carries the NFL Network.³⁹³ Accordingly, Comcast argues that it has not conditioned carriage of the NFL Network on obtaining an equity interest in the NFL Network.³⁹⁴

88. In response, the NFL argues that the statute precludes an MVPD from requiring any "financial interest" in a program service, not merely an "equity interest," and thus includes an MVPD's demand that a programmer provide licensing rights, equity interests, or other financial interests in a program service.³⁹⁵ The NFL submits that narrowly construing the term "financial interest" to pertain only to demands for an equity interest would fail to curb many anticompetitive abuses of vertically integrated MVPDs during carriage negotiations.³⁹⁶ Moreover, the NFL notes that Section 76.1301(a) prohibits an MVPD from requiring a financial interest in "any program service," not merely the program service for which carriage is sought³⁹⁷ and not only in a "video programming vendor."³⁹⁸

89. In the *Second Report and Order*, the Commission emphasized that the statute "does not explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are

³⁸⁷ See NFL Complaint Against Comcast at ¶¶ 4, 63, 77, 79, 83; NFL Reply to Comcast at ¶¶ 9, 59-60. Section 76.1301(a) of the Commission's rules mirrors Section 616(a) of the Act: "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." See 47 C.F.R. § 76.1301(a); see also 47 U.S.C. § 536(a)(1).

³⁸⁸ See NFL Complaint Against Comcast at ¶¶ 7, 22 (citing *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, MB Docket No. 06-148, File No. CSR-6911-N, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8995, ¶ 12 (2006)). The NFL notes that the Commission in *TCR v. Comcast* found that the programmer, MASN, had established a *prima facie* case that Comcast refused to carry MASN as a retaliatory action for Major League Baseball's decision to award distribution rights for the Washington Nationals baseball games to MASN. See NFL Complaint Against Comcast at ¶ 22, Singer Decl. at ¶ 12.

³⁸⁹ See Comcast Answer to NFL, Burke Decl. at ¶¶ 11, 16, Roberts Decl. at ¶ 7.

³⁹⁰ See Comcast Answer to NFL at 60-61 (¶¶ 20-21).

³⁹¹ See *id.* at 60-61 (¶¶ 20-21) (citing 47 C.F.R. § 76.1301(a)).

³⁹² See *id.* at ¶ 72, 55 (¶ 4).

³⁹³ See *id.* at ¶ 74.

³⁹⁴ See *id.*

³⁹⁵ See NFL Reply to Comcast at ¶¶ 62-65.

³⁹⁶ See *id.* at ¶ 66.

³⁹⁷ See *id.* at ¶ 62.

³⁹⁸ See NFL Reply to Comcast at ¶ 68.

otherwise permissible,” and thus, that “multichannel distributors [may] negotiate for, but not insist upon such benefits in exchange for carriage on their systems.”³⁹⁹ The Commission stated, however, that “ultimatums, intimidation, conduct that amounts to exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or exclusivity rights for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616.”⁴⁰⁰ We find that the NFL has presented sufficient evidence to make a *prima facie* showing that Comcast indirectly and improperly demanded a financial interest in the NFL’s programming in exchange for carriage. We further find that the pleadings and documentation present several factual disputes as to whether Comcast’s retiering of the NFL Network is the result of Comcast’s failure to obtain a financial interest in the NFL’s programming. Accordingly, we direct an Administrative Law Judge to hold a hearing, issue a recommended decision on the facts underlying the financial interest claim and a recommended remedy, if necessary, and then return the matter to the Commission within 60 days.

C. MASN v. Comcast

90. After reviewing the pleadings and supporting documentation filed by the parties, we find that MASN has established a *prima facie* case under Section 76.1301(c). MASN is an RSN that owns the rights to produce and exhibit the games of the Baltimore Orioles and Washington Nationals, among other sporting events.⁴⁰¹ MASN is a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission’s rules.⁴⁰² Pursuant to the by-laws of Major League Baseball (“MLB”), each MLB team is assigned television rights to certain geographic regions based on its determination of which teams’ baseball fans in certain areas would or would not support.⁴⁰³ The home territory for MASN consists of the entire states of Virginia, Maryland, Delaware, and Washington, D.C., and certain parts of southern Pennsylvania, eastern West Virginia, and a substantial part of North Carolina (the “MASN Territory”).⁴⁰⁴ Comcast is the nation’s largest MVPD and holds an attributable ownership interest in Comcast SportsNet Philadelphia (“CSN-P”) and Comcast SportsNet Mid-Atlantic (“CSN-MA”), among other networks.⁴⁰⁵

91. On March 7, 2008, MASN provided Comcast with its pre-filing notice.⁴⁰⁶ MASN filed its complaint on July 1, 2008, alleging that Comcast discriminated against MASN in violation of the program carriage rules.⁴⁰⁷ MASN asks the Commission to (i) declare that Comcast’s conduct is a violation of the program carriage obligations under the Act and the Commission’s rules; (ii) order mandatory carriage of MASN on the Comcast systems in the MASN Territory that do not carry MASN; (iii) if necessary, require Comcast to delete its affiliated programming to clear capacity for MASN; (iv) require Comcast to provide a timetable for the upgrade of the former-Adelphia systems; (v) grant MASN substantial damages that have resulted from Comcast’s misconduct; and (vi) grant MASN such other and

³⁹⁹ *Second Report and Order*, 9 FCC Rcd at 2649.

⁴⁰⁰ *Id.*

⁴⁰¹ See MASN Complaint Against Comcast at ¶¶ 3, 68.

⁴⁰² See 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

⁴⁰³ See MASN Complaint Against Comcast at ¶ 8; [REDACTED].

⁴⁰⁴ See MASN Complaint Against Comcast at ¶ 8; [REDACTED].

⁴⁰⁵ Comcast Corporation, Answer, File No. CSR-8001-P (July 31, 2008), at 48 (¶ 67) (“Comcast Answer to MASN”).

⁴⁰⁶ See MASN Complaint Against Comcast at ¶ 58 [REDACTED].

⁴⁰⁷ See *id.* at ¶ 1.

further relief as the Commission deems just and proper.⁴⁰⁸ Comcast urges the Commission to find MASN in violation of the rules prohibiting frivolous pleadings and to impose appropriate penalties, including monetary forfeitures.⁴⁰⁹

1. Background

92. MASN claims that since 2005 it has sought carriage on *all* of Comcast's cable systems located within the MASN Territory, including in the Harrisburg-Lancaster-Lebanon-York DMA ("Harrisburg DMA"), as well as the Roanoke-Lynchburg DMA and the Tri-Cities DMA (the later two DMAs are referred to as the "southwestern Virginia DMAs").⁴¹⁰ Comcast denies that MASN ever specifically sought carriage in Harrisburg and southwestern Virginia during negotiations in 2005 or 2006.⁴¹¹ In fact, Comcast claims that MASN's primary focus was to obtain carriage in its core Washington, D.C. and Baltimore markets before the end of the 2006 baseball season, and at no point did MASN express any specific interest in Comcast's Harrisburg or southwestern Virginia systems.⁴¹²

93. The parties failed to reach a carriage agreement. In June 2005, MASN filed a program carriage complaint alleging discrimination and that Comcast illegally demanded a financial interest in MASN as a condition of carriage.⁴¹³ MASN requested that the Commission order Comcast to provide carriage of MASN on *all* Comcast systems in the MASN Territory.⁴¹⁴ On July 21, 2006, while MASN's program carriage complaint against Comcast was pending, the Commission adopted the *Adelphia Order*, which provided unaffiliated RSNs with the opportunity to pursue commercial arbitration of program carriage disputes with Comcast.⁴¹⁵ On July 31, 2006, the Commission found that MASN had established a *prima facie* case of discrimination in its pending program carriage complaint and referred the matter to an ALJ.⁴¹⁶ The Commission stayed the decision to give MASN an opportunity to decide whether to proceed with the complaint or with the expedited arbitration provided in the *Adelphia Order*.⁴¹⁷ MASN claims that pursuant to the *Adelphia Order* conditions it had only five days -- until August 4, 2006 -- to decide whether to file an arbitration demand with the American Arbitration Association ("AAA") or to proceed with the carriage complaint before an ALJ.⁴¹⁸ Comcast disputes this claim, arguing that MASN could have elected to file a simple notice with the AAA (or the Commission) and ask that the proceeding be held in

⁴⁰⁸ See *id.* at p. 41-42.

⁴⁰⁹ See Comcast Answer to MASN at 52 (citing 47 C.F.R. § 76.6(c); *Second Report and Order*, 9 FCC Rcd at 2657, ¶ 36).

⁴¹⁰ See MASN Complaint Against Comcast at ¶ 21; [REDACTED].

⁴¹¹ See Comcast Answer to MASN at 38 (¶ 21).

⁴¹² See *id.* at Exhibit B, Declaration of Madison Bond, at ¶ 10 ("Bond Decl").

⁴¹³ See MASN Complaint Against Comcast at ¶ 27.

⁴¹⁴ See *id.*

⁴¹⁵ See MASN Complaint Against Comcast at ¶ 32; see also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., et al.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8287, ¶¶ 189-90, Appendix B (2006) ("*Adelphia Order*").

⁴¹⁶ See *id.* at ¶ 34.

⁴¹⁷ See *id.* at ¶ 35.

⁴¹⁸ See *id.* at ¶ 32.

abeyance while the parties continued to negotiate.⁴¹⁹ With the deadline for filing for arbitration approaching, the parties entered into further negotiations.

94. MASN claims that on August 2, 2006, it emailed a revised version of the Term Sheet the parties had been negotiating to Comcast.⁴²⁰ As with the previous versions, MASN claims that the Term Sheet contained an intentionally blank list of the Comcast systems on which Comcast would carry MASN (the “List of Systems”).⁴²¹ MASN claims that it understood and intended that Comcast would fill in the List of Systems with all of Comcast’s cable systems within the MASN Territory.⁴²² MASN claims that on August 2, 2006, Comcast for the first time expressed concern that it could not immediately commit to carry MASN on systems serving approximately [REDACTED] subscribers in Roanoke/Lynchburg and other Virginia areas that were served by systems that Comcast acquired from Adelphia because these systems lacked sufficient capacity.⁴²³

95. MASN states that on the afternoon of August 4, 2006 – just three hours before the arbitration deadline – Comcast transmitted to MASN via email a revised version of the Term Sheet the parties had been negotiating.⁴²⁴ MASN states that Comcast’s email provided Comcast’s List of Systems for the first time.⁴²⁵ MASN explains that Comcast gave no indication that the list excluded any of its systems except for the former-Adelphia systems in Roanoke/Lynchburg and other Virginia areas that served [REDACTED] subscribers.⁴²⁶ Comcast explains that its revised draft of the Term Sheet specifically deleted the language providing for carriage of MASN on “all Comcast systems” and inserted language limiting Comcast’s carriage obligation to the specific systems listed in the List of Systems.⁴²⁷ Comcast claims that MASN never asked whether any Comcast systems were excluded from the List of Systems or otherwise raised any objections to the List of Systems.⁴²⁸ MASN states that Comcast’s email accompanying the Term Sheet stated that the revised version “reflects the deal we’ve been discussing over the past two days as well as some other clean-up changes.”⁴²⁹ MASN claims that this representation is clear that the Term Sheet would memorialize and not alter the parties’ discussions, which concerned carriage of MASN to all Comcast subscribers within the MASN Territory with the sole exception of the estimated [REDACTED] former-Adelphia subscribers previously discussed.⁴³⁰ Comcast disagrees, claiming that the deal Comcast and MASN had been discussing was for carriage on most, but not all, of Comcast’s systems.⁴³¹ Comcast claims that it never committed to carry MASN on all of its systems.⁴³²

⁴¹⁹ See Comcast Answer to MASN at ¶¶ 8, 29 and p. 40 (¶ 32).

⁴²⁰ See MASN Complaint Against Comcast at ¶ 39; [REDACTED].

⁴²¹ See MASN Complaint Against Comcast at ¶ 39; [REDACTED].

⁴²² See MASN Complaint Against Comcast at ¶ 39; [REDACTED].

⁴²³ See MASN Complaint Against Comcast at ¶ 40; [REDACTED].

⁴²⁴ See MASN Complaint Against Comcast at ¶ 41, [REDACTED].

⁴²⁵ See MASN Complaint Against Comcast at ¶ 41; [REDACTED].

⁴²⁶ See MASN Complaint Against Comcast at ¶ 41; [REDACTED].

⁴²⁷ See Comcast Answer to MASN at ¶ 25; Bond Decl. at ¶ 6; Comcast Corporation, Surreply, File No. CSR-8001-P (September 15, 2008) at 5 (“Comcat Surreply”).

⁴²⁸ See Bond Decl. at ¶ 8.

⁴²⁹ See MASN Complaint Against Comcast at ¶ 42; [REDACTED].

⁴³⁰ See MASN Complaint Against Comcast at ¶ 42; [REDACTED].

⁴³¹ See Comcast Answer to MASN at ¶ 26; Bond Decl. at ¶ 5; *id.* at Exhibit C, Declaration of Michael Ortman, at ¶ 4 (“Ortman Decl.”).

96. MASN claims that it attempted to review the List of Systems, but it lacked any independent means of verifying the contents, particularly with only three hours before the arbitration deadline.⁴³³ In response, Comcast states that MASN never claimed during the negotiations that it did not have adequate time to review the List of Systems.⁴³⁴ In addition, Comcast states that, because the List of Systems is less than two pages long with only 60 systems listed, it should not have taken hours to review.⁴³⁵ Comcast also claims that there were multiple public sources available to MASN that would have allowed it to easily determine which Comcast systems were and were not included in the List of Systems.⁴³⁶ MASN claims that none of these public sources would have allowed MASN to verify the contents of the List of Systems.⁴³⁷

97. MASN and Comcast signed the Term Sheet on August 4, 2006, less than one-half hour before the deadline to file for arbitration.⁴³⁸ The Term Sheet included a Release which required MASN to withdraw its pending program carriage complaint against Comcast.⁴³⁹ MASN filed a Motion to withdraw its complaint on August 9, 2006. On August 15, 2006, an ALJ released a decision granting the Motion and terminating the proceeding.⁴⁴⁰

98. In January 2007, four months after Comcast's first launch in September 2006 of MASN on some of its systems, MASN learned that Comcast did not intend to launch MASN on certain systems around Harrisburg.⁴⁴¹ MASN then initiated an effort to document the Comcast systems where Comcast did not launch MASN.⁴⁴² MASN determined that it had not been launched on Comcast systems encompassing approximately [REDACTED] Comcast subscribers in the Harrisburg, Roanoke/Lynchburg, and Tri-Cities DMAs, and in other small systems in Virginia and Pennsylvania as well as in [REDACTED] (collectively, the "Unlaunched Systems").⁴⁴³ These Unlaunched Systems serve approximately [REDACTED] of Comcast's subscribers within the MASN Territory.⁴⁴⁴ Some of these systems are not former-Adelphia systems, which MASN claims Comcast never raised as an issue during negotiations.⁴⁴⁵ Some of these systems are former-Adelphia systems, but MASN argues that Comcast has provided no indication as to

(Continued from previous page)

⁴³² See Comcast Answer to MASN at ¶ 26; Bond Decl. at ¶ 5; Ortman Decl. at ¶ 4.

⁴³³ See MASN Complaint Against Comcast at ¶ 46; [REDACTED]; MASN Reply to Comcast at ¶ 38.

⁴³⁴ See Bond Decl. at ¶ 11.

⁴³⁵ See *id.*; Ortman Decl. at ¶ 11.

⁴³⁶ See Comcast Answer to MASN at ¶¶ 7, 27; Bond Decl. at ¶¶ 7, 9; Ortman Decl. at ¶ 10.

⁴³⁷ See MASN Reply to Comcast ¶ 38; [REDACTED].

⁴³⁸ See MASN Complaint Against Comcast at ¶ 50; [REDACTED].

⁴³⁹ See MASN Complaint Against Comcast at ¶ 50; Comcast Answer to MASN at n.19.

⁴⁴⁰ See *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, MB Docket No. 06-148, File No. CSR-6911-N, Order Terminating Proceeding (Arthur I. Steinberg, Administrative Law Judge, August 14, 2006).

⁴⁴¹ See MASN Complaint Against Comcast at ¶ 52; [REDACTED].

⁴⁴² See MASN Complaint Against Comcast ¶ 53; [REDACTED].

⁴⁴³ See MASN Complaint Against Comcast at ¶ 53; [REDACTED].

⁴⁴⁴ See MASN Complaint Against Comcast at ¶ 53.

⁴⁴⁵ See MASN Complaint Against Comcast at ¶¶ 40, 48, 49; [REDACTED].

when these systems will be upgraded.⁴⁴⁶ Moreover, some former-Adelphia systems have been upgraded but are still not carrying MASN.⁴⁴⁷

99. Thus, the Unlaunched Systems on which MASN is not being carried fall into two relevant categories: (i) unlaunched Comcast systems in the MASN Territory that Comcast did not acquire from Adelphia (the “Unlaunched Non-Former-Adelphia Systems”) (which serve a total of approximately [REDACTED] Comcast subscribers⁴⁴⁸); and (ii) unlaunched Comcast systems in the MASN Territory that Comcast acquired from Adelphia (the “Unlaunched Former-Adelphia Systems”) (which serve a total of approximately [REDACTED] Comcast subscribers⁴⁴⁹).

100. For approximately a year, the parties engaged in negotiations for carriage of MASN on the Unlaunched Systems.⁴⁵⁰ These negotiations have not resulted in an agreement.⁴⁵¹

2. Procedural Issues

101. Comcast argues that the MASN complaint should be dismissed on the following procedural grounds.⁴⁵² For the reasons discussed below, we decline to dismiss the complaint on any of these grounds.

a. Program Carriage Statute of Limitations

102. Comcast argues that the MASN Complaint is barred by the program carriage statute of limitations.⁴⁵³ Comcast contends that, of the three events that trigger the running of the program carriage statute of limitations, only the first event -- the date on which the parties entered into the Term Sheet -- is applicable in this case.⁴⁵⁴ Comcast notes that the Term Sheet was executed on August 4, 2006, and thus argues that the statute of limitations expired one year later—on August 4, 2007.⁴⁵⁵ Comcast points out that the Complaint was filed on July 1, 2008, almost 11 months after that date.⁴⁵⁶ MASN disagrees. MASN notes that the Term Sheet commits future carriage decisions to Comcast’s “discretion,” but any such discretion is constrained by the non-discrimination obligations of the Act and the Commission’s rules.⁴⁵⁷ MASN states that its Complaint is based on Comcast’s discriminatory refusal to carry MASN on the Unlaunched Systems since 2007.⁴⁵⁸

⁴⁴⁶ See MASN Complaint Against Comcast at ¶ 51.

⁴⁴⁷ See MASN Complaint Against Comcast at ¶ 43; [REDACTED].

⁴⁴⁸ [REDACTED].

⁴⁴⁹ [REDACTED].

⁴⁵⁰ See MASN Complaint Against Comcast at ¶ 54; Comcast Answer to MASN at 45 (¶ 54); Ortman Decl. at ¶¶ 4, 6.

⁴⁵¹ See MASN Complaint Against Comcast at ¶ 54.

⁴⁵² See Comcast Answer to MASN at ¶¶ 19-21.

⁴⁵³ See MASN Complaint Against Comcast at ¶¶ 32-36.

⁴⁵⁴ See Comcast Answer to MASN at ¶ 34 and n.49. See 47 C.F.R. § 76.1302(f)(1) (“Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs: (1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more rules contained in this section”).

⁴⁵⁵ See Comcast Answer to MASN at ¶¶ 9, 34.

⁴⁵⁶ See *id.*

⁴⁵⁷ See MASN Reply to Comcast at ¶¶ 5, 34.

⁴⁵⁸ See *id.* at ¶¶ 2, 90, 92.

103. Comcast argues that MASN's claim regarding post-Term Sheet conduct is a new claim which MASN raised for the first time in its Reply.⁴⁵⁹ MASN disagrees, explaining that its Complaint was clear that its legal claims focused on Comcast's post-Term Sheet conduct.⁴⁶⁰ MASN explains that from the time it discovered that Comcast would not carry MASN on the Unlaunched Systems until the filing of its Complaint in July 2008, MASN attempted to reach a carriage agreement with Comcast.⁴⁶¹ Because those negotiations had appeared to reach an impasse in March 2008, MASN sent a notice letter to Comcast on March 7, 2008.⁴⁶² MASN filed its Complaint on July 1, 2008, well within one year of notifying Comcast, as required by Section 76.1302(f)(3).⁴⁶³

104. In any event, Comcast argues that there can be no "refusal to negotiate" or "refusal to carry" with respect to any Comcast system in the MASN Territory because a Term Sheet and Release were already executed between the parties in August 2006.⁴⁶⁴ MASN responds that this line of argument is a contract-based defense to MASN's carriage claims that is legally and factually unfounded.⁴⁶⁵ Comcast also claims that there is no "refusal to carry" because Comcast carries MASN in the vast majority of Comcast systems in the MASN Territory.⁴⁶⁶ MASN responds that there is no legal authority to support Comcast's view that carriage of MASN on some Comcast systems extinguishes MASN's legal right to enforce its program carriage rights with respect to other Comcast systems.⁴⁶⁷

105. We conclude that MASN filed its program carriage complaint in compliance with the program carriage statute of limitations.⁴⁶⁸ MASN's claims regarding program carriage discrimination apply to Comcast's refusal to exercise its discretion to carry MASN on the Unlaunched Systems after the Term Sheet was signed. As MASN notes, the Term Sheet committed Comcast's future carriage decisions, including carriage on systems not included in the List of Systems, to Comcast's "discretion." The Term Sheet, however, does not indicate that MASN waived its statutory program carriage rights with respect to Comcast's exercise of such discretion. Accordingly, MASN's claims based on Comcast's exercise of its discretion pursuant to the Term Sheet are not subject to the one-year limitations period in Section

⁴⁵⁹ See Comcast Surreply at 4.

⁴⁶⁰ See TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Opposition to Surreply, File No. CSR-8001-P (filed September 22, 2008), at ¶¶ 3, 5 ("MASN Opposition to Comcast Surreply"); MASN Complaint Against Comcast at ¶ 84 ("The core of this complaint seeks to hold Comcast liable for its conduct and its program carriage violations *since* the Term Sheet – namely, Comcast's unreasonable and discriminatory refusal to carry MASN on those unlaunched systems."). Based on our examination of the pleadings, we agree with MASN that its claim regarding post-Term Sheet conduct was not raised for the first time in its Reply.

⁴⁶¹ See MASN Reply to Comcast at ¶ 88.

⁴⁶² See *id.* at ¶¶ 88-90.

⁴⁶³ See *id.* Comcast argues that the one-year limitations period cannot run from the date of filing of MASN's 10-day letter on March 7, 2008 because, under such an interpretation, a programmer could bring a program carriage complaint simply by sending a "trigger letter" at any time. See Comcast Answer to MASN at n. 51. In response, MASN contends that Comcast's position is contradicted by the text of the Commission's rules, which provides that a programming vendor may bring a complaint for an unreasonable refusal to carry within one-year after sending a notice letter. See MASN Reply to Comcast ¶ 93.

⁴⁶⁴ See Comcast Surreply at 4.

⁴⁶⁵ See MASN Opposition to Comcast Surreply at ¶ 9; MASN Reply to Comcast at ¶¶ 33-57; see also *infra* at ¶¶ 112-114.

⁴⁶⁶ See Comcast Surreply at 5.

⁴⁶⁷ See MASN Opposition to Comcast Surreply at ¶ 10; MASN Reply to Comcast at ¶ 59.

⁴⁶⁸ See 47 C.F.R. § 76.1302(f).

76.1302(f)(1). MASN explains that its negotiations with Comcast for carriage of MASN on the Unlaunched Systems appeared to reach an impasse in March 2008. MASN filed its program carriage complaint within one year of this date and within one year of its pre-filing notice. Accordingly, MASN filed its complaint in compliance with the limitations period in Section 76.1302(f)(3).⁴⁶⁹

b. Res Judicata

106. Comcast claims that MASN's complaint is barred by the doctrine of *res judicata*.⁴⁷⁰ As required by the Release, MASN voluntarily sought and received from the Commission dismissal of its 2005 Complaint.⁴⁷¹ Comcast asserts that voluntary dismissal with prejudice of a complaint constitutes a final judgment on the merits as to all claims encompassed therein.⁴⁷² MASN disagrees, arguing that *res judicata* only applies where the prior and subsequent actions share a "common nucleus of operative facts."⁴⁷³ MASN's past complaint against Comcast concerned Comcast's discriminatory refusal to carry MASN in response to its carriage requests beginning in 2005.⁴⁷⁴ MASN claims that the current action, however, is forward-looking and concerns Comcast's discriminatory refusal to carry MASN after the August 2006 date of the Release.⁴⁷⁵

107. We conclude that the MASN complaint is not barred by *res judicata*. MASN's claims regarding program carriage discrimination apply to Comcast's refusal to exercise its discretion to carry MASN on the Unlaunched Systems after the parties settled their previous disputes and signed the Term Sheet. This presents a different set of facts and circumstances than those presented in the 2005 Complaint.⁴⁷⁶

3. Similarly Situated

108. MASN claims that it is similarly situated to CSN-MA in the southwestern Virginia DMAs and to CSN-P in the Harrisburg DMA because the networks are all RSNs and they compete head-to-head in the same geographic areas.⁴⁷⁷ MASN explains that it is an RSN that provides live sports programming of major professional sports teams (the Orioles and Nationals).⁴⁷⁸ Similarly, Comcast's

⁴⁶⁹ The EchoStar case cited by Comcast is inapposite. Comcast Surreply at 6 (citing *EchoStar Communications Corp. v. Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C.*, Memorandum Opinion & Order, 14 FCC Rcd 9327 (CSB, 1999), *aff'd*, *EchoStar Communications Corp. v. Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C.*, Memorandum Opinion & Order, 16 FCC Rcd 4949 (2001)). In that decision, the Commission did not hold that a refusal to sell claim is barred when the parties reached a carriage agreement over one year earlier.

⁴⁷⁰ See Comcast Answer to MASN at n.19 (citing *Comcast Corp. v. IDB Mobile Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7906, ¶ 13 (2000)).

⁴⁷¹ See Comcast Answer to MASN at n.19.

⁴⁷² See Comcast Answer to MASN at n.19.

⁴⁷³ See MASN Reply to Comcast at ¶ 52 (citing *Mid-Atlantic Network, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7582, ¶ 8 (Chief, Audio Division, Media Bureau, 2008)).

⁴⁷⁴ See MASN Reply to Comcast at ¶ 52.

⁴⁷⁵ See *id.*

⁴⁷⁶ See Restatement (2d) of Judgments, §§ 19, 24, 25; 18 Moore's Federal Practice § 131.01 at 131-11, 12 (3d ed. 1997) (collecting cases). Cf. *Teleservices Industry Ass'n v. AT&T Corp.*, 15 FCC Rcd 21454, 21457-58 (Enf. Bur. 2000) (required *res judicata* element of a common nucleus of operative facts met where facts surrounding instant complaint were same as those in an earlier action).

⁴⁷⁷ See MASN Complaint Against Comcast at ¶¶ 64, 65, 92; Comcast Answer to MASN at p. 47 (¶¶ 64-65), p. 48 (¶ 67), p. 50 (¶ 92); MASN Reply to Comcast at ¶¶ 14-15; MASN Opposition to Comcast Surreply at ¶ 8.

⁴⁷⁸ See MASN Reply to Comcast at ¶ 14.

affiliated RSNs carry major professional sports programming throughout Comcast's footprint (including the Washington Wizards and Capitals (in the case of CSN-MA) and the Philadelphia Phillies and Flyers (in the case of CSN-P)).⁴⁷⁹ Comcast has not attempted to demonstrate that MASN, CSN-MA, and CSN-P are not similarly situated.

4. Differential Treatment

109. MASN explains that Comcast treats CSN-MA and CSN-P differently than MASN: on the majority of the Unlaunched Systems, Comcast carries CSN-P and/or CSN-MA, but Comcast has refused to carry MASN on those same systems.⁴⁸⁰

5. Harm to Ability to Compete

110. As required by the program carriage statute and rules, MASN has provided evidence that Comcast's refusal to carry MASN on the Unlaunched Systems restrains its ability to compete fairly by (i) preventing MASN from achieving maximum subscribership;⁴⁸¹ (ii) restraining MASN's ability to compete for advertising revenues;⁴⁸² (iii) restraining MASN's ability to compete for sports programming rights;⁴⁸³ and (iv) increasing MASN's average, [REDACTED] costs.⁴⁸⁴ MASN has put forth evidence demonstrating that as an RSN it needs access to the maximum number of subscribers within its geographic footprints in order to compete optimally for advertisers and sports programming rights.⁴⁸⁵ In response, Comcast explains that MASN is carried very broadly in its territory,⁴⁸⁶ including by Comcast, DIRECTV, DISH Network, Cox, Verizon, RCN, and many others.⁴⁸⁷ Moreover, Comcast explains that MASN

⁴⁷⁹ See Comcast Answer to MASN at p. 47 (¶ 64), p. 48 (¶ 67), p. 50 (¶ 92); MASN Reply to Comcast at ¶¶ 14-15.

⁴⁸⁰ See MASN Complaint Against Comcast at ¶¶ 55, 71; MASN Reply to Comcast at ¶¶ 2, 6, 13, 16; MASN Opposition to Comcast Surreply at ¶¶ 8, 10.

⁴⁸¹ MASN claims that, unlike national programming networks, RSNs are by definition regional in nature and they must pay substantial license fees to get access to valuable sports programming; accordingly, they need access to the maximum number of subscribers within their geographic footprints in order to compete optimally. See MASN Reply to Comcast at ¶ 20; [REDACTED].

⁴⁸² MASN explains that the prices it charges for advertising are based in part on the number of viewers that will get access to MASN's programming and thus to advertising; thus MASN would receive increased advertising revenue if Comcast carried MASN on the Unlaunched Systems. See MASN Reply to Comcast at ¶¶ 23, 29; [REDACTED]. Comcast disagrees, claiming that advertisers who buy time on MASN focus on how many households MASN can deliver inside the Baltimore and Washington, DC DMAs. See Comcast Answer to MASN at ¶¶ 13, 54; *id.* at Exhibit I, Declaration of Michael Wall, at ¶¶ 6-8 ("Wall Decl.").

⁴⁸³ MASN argues that Comcast's refusal to deliver MASN to subscribers of the Unlaunched Systems reduces MASN's revenues and its distribution, which in turn decreases MASN's ability to compete with Comcast's affiliated RSNs to acquire high-priced sports programming. See MASN Complaint Against Comcast at ¶ 60; [REDACTED]; MASN Reply to Comcast at ¶¶ 21-22; [REDACTED]. While Comcast notes that its refusal to carry MASN in Harrisburg and southwestern Virginia has not diminished MASN's ability to obtain rights to numerous college sporting events, including Division I football and basketball games and Baltimore Ravens pre-season games (Comcast Answer to MASN at ¶¶ 13, 56; Ortman Decl. at ¶ 19), MASN explains that it would be better positioned to bid for the rights to sports programming if it were carried on the Unlaunched Systems. See MASN Reply to Comcast at ¶ 28; [REDACTED].

⁴⁸⁴ See [REDACTED]; MASN Reply to Comcast at ¶ 20; [REDACTED].

⁴⁸⁵ See MASN Reply to Comcast at ¶ 20; [REDACTED].

⁴⁸⁶ See Comcast Answer to MASN at ¶¶ 13, 51.

⁴⁸⁷ See *id.*

reaches over 5 million MVPD subscribers, making it one of the largest RSNs in the country.⁴⁸⁸ Comcast notes that it is carrying MASN to approximately [REDACTED] subscribers, or almost [REDACTED] of its subscribers in the MASN Territory,⁴⁸⁹ and there is no evidence that its refusal to carry MASN in the “outer reaches” of Harrisburg and southwestern Virginia has in any way harmed MASN or affected its ability to compete.⁴⁹⁰

6. Alleged Contract-Based, Business and Editorial Justifications for Comcast’s Refusal to Carry MASN on the Unlaunched Systems

111. Comcast offers a number of contract-based and alleged business and editorial justifications for its decision to refrain from carrying MASN on the Unlaunched Systems.

a. Contract-Based Justifications

(i) Term Sheet

(a) Unlaunched Non-Former-Adelphia Systems

112. Comcast argues that the unambiguous terms of the Term Sheet do not obligate it to carry MASN on the Unlaunched Non-Former-Adelphia Systems because those systems are not included in the List of Systems attached to the Term Sheet.⁴⁹¹ Comcast asserts that the exclusion of these systems from the List of Systems was “an important part of the negotiated compromise” that led to the settlement of the carriage dispute between Comcast and MASN.⁴⁹² MASN notes that the Term Sheet, however, commits future carriage decisions to Comcast’s “discretion,” which is constrained by the non-discrimination obligations of the program carriage rules.⁴⁹³ By signing the Term Sheet, MASN claims that it did not forfeit its rights to insist that Comcast abide by its program carriage obligations with respect to any Comcast system within the MASN Territory.⁴⁹⁴

(b) Unlaunched Former-Adelphia Systems

113. Comcast argues that, under the unambiguous terms of the Term Sheet, it is not obligated to carry MASN on the Unlaunched Former-Adelphia Systems because those systems are not included in the List of Systems.⁴⁹⁵ MASN states that it agreed to Comcast’s proposal to exclude certain former Adelphia systems in Roanoke/Lynchburg and other small Virginia communities based on Comcast’s representation that there was not sufficient capacity to carry MASN on these systems at the time.⁴⁹⁶ MASN explains that Comcast represented to the Commission that it would rapidly upgrade the former Adelphia systems it acquired in 2006, a representation that was crucial to the Commission’s approval of

⁴⁸⁸ *See id.*

⁴⁸⁹ *See id.*; Bond Decl. at ¶¶ 13, 15; Ortman Decl. at ¶ 14.

⁴⁹⁰ *See* Comcast Answer to MASN at ¶¶ 13, 42; *id.* at Exhibit H, Declaration of Jonathan Orszag and Jay Ezrielev, at ¶ 18 (“Orszag Decl.”).

⁴⁹¹ *See* Comcast Answer to MASN at ¶¶ 4, 17, 18, 28, p. 43 (¶¶ 44, 45), p. 45-46 (¶ 55), p. 46 (¶ 59); Bond Decl. at ¶ 9; Ortman Decl. at ¶¶ 4, 6; Comcast Surreply at 4-5.

⁴⁹² *See* Comcast Answer to MASN at ¶¶ 4, 17, 18; Bond Decl. at ¶ 4.

⁴⁹³ *See* MASN Reply to Comcast at ¶¶ 5, 34, and p.19 n.60.

⁴⁹⁴ *See* MASN Complaint Against Comcast at ¶ 83.

⁴⁹⁵ *See* Comcast Answer to MASN at n. 46; Bond Decl. at ¶ 5; Comcast Surreply at 4-5.

⁴⁹⁶ *See* MASN Complaint Against Comcast at ¶ 43; [REDACTED].

the Adelphia transaction.⁴⁹⁷ MASN states that, given assurances made by Comcast to the Commission that it would soon upgrade the Former-Adelphia systems, thereby providing sufficient capacity to MASN, MASN viewed Comcast's representations to the Commission as sufficient protection that MASN would eventually be launched on the Former-Adelphia systems.⁴⁹⁸ Comcast states that it never committed to launch MASN in Roanoke and other Former-Adelphia systems in Virginia once those systems were upgraded, nor is such a commitment reflected in the Term Sheet.⁴⁹⁹ MASN notes that, as with the Non-Former-Adelphia Systems, the Term Sheet commits future carriage decisions to Comcast's "discretion," which is constrained by the non-discrimination obligations of the program carriage rules.⁵⁰⁰ By signing the Term Sheet, MASN claims that it did not forfeit its rights to insist that Comcast abide by its program carriage obligations with respect to any Comcast system within the MASN Territory.⁵⁰¹

(ii) Release

114. Comcast argues that the Term Sheet and Release comprehensively settled MASN's 2005 program carriage complaint against Comcast, in which MASN requested carriage on "all Comcast systems," including the Harrisburg and the southwestern Virginia systems, and thereby relinquished any right MASN may have had to seek any different deal with Comcast covering Comcast's cable systems in the MASN Territory.⁵⁰² MASN notes, however, that the Release covers only conduct "until the date of this Release clause" – that is, up until August 2006.⁵⁰³ MASN's complaint, however, concerns Comcast's refusal to exercise its discretion to carry MASN since 2007 when MASN discovered it was not being carried on the Unlaunched Systems, well after the date of the Release.⁵⁰⁴ Accordingly, MASN contends that the Release does not justify Comcast's decision to refuse to carry MASN on the Unlaunched Systems but to carry its affiliated RSNs.

⁴⁹⁷ See MASN Complaint Against Comcast at ¶¶ 33, 93, 97; MASN Reply to Comcast at ¶ 86.

⁴⁹⁸ See MASN Complaint Against Comcast at ¶ 43; [REDACTED].

⁴⁹⁹ See Comcast Answer to MASN at n. 46; Bond Decl. at ¶ 5.

⁵⁰⁰ See MASN Reply to Comcast at ¶¶ 5, 34, p.19 n.60.

⁵⁰¹ See MASN Complaint Against Comcast at ¶ 83.

⁵⁰² See Comcast Answer to MASN at ¶¶ 3, 5, 15, 19, 20 and p.49 (¶ 84).

⁵⁰³ See MASN Complaint Against Comcast at ¶ 84; MASN Reply to Comcast at ¶¶ 48-49.

⁵⁰⁴ See MASN Complaint Against Comcast at ¶ 84; MASN Reply to Comcast at ¶¶ 48-49; MASN Opposition to Comcast Surreply ¶ 5. Comcast cites two cases to support its claims regarding the Release, both of which MASN claims are readily distinguishable. First, Comcast argues that in *Nova Cellular West v. AirTouch Cellular*, 17 FCC Rcd 15026 (2002), the Commission concluded that the settlement and release covered the new complaint and that Nova Cellular had therefore waived its right to assert that AirTouch's conduct violated the Act. See Comcast Answer to MASN at n.19. MASN contends, however, *Nova Cellular* reaffirmed the Commission's position that release clauses do not cover post-release conduct, but carved out a narrow exception regarding contingent future acts which is not relevant here. See MASN Reply to Comcast at ¶ 55. Second, Comcast cites *Robert L. Kile*, Memorandum Opinion and Order, 5 FCC Rcd 513 (1990), for the proposition that the "validity of a settlement agreement is . . . a private contractual matter best resolved by negotiation of the parties or by the courts." See Comcast Answer to MASN at 10 n.14 (citing *Kile*, 5 FCC Rcd 513 ¶ 11). MASN contends that the Commission in *Kile* took precisely the opposite course and, in fact, restated its longstanding position that "the Commission will not enforce or interpret settlement agreements among cellular applicants," particularly where enforcement of the settlement agreement might interfere with its ability to give full consideration to the public interest." See MASN Reply to Comcast at ¶ 57.

b. Editorial and Business Justifications

115. Comcast argues that its refusal to carry MASN on the Unlaunched Systems was based on its editorial and business judgment that carriage on those systems was not justified in light of a number of factors, including MASN's carriage cost (both licensee fee and bandwidth) and its allegedly low consumer appeal.⁵⁰⁵

(i) License Fee

116. Comcast contends that MASN would be among the most expensive networks carried in its Harrisburg and southwestern Virginia systems.⁵⁰⁶ MASN contends that Comcast has submitted no evidence, however, demonstrating that the cost of carrying MASN is materially greater than the cost of carrying Comcast's affiliated RSNs in the relevant DMAs.⁵⁰⁷ MASN claims that Comcast provides no justification for applying a stricter cost standard to unaffiliated programming than to affiliated programming.⁵⁰⁸ Moreover, while Comcast claims that a network's license fee is a relevant consideration in making carriage decisions, MASN argues that Comcast has not submitted any evidence that its decision-makers compared the cost of MASN to the cost of its affiliated RSNs in deciding to deny carriage to MASN on the Unlaunched Systems but to grant carriage to Comcast's affiliated RSNs.⁵⁰⁹ MASN provides the following evidence which it claims justifies its license fee for carriage on the Unlaunched Systems: (i) the carriage rates proposed by MASN are fair and reasonable in light of the popularity and value of live sports programming that MASN offers;⁵¹⁰ (ii) every other major MVPD in the relevant parts of the MASN Territory other than Comcast (such as Cox, DIRECTV, and DISH Network) has agreed to carry MASN on their basic or expanded basic tier (or equivalent) at the rates MASN has proposed for Comcast;⁵¹¹ (iii) Comcast has agreed to the same carriage terms for MASN on its systems in other areas (some of which are farther away from Baltimore and Washington than the Harrisburg and southwestern Virginia DMAs);⁵¹² and (iv) MASN's rate is comparable to what other RSNs charge and MVPDs pay for comparable extended inner-market programming.⁵¹³

⁵⁰⁵ See Comcast Answer to MASN at ¶ 43; Bond Decl. at ¶ 17; Ortman Decl. at ¶ 7.

⁵⁰⁶ See Comcast Answer to MASN at ¶ 11; Ortman Decl. at ¶ 7.

⁵⁰⁷ See MASN Reply to Comcast at ¶ 64.

⁵⁰⁸ See *id.*

⁵⁰⁹ See *id.*

⁵¹⁰ See MASN Complaint Against Comcast at ¶ 87; [REDACTED].

⁵¹¹ See MASN Complaint Against Comcast at ¶¶ 15; 87; [REDACTED]; MASN Reply to Comcast at ¶ 66. In response, Comcast notes that cable operators aside from Comcast have decided not to carry MASN in Harrisburg, including the Blue Ridge systems in Duncannon and North Lancaster, the Atlantic Broadband system in McClure, and the Nittany Media system in Mifflintown. See Comcast Answer to MASN at n.83; Ortman Decl. at ¶ 12. Moreover, Comcast notes that, with the exception of Cox's carriage of MASN in Roanoke, most other cable operators serving southwestern Virginia, such as Suddenlink, Jet Broadband, Almega Cable, and Citizens Cablevision, have made the same decision as Comcast not to carry MASN. See Comcast Answer to MASN at n.83; Ortman Decl. at ¶ 12. MASN contends that the decisions of a few small cable operators do not cast doubt on MASN's value given the evidence of extensive carriage of MASN by other MVPDs. See MASN Reply to Comcast at 44 n.139; [REDACTED].

⁵¹² See MASN Reply to Comcast at ¶ 65.

⁵¹³ See Wyche Decl. at ¶ 36; MASN Reply to Comcast at ¶ 67.

(ii) Bandwidth

117. Comcast argues that, because the Term Sheet requires carriage of MASN on Comcast's expanded basic tier, Comcast would be required to devote scarce analog capacity to carriage of the network.⁵¹⁴ Moreover, Comcast notes that MASN would require two analog channels to accommodate both the Orioles' and Nationals' games.⁵¹⁵ MASN argues that Comcast has provided no evidence regarding its bandwidth constraints on the Unlaunched Systems.⁵¹⁶ In addition, MASN contends that Comcast has failed to justify why its alleged bandwidth constraints on the Unlaunched Systems justified denying carriage to MASN but granting carriage to Comcast's affiliated RSNs.⁵¹⁷

(iii) Demand

118. Comcast argues that its refusal to carry MASN on the Unlaunched Systems is justified based on MASN's low consumer appeal.⁵¹⁸ Comcast notes that, even in its core Baltimore and Washington, DC markets, MASN has the lowest viewership ratings of any RSN in the country, attracting less than one-third the average number of households of any other RSN.⁵¹⁹ MASN argues that Comcast has submitted no evidence, however, demonstrating that the demand for MASN is materially different than the demand for Comcast's affiliated RSNs in the relevant DMAs.⁵²⁰ MASN also alleges that Comcast provides no justification for applying a stricter demand standard to unaffiliated programming than to affiliated programming.⁵²¹ Moreover, while Comcast claims that demand is a relevant consideration in making carriage decisions, MASN submits that Comcast has not provided any evidence that its decision-makers compared the demand for MASN to the demand for its affiliated RSNs in deciding to deny carriage to MASN on the Unlaunched Systems but to grant carriage to Comcast's affiliated RSNs.⁵²² MASN argues that the following demonstrates consumer demand for its programming on the Unlaunched Systems based on the following factors: (i) the decisions of 21 other major MVPDs throughout the MASN Territory to carry MASN (including Charter, Cox, DIRECTV, DISH Network, RCN, and Verizon);⁵²³ (ii) Comcast's efforts to keep the rights to the Orioles games and to acquire the rights to the Nationals games, both of which are now shown on MASN;⁵²⁴ (iii) prior to the launch of MASN, Comcast's affiliated RSN carried Orioles games in the Harrisburg DMA;⁵²⁵ (iv) every other major MVPD serving Harrisburg

⁵¹⁴ See Comcast Answer to MASN at ¶ 44.

⁵¹⁵ See Comcast Answer to MASN at ¶¶ 11, 44; Bond Decl. at ¶ 17; Ortman Decl. at ¶ 7.

⁵¹⁶ See MASN Reply to Comcast at ¶ 69.

⁵¹⁷ See *id.*

⁵¹⁸ See Comcast Answer to MASN at ¶ 43; Bond Decl. at ¶ 17; Ortman Decl. at ¶ 7.

⁵¹⁹ See Comcast Answer to MASN at ¶¶ 11, 48.

⁵²⁰ See MASN Reply to Comcast at ¶ 73.

⁵²¹ See *id.*

⁵²² See *id.* at ¶ 74.

⁵²³ See *id.* at ¶ 82.

⁵²⁴ See *id.* at ¶ 68.

⁵²⁵ See MASN Complaint Against Comcast at ¶¶ 13, 78, 87; [REDACTED]; MASN Reply to Comcast at ¶ 81; [REDACTED]. Comcast notes that it carried the RSN on a sports tier and that it dropped it prior to the launch of MASN. See Comcast Answer to MASN at ¶¶ 11, 45, p.36-37 (¶ 13), p. 49 (¶ 78); Bond Decl. at ¶ 18; Ortman Decl. at ¶ 9.

(DIRECTV, DISH Network, [REDACTED]) except Comcast has agreed to carry MASN;⁵²⁶ (v) prior to the launch of MASN, Comcast's affiliated RSN carried Orioles games on systems in southwestern Virginia;⁵²⁷ (vi) other major MVPDs serving southwestern Virginia (Cox, DIRECTV, DISH Network) have agreed to carry MASN;⁵²⁸ (vii) evidence that demand for MASN's programming is comparable to or eclipses demand for Comcast's affiliated programming in MASN's core markets on a per-game ratings basis;⁵²⁹ (viii) MASN is among the top RSNs in the country with respect to live major professional sports programming;⁵³⁰ and (ix) MASN carries other programming of interest to subscribers in the Harrisburg and southwestern Virginia DMAs, including sporting events of local colleges.⁵³¹ MASN also argues that Comcast's claim that there is no demand for MASN in Harrisburg is contradicted by the fact that Comcast has launched MASN on other systems in southern Pennsylvania, such as in York, Pennsylvania (25 miles from Harrisburg).⁵³² Moreover, MASN submits that Comcast's claim that there is no demand for MASN on the periphery of the MASN Territory is contradicted by the fact that it carries CSN-MA on the same cable systems in southwestern Virginia despite the fact that CSN-MA's core sports programming of Washington Wizards and Capitals games is also based in the Washington DMA.⁵³³

7. Conclusion

119. In the *Second Report and Order*, the Commission stated that it would identify specific behavior that constitutes discrimination on a case-by-case basis "because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation."⁵³⁴ Any complainant alleging a violation of the prohibition in Section 616(a)(3) on discrimination must demonstrate that the alleged discrimination is "on the basis of affiliation or nonaffiliation" of a vendor, and that "the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly."⁵³⁵ After reviewing the pleadings and supporting documentation filed by the parties, we find that MASN has established a *prima facie* case in the above-referenced case under Section 76.1301(c). We also find that the pleadings and supporting

⁵²⁶ See MASN Complaint Against Comcast at ¶ 15; [REDACTED]; MASN Reply to Comcast at ¶ 82. Comcast notes some small cable operators in Harrisburg that do not carry MASN. See Comcast Answer to MASN at n.83; Ortman Decl. at ¶ 12. We do not believe that the decisions of few small cable operators cast doubt on MASN's value given the evidence of extensive carriage of MASN by other MVPDs in Harrisburg. See MASN Reply to Comcast at 44 n.139; [REDACTED].

⁵²⁷ See MASN Complaint Against Comcast at ¶¶ 13, 87; [REDACTED]; MASN Reply to Comcast at ¶ 81; [REDACTED].

⁵²⁸ See MASN Complaint Against Comcast at ¶ 15; [REDACTED]; MASN Reply to Comcast at ¶ 82; [REDACTED]. Comcast argues that, with the exception of Cox's carriage of MASN in Roanoke, most other cable operators serving southwestern Virginia, such as Suddenlink, Jet Broadband, Almega Cable, and Citizens Cablevision, have made the same decision as Comcast not to carry MASN. See Comcast Answer to MASN at n.83; Ortman Decl. at ¶ 12. We do not believe that the decisions of certain cable operators cast doubt on MASN's value given the evidence of extensive carriage of MASN by other MVPDs in southwestern Virginia, such as DIRECTV and DISH. See MASN Reply to Comcast at 44 n.139; [REDACTED].

⁵²⁹ See MASN Reply to Comcast at ¶ 75; [REDACTED].

⁵³⁰ See MASN Complaint Against Comcast at ¶ 18.

⁵³¹ See *id.* at ¶ 19; [REDACTED]; MASN Reply to Comcast at ¶ 83; [REDACTED].

⁵³² See MASN Reply to Comcast at ¶¶ 55, 80; [REDACTED].

⁵³³ See MASN Reply to Comcast at ¶¶ 16, 73.

⁵³⁴ *Second Report and Order*, 9 FCC Rcd at 2648.

⁵³⁵ *Id.*; 47 C.F.R. § 76.1302(c)(3).

documentation present several factual disputes as to whether Comcast discriminated against MASN in favor of its affiliated services. Accordingly, we direct the ALJ to make and return a Recommended Decision to the Commission pursuant to the procedures set forth below within 60 days after release of this *Order*.

IV. REFERRAL TO ADMINISTRATIVE LAW JUDGE OR ALTERNATIVE DISPUTE RESOLUTION

120. We direct that an Administrative Law Judge resolve the factual disputes with respect to the claims and return a recommended decision and a recommended remedy, if necessary, to the Commission within 60 days of the date of this *Order*. Pursuant to Section 76.7(g)(2) of the Commission's rules, the parties will have ten days following release of this *Order* to elect to resolve this dispute through ADR.⁵³⁶ Each party will notify the Commission, in writing, of its election within 10 days of release of this *Order* and, in the event that ADR is chosen, will update the Commission monthly on the status of the ADR process.⁵³⁷ If the parties elect to resolve the dispute through ADR, the 60-day period for review by an Administrative Law Judge will be tolled. In the event that the parties fail to reach a settlement through the ADR process, the parties shall promptly notify the Commission in writing, and the 60-day period will resume upon receipt of such notification.

121. Upon receipt of the Administrative Law Judge's recommended decision and remedy, the Commission will make the requisite legal determinations as to whether (i) the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c); and (ii) only in the case of *NFL Network v Comcast*, whether Comcast has demanded a financial interest in the NFL's programming in exchange for carriage in violation of Section 76.1301(a). If necessary, the Commission will then decide upon appropriate remedies.

V. ORDERING CLAUSES

A. *WealthTV v. TWC*

122. Accordingly, **IT IS ORDERED**, that Herring Broadcasting, Inc. d/b/a/ *WealthTV*'s Complaint against Time Warner Cable Inc. is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

123. **IT IS FURTHER ORDERED**, that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and 47 C.F.R. §§ 76.1300-1302, Herring Broadcasting, Inc. d/b/a *WealthTV* and Time Warner Cable Inc. submit to the Commission, in writing within ten days of this *Order*, their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution

⁵³⁶ 47 C.F.R. § 76.7(g)(2).

⁵³⁷ *Id.*

and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

124. **IT IS FURTHER ORDERED**, that the Administrative Law Judge, within 60 days of this *Order*, will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

125. **IT IS FURTHER ORDERED**, that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

B. WealthTV v. BHN

126. Accordingly, **IT IS ORDERED**, that Herring Broadcasting, Inc. d/b/a/ WealthTV's Complaint against Bright House Networks, LLC is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried in defendant's systems and such other remedies as the Administrative Law Judge recommends.

127. **IT IS FURTHER ORDERED**, that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and 47 C.F.R. §§ 76.1300-1302, Herring Broadcasting, Inc. d/b/a WealthTV and Bright House Networks, LLC submit to the Commission, in writing within ten days of this *Order*, their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

128. **IT IS FURTHER ORDERED**, that the Administrative Law Judge, within 60 days of this *Order*, will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

129. **IT IS FURTHER ORDERED**, that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

C. WealthTV v. Cox

130. Accordingly, **IT IS ORDERED**, that Herring Broadcasting, Inc. d/b/a/ WealthTV's Complaint against Cox Communications, Inc. is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

131. **IT IS FURTHER ORDERED**, that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and 47 C.F.R. §§ 76.1300-1302, Herring Broadcasting, Inc. d/b/a WealthTV and Cox Communications, Inc. submit to the Commission, in writing within ten days of this *Order*, their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

132. **IT IS FURTHER ORDERED**, that the Administrative Law Judge, within 60 days of this *Order*, will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

133. **IT IS FURTHER ORDERED**, that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

D. WealthTV v. Comcast

134. Accordingly, **IT IS ORDERED**, that Herring Broadcasting, Inc. d/b/a/ WealthTV's Complaint against Comcast Corporation is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

135. **IT IS FURTHER ORDERED**, that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and 47 C.F.R. §§ 76.1300-1302, Herring Broadcasting, Inc. d/b/a WealthTV and Comcast Corporation submit to the Commission, in writing within ten days of this *Order*, their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

136. **IT IS FURTHER ORDERED**, that the Administrative Law Judge, within 60 days of this *Order*, will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

137. **IT IS FURTHER ORDERED**, that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

E. NFL v. Comcast

138. Accordingly, **IT IS ORDERED**, that NFL Enterprises LLC's Complaint against Comcast Corporation is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) whether the defendant has demanded a financial interest in the complainant's programming in exchange for carriage in violation of Section 76.1301(a);

(c) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c) or demanded a financial interest in the complainant's programming in exchange for carriage in violation of Section 76.1301(a), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

139. **IT IS FURTHER ORDERED**, that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and 47 C.F.R. §§ 76.1300-1302, NFL Enterprises LLC and Comcast Corporation submit to the Commission, in writing within ten days of this *Order*, their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

140. **IT IS FURTHER ORDERED**, that the Administrative Law Judge, within 60 days of this *Order*, will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

141. **IT IS FURTHER ORDERED**, that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

F. MASN v. Comcast

142. Accordingly, **IT IS ORDERED**, that TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network's Complaint against Comcast Corporation is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

143. **IT IS FURTHER ORDERED**, that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and 47 C.F.R. §§ 76.1300-1302, TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network and Comcast Corporation submit to the Commission, in writing within ten days of this *Order*, their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

144. **IT IS FURTHER ORDERED**, that the Administrative Law Judge, within 60 days of this *Order*, will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

145. **IT IS FURTHER ORDERED**, that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

G. General Ordering Clauses

146. **IT IS FURTHER ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), in order to avail itself of the opportunity to be heard, each party to an above-captioned proceeding, in person or by its attorney, **SHALL FILE** with the Commission, by October 17, 2008, a written appearance stating that the party will appear on the date fixed for hearing and present evidence on the issues specified herein.⁵³⁸

147. **IT IS FURTHER ORDERED** that, if any complainant in an above-captioned proceeding fails to file a written appearance by the deadline specified above, or has not filed prior to that deadline, a petition to accept, for good cause shown, a written appearance beyond the deadline, the Presiding Administrative Law Judge **SHALL DISMISS** the relevant above-captioned proceeding with prejudice for failure to prosecute.

148. **IT IS FURTHER ORDERED** that all parties to the above-captioned proceedings will be served with a copy of this Order and the Erratum thereto by e-mail and by certified mail, return receipt requested.

149. **IT IS FURTHER ORDERED** that the Chief, Enforcement Bureau, shall be made a party to each of the above-captioned proceedings without the need to file a written appearance and will determine the Enforcement Bureau's level of participation in the proceedings.

150. **IT IS FURTHER ORDERED** that a copy of this Hearing Designation Order and the Erratum thereto or a summary thereof **SHALL BE PUBLISHED** in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

⁵³⁸ In light of the deadline for a Recommended Decision contained in this Order, the deadline for written appearances set forth in 47 C.F.R. § 1.221 is waived and replaced with the deadline set forth above.