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

In the Matter of	)
	)
TCR Sports Broadcasting Holding, L.L.P.	)
d/b/a Mid-Atlantic Sports Network	)
	)
v.	)
	)
Time Warner Cable Inc.	)

ORDER ON REVIEW

Adopted: October 30, 2008 **Released: October 30, 2008**

By the Chief, Media Bureau:

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION 1
II. BACKGROUND 2
III. DISCUSSION 19
A. *De Novo* Review Standard 20
B. Program Carriage Discrimination 21
1. Legal Framework 21
2. Finding of Discrimination Against MASN on the Basis of Affiliation 26
3. Finding that Discrimination Unreasonably Restrained the Ability of MASN to Compete Fairly 30
4. Failure of TWC to Rebut MASN's *Prima Facie* Case 32
C. Fair Market Value 42
D. First Amendment Claims 49
E. Jurisdictional Claims 50
F. Damages 54
IV. ORDERING CLAUSES 55

I. INTRODUCTION

1. The Bureau has before it a Petition for Review[1] filed by Time Warner Cable Inc. ("TWC") seeking *de novo* review of a decision issued by an independent arbitrator pursuant to a condition in the *Adelphia Order*.[2] The Petition is an outgrowth of a longstanding carriage dispute between TWC and TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network ("MASN"), an unaffiliated regional sports network ("RSN"). MASN filed an Opposition to TWC's Petition,[3] to which TWC replied.[4] For the reasons set forth below, we deny TWC's Petition, and conclude – consistent with the arbitration decision under review -- that: (i) TWC discriminated unlawfully against MASN by refusing MASN carriage in North Carolina on an analog tier, and that such discrimination unreasonably restrained the ability of MASN to compete fairly; and (ii) MASN's final offer more closely approximates the fair market value of the programming carriage rights at issue than the final offer presented by TWC.

II. BACKGROUND

2. In the *Adelphia Order*, the Commission approved the acquisition by TWC of cable systems owned by Adelphia Communications Corporation, subject to certain conditions.[5] In approving the transaction, the Commission found, among other things, that "the programming provided by regional sports networks is unique because it is particularly desirable and cannot be duplicated" and that "as a result of the transactions, the sports rights with a regional interest become more valuable to the Applicants."[6] Accordingly, the Commission concluded that "post-transaction Time Warner . . . will have an increased incentive to deny carriage to rival unaffiliated RSNs with the intent of forcing the RSNs out of business or discouraging potential rivals from entering the market, thereby allowing . . . Time Warner to obtain the valuable programming for its affiliated RSNs."[7] To address this concern, the Commission imposed a condition in the *Adelphia Order* that required TWC to engage in commercial arbitration with any RSN that was unable to reach a carriage agreement with TWC, upon election by the RSN.[8] This

---

[1] *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Petition for Review (filed July 2, 2008) ("*Petition*" or "*Petition for Review*").

[2] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable Inc., et al.,* Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203, 8287, ¶¶ 189-90, Appendix B (2006) ("*Adelphia Order*").

[3] *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Opposition to Petition for Review (filed July 17, 2008) ("*MASN Opposition*" or "*Opposition*").

[4] *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Reply (filed July 28, 2008) ("*TWC Reply*" or "*Reply*").

[5] *Adelphia Order*, 21 FCC Rcd at 8207, ¶ 5.

[6] *Id*. at 8287, ¶ 189.

[7] *Id*.

[8] *Id.* at 8287-8288, ¶¶ 189-191. Although the Commission has since suspended the RSN condition, it did so only with respect to disputes in which the arbitration condition had not yet been invoked. Because MASN filed its arbitration demand prior to suspension of the RSN condition, the condition continues to apply to the instant dispute. *See In the Matter of Comcast Corp., Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938, ¶ 24 n.66 (2007) ("*TAC Order*").

condition was intended principally to address concerns regarding TWC's potential incentive and ability to deny carriage on its cable systems to unaffiliated RSNs, and to provide such RSNs with an expeditious alternative to the Commission's program carriage complaint procedures.

3. The *Adelphia Order* prescribed specific procedures for pursuing the arbitration remedy applicable to disputes concerning RSN programming. To invoke the remedy, an aggrieved RSN unaffiliated with any MVPD that has been denied carriage by TWC must submit its carriage claim to arbitration within 30 days after the denial of carriage, or within ten business days after release of the *Adelphia Order,* whichever is later.[9] The arbitrator must render a decision within 45 days of such request for arbitration.[10] A party aggrieved by the arbitrator's award may file with the Commission, within 30 days, a petition seeking *de novo* review of the award.[11] The Commission must issue its findings and conclusions not more than 60 days after receipt of a petition for review, and may extend this review period for an additional 60 days.[12] In reviewing the award, the Commission must examine the same evidence presented to the arbitrator, and choose the final offer of the party that more closely approximates the fair market value of the programming carriage rights at issue.[13]

4. Pursuant to the RSN condition, on June 5, 2007, MASN filed with the American Arbitration Association ("AAA") a request for commercial arbitration of a dispute with TWC concerning carriage of MASN on TWC's cable systems in North Carolina.[14] Among other things, MASN asserted that TWC had engaged in unlawful discrimination by denying it carriage on an analog tier, a tier that MASN claimed was more widely subscribed to than the digital tier on which TWC suggested it might consider carrying MASN.[15] On the basis of evidence and arguments presented by the parties, the AAA-appointed arbitrator, on January 7, 2008, issued an *Interim Award* that found for MASN on the discrimination issue, and ordered the parties to proceed to a second phase of the arbitration to determine which of the parties' final offers more closely reflected the fair market value of the carriage rights at issue.[16] On February 21, 2008, the AAA removed the arbitrator from the proceeding in response to a motion to disqualify filed by

---

[9] *Adelphia Order,* 21 FCC Rcd at 8287-8288, ¶ 190.

[10] *Id.*

[11] *Id.* at 8339, Appendix B, § B.4.a.

[12] *Id.* at 8287-8288, ¶¶ 189-190. Pursuant to the *Adelphia Order,* the Bureau, on August 26, 2008, extended for an additional 60 days the deadline for Commission action on TWC's Petition. *In the Matter of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.,* Order, DA 08-1986 (M.B. rel. August 26, 2008) ("*Extension Order*"). Although the *Extension Order* stated that the Commission must act on TWC's Petition by October 28, 2008, we note that the actual deadline for disposition is October 30, 2008, which is 120 days from July 2, 2008, the date that TWC filed its Petition.

[13] *Adelphia Order,* 21 FCC Rcd at 8339, Appendix B, § B.4.c.

[14] *In the Matter of the Arbitration between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable, Inc., Respondent*, Arbitration Demand and Statement of Claim (filed June 5, 2007) ("*MASN Arbitration Demand*").

[15] *Id.* at 2.

[16] *In the Matter of the Arbitration between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable Inc., Respondent*, AAA Case No. 71 472 E 00697 07, Interim Award, January 7, 2008 ("*Interim Award*").

TWC.[17] Shortly thereafter, the AAA appointed a second arbitrator.[18] After conducting a joint hearing that addressed the discrimination and fair market value issues, the arbitrator issued a *Decision and Award* on June 2, 2008, which found in favor of MASN on both issues.[19] The arbitrator awarded MASN carriage on TWC's North Carolina systems in accordance with terms and conditions proposed by MASN in the "baseball style" arbitration.[20] TWC filed the instant *Petition for Review* urging the Commission to set aside the arbitrator's *Decision and Award.* For the purpose of our *de novo* review, we discuss in greater detail below the history of the dispute and the factual underpinnings of the arbitrator's ruling.

5. *The Parties.* TWC is a multiple system operator ("MSO") of cable television systems in several states nationwide, including North Carolina, where TWC serves approximately **[REDACTED]** video subscribers.[21] All of TWC's customers subscribe to the "basic" tier, which includes broadcast stations and public access services, and roughly **[REDACTED]** of its customers subscribe to the "cable programming services tier" ("CPST"), which includes services such as the Discovery Channel and A&E.[22] The basic tier and CPST are "analog" tiers, in that TWC transmits them to subscribers in parts of the electromagnetic spectrum dedicated to analog transmission.[23] As TWC has upgraded its cable systems to allow for digital transmission, TWC has used its digital spectrum to provide a "digital basic tier," which includes a multitude of additional video programming services.[24] In North Carolina, approximately **[REDACTED]** of TWC's customers subscribe to the digital basic tier.[25]

6. Among other programming interests, TWC is affiliated with News 14, a regional service that provides local news and weather programming, and that telecast the games of the

---

[17] *See* Letter from Christopher Cole, Case Manager, American Arbitration Association, to Evan Leo, Esq., Kellogg Huber, Hansen, Todd, Evans & Figel, P.L.L.C., and Jay Cohen, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, Case No. 71 472 E 00697 07, February 21, 2008.

[18] *See* Letter from Christopher Cole, Case Manager, American Arbitration Association, to Evan Leo, Esq., Kellogg Huber, Hansen, Todd, Evans & Figel, P.L.L.C., and Jay Cohen, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, Case No. 71 472 E 00697 07, March 10, 2008.

[19] *In the Matter of Arbitration between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable Inc., Respondent*, Case No. 71 472 E 00697 07, Decision and Award, June 2, 2008 ("*Decision and Award*" or "*Award*"). Because the arbitrator reached the same conclusion as the *Interim Award* on the issue of discrimination, the arbitrator declined to vacate the *Interim Award*, and instead offered the reasoning in his *Decision and Award* as a "supplemental analysis." *Id.* at 16. Nevertheless, in light of the AAA's decision to remove the initial arbitrator, we limit the scope of our *de novo* review to the June 2, 2008 *Decision and Award.*

[20] *See id.* at 22.

[21] *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable Inc., Respondent*, No. 12 494 00326 07, Time Warner Cable's Answering Statement, filed July 2, 2007, at 3 ("*TWC Answering Statement*").

[22] *Id.* at 4.

[23] *Id.*

[24] *Id.* According to TWC, digital transmission allows up to twelve video programming services to be compressed into a channel that, when using analog transmission, can accommodate only a single service. *Id.*

[25] *Id.* at 5.

Charlotte Bobcats of the National Basketball Association ("NBA") during the period of TWC's negotiations with MASN.[26] In addition, at the time MASN requested carriage on TWC systems, TWC was also affiliated with Turner South, an RSN that held the distribution rights for several professional sports teams, including the Atlanta Thrashers of the National Hockey League ("NHL"), the Atlanta Hawks NBA team, and the Atlanta Braves of Major League Baseball ("MLB").[27]

7. MASN is an RSN that owns the rights to produce and exhibit nearly all of the games of two MLB franchises – the Baltimore Orioles and the Washington Nationals.[28] The network was established in 1996 by the Baltimore Orioles as a holding company for the Orioles' television production and exhibition rights.[29] In 2005, when MLB transferred the former Montreal Expos to Washington, D.C. to become the Washington Nationals, the Orioles executed a settlement agreement with MLB whereby the Orioles agreed to share their entire television viewing territory with the Nationals.[30] Consequently, MASN is now held jointly by the owners of the Orioles and Nationals, and maintains the rights to produce and exhibit the games of both teams.

8. In 2005 and 2006, MASN televised roughly 300 Nationals games, and, in 2007, began to televise all of the Orioles games.[31] During the 2007 MLB season, MASN broadcast 321 live regular season games of the Orioles and Nationals.[32] Since its launch, MASN has sought carriage on the networks of MVPDs throughout its television territory, which stretches from Pennsylvania to North Carolina.[33] MASN's footprint is co-extensive with the shared television territories of the Orioles and Nationals, as designated by MLB.[34] That territory includes designated market areas ("DMAs") within the states of Maryland, Virginia, Delaware, and Washington, D.C., as well as parts of Pennsylvania, West Virginia, and North Carolina.[35]

---

[26] *Id*. at 25-26; *see also MASN Arbitration Demand* at 12-16.

[27] *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Nos. 12 494 E 000326 07, 71 472 E 00697 07, Claimant's Proposed Findings of Fact, May 2, 2008, at 8 ("*MASN Proposed Findings of Fact*").

[28] *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case No. 12 494 E 000326 07, Claimant's Pre-Hearing Arbitration Brief, November 9, 2007, at 4 ("*MASN Pre-Hearing Brief*").

[29] *Id.* at 5.

[30] *Id.*

[31] *Id* at 4. From 1996 to 2006, MASN licensed the production and exhibition rights to certain Orioles games to another RSN, Home Team Sports, which was later acquired by Comcast and re-named Comcast Sports Net Mid-Atlantic. When MASN's agreement with Home Team Sports expired following the 2006 MLB season, MASN decided that it would produce and exhibit itself all of the Orioles games. Thus, while MASN has televised the Nationals games since the franchise's inception in 2005, it has televised the Orioles games only since 2007. *Id.* at 5.

[32] *Id.*

[33] *Id.* at 4.

[34] *Id.,* n.4.

[35] *Id.* A DMA is a local television market area designated by Nielsen Media Research. There are 210 DMAs in the United States. *See* www.nielsenmedia.com.

9. In North Carolina, the Orioles and Nationals have exclusive television rights in the eastern part of the state, which includes the Raleigh-Durham, Greenville-New Bern-Washington, Myrtle Beach-Florence, Wilmington, and Norfolk-Portsmouth-Newport News DMAs.[36] In the central part of the state, which includes the Charlotte and Greensboro-High Point-Winston Salem DMAs, the Orioles and Nationals share television rights with the Atlanta Braves and Cincinnati Reds.[37] Thus, the Orioles and Nationals are "home teams" in the eastern part of North Carolina, and comprise two of the four "home teams" in the central region.[38] Nevertheless, the distance between the teams' home cities and their North Carolina territory renders North Carolina part of their "extended inner market," as compared with their "inner market" territories of Baltimore, Maryland, and Washington, D.C.[39]

10. *The Program Carriage Dispute.* MASN first sought carriage on TWC's North Carolina cable systems in March 2005, when it approached TWC regarding carriage on a basic or expanded basic service tier.[40] Shortly after TWC announced its intent to acquire the North Carolina cable systems of Adelphia Cable in April 2005, negotiations between the parties lapsed.[41] After the Commission approved the Adelphia transaction in July 2006, TWC indicated that it would resume carriage negotiations with MASN.[42] Negotiations proceeded until January 2007, when TWC informed MASN that it had no interest in launching the service on its North Carolina cable systems.[43] Despite repeated requests for carriage from MASN, TWC responded with neither a formal denial nor an alternative carriage proposal.[44] Consequently, in April 2007, MASN informed TWC that it intended to treat TWC's refusal to provide a carriage offer as a formal denial of carriage for the purpose of triggering the *Adelphia Order's* arbitration remedy.[45] TWC, responding shortly thereafter, stated that it was willing to negotiate for carriage of MASN

---

[36] Declaration of Mark C. Wyche, June 1, 2007, at ¶¶ 5-6 ("Wyche Declaration"). Within its exclusive television territory, an MLB team may insist that only its games be televised on programming services such as MASN. *Petition for Review* at 12. Thus, if a cable operator were to carry a sports programming service that televised games of another MLB team within that territory, the MLB team with exclusive rights to that area could demand that such games be blacked out. *Id.*

[37] *Id.* Western North Carolina, which includes the Asheville DMA, is exclusive to the Braves and Reds. *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Nos. 12 494 E 000326 07, 71 472 E 00697 07, Time Warner Cable's Proposed Findings of Fact, May 2, 2008, at 6 ("*TWC Proposed Findings of Fact*").

[38] *MASN Pre-Hearing Brief* at 4.

[39] Wyche Declaration at ¶¶ 5-6.

[40] *MASN Arbitration Demand* at 10.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 11.

[44] *Id.*

[45] *Id.*

on a digital tier, but indicated that "there may be opportunity for further negotiation."[46] In a letter to TWC dated May 4, 2007, MASN informed TWC of its intention to defer arbitration pending a final meeting between the parties on May 7, 2007 in order to "clarify TWC's intentions with respect to carriage."[47] In a response on May 16, 2007, TWC put forth several reasons for its decision declining to carry MASN on a basic or expanded basic programming tier.[48] On June 5, 2007, MASN filed its formal demand for arbitration with the AAA, thereby invoking the *Adelphia Order*'s arbitration remedy.[49]

11. *The Arbitrator's Decision and Award.* Based on an extensive record that included live testimony, discovery by the parties, and multiple written submissions, the arbitrator, on June 2, 2008, rendered a *Decision and Award* in favor of MASN, which is the basis for the TWC petition currently before the Bureau. In the *Decision and Award,* the arbitrator identified two principal issues for resolution: (i) whether TWC had engaged in unlawful discrimination by refusing MASN carriage on an analog tier;[50] and (ii) which of the parties' final offers more closely approximated the fair market value of the programming carriage rights at issue.[51] After defining the legal standard applicable to the dispute, the arbitrator found, with regard to the first issue, that TWC had discriminated against MASN on the basis of affiliation, contrary to the Commission's program carriage rules and the *Adelphia Order*, and that such discrimination unreasonably restrained the ability of MASN to compete fairly. On the second issue, the arbitrator concluded that MASN's final offer more accurately reflected the fair market value of the rights to carry MASN in its North Carolina television territory.

12. *Petition for Review*. In general, TWC argues that the Commission should set aside the *Decision and Award* on the basis that its denial of carriage on an analog tier was an unbiased exercise of editorial discretion and a legitimate business decision based upon a cost-benefit analysis.[52] MASN argues that the Commission should affirm the *Decision and Award* on the basis that TWC's denial of carriage on an analog tier in North Carolina is discriminatory in violation of Section 616 of the Communications Act of 1934, as amended ("the Act"), the Commission's program carriage rules, and the *Adelphia Order*.[53]

---

[46] *See* Letter from Henk Brands, Counsel for TWC, Paul, Weiss, Rifkind, Wharton and Garrison, L.L.P., to David C. Frederick, Counsel for MASN, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C, April 26, 2007, *MASN Arbitration Demand*, Exhibit J ("TWC April 26 Letter").

[47] Letter from David C. Frederick, Counsel for MASN, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C, to Henk Brands, Counsel for TWC, Paul, Weiss, Rifkind, Wharton and Garrison, L.L.P., May 4, 2007, *MASN Arbitration Demand*, Exhibit K ("MASN May 4 Letter").

[48] *MASN Arbitration Demand* at 12.

[49] *See id.*, Exhibit A.

[50] *Decision and Award* at 2-3.

[51] *Id.* at 3.

[52] *Petition for Review* at 33-52*; see also TWC Answering Statement* at 2.

[53] *MASN Opposition* at 48-71.

13. TWC contends that *de novo* review mandates that the Commission accord no deference to the decisions of the arbitrators in this proceeding.[54] MASN argues that the extensive factual findings by the arbitrators – including credibility determinations -- are entitled to respect even with a *de novo* standard of review.[55]

14. TWC maintains that the relevant inquiry under the program carriage statute and rules is not whether an MVPD's carriage decision was reasonable or consistent with market practices, but whether the decision was made "on the basis of" affiliation -- *i.e.*, it was motivated by considerations of affiliation.[56] To make such a showing, TWC claims that a program carriage complainant must provide evidence of intentional discrimination.[57] In this regard, TWC claims, MASN can point to no such evidence.[58] MASN contends that a program carriage complainant has an initial burden to establish a *prima facie* case by showing that it is a video programming vendor that is similarly situated to an affiliated video programming vendor; the defendant multichannel video programming distributor ("MVPD") treats the complainant differently than affiliated programming vendors; and the discrimination restrains the ability of the complainant to compete fairly.[59] MASN claims that once the complainant meets this burden, the burden shifts to the defendant MVPD to demonstrate a legitimate, non-discriminatory reason for the disparate treatment.[60] MASN states that the Commission uses this burden-shifting framework in resolving program access cases and in other cases involving economic discrimination.[61] As applied here, MASN claims that it has met its initial burden but that TWC has failed to meet its burden of demonstrating a legitimate, non-discriminatory reason for the disparate treatment.[62]

15. TWC contends that its decision was motivated by a variety of factors unrelated to MASN's affiliation status, including the lack of vacant analog channel capacity, MASN's lack of strong appeal to North Carolina subscribers, and the high cost of MASN's programming.[63] Among other things, MASN asserts that, because TWC carried its affiliated RSN, News 14, on an analog tier in North Carolina, TWC's refusal to accord MASN similar treatment constitutes unlawful discrimination.[64] TWC contends, contrary to MASN's claims, that MASN and News 14 are not similarly situated, because the latter is a local news and weather service that is

---

[54] *TWC Reply* at 6-8.

[55] *MASN Opposition* at 27-28.

[56] *Petition for Review* at 33-39; *see also TWC Answering Statement* at 2-3.

[57] *Petition for Review* at 34-35; *TWC Reply* at 17. To support its claims, TWC relies on court precedent interpreting statutes, such as employment discrimination laws, that prohibit discrimination "on the basis of" a prohibited consideration. *Petition for Review* at 34, *citing* 47 U.S.C. § 536(a)(3).

[58] *Id.* at 33-39.

[59] *MASN Opposition* at 30.

[60] *Id.*

[61] *Id*. at 33.

[62] *Id*. at 48-65.

[63] *Petition for Review* at 40-52.

[64] *MASN Opposition* at 48-71; *see also MASN Arbitration Demand* at 1-2.

attractive to a North Carolina audience, whereas the former is not.[65] MASN contends that TWC's carriage denial is an attempt to protect TWC's own RSN and other affiliated content, and, by virtue of TWC's continuing vertical integration into North Carolina's market for regional sports, part of a broader strategy to solidify TWC's dominance in the MVPD market.[66] Thus, MASN asserts, TWC's purportedly legitimate business reasons for refusing to carry MASN are illusory and merely a pretext for discrimination.[67]

16. TWC claims that, in order to demonstrate that its carriage decision "unreasonably restrain[ed] the ability of [MASN] to compete fairly," MASN must demonstrate that "without carriage, [it] cannot compete at all, *i.e.,* would exit the industry, operate at a loss, or suffer some similar major disadvantage."[68] TWC asserts that its refusal to carry MASN on an analog tier does not hamper MASN's ability to compete fairly because MASN recovers most of its costs in "core" markets, such as Washington, DC and Baltimore, rather than outlying markets such as North Carolina.[69] According to MASN, carriage on a basic or expanded basic tier is essential for it to establish a presence in North Carolina, because TWC is, by far, the largest MVPD in the state.[70]

17. With respect to the fair market value for carriage of MASN, TWC generally argues that its final offer more closely reflects the fair market value, as evidenced by the decision of other North Carolina cable operators to deny carriage to MASN, MASN's poor ratings, and MASN's high cost relative to more popular programming services.[71] MASN asserts that its final offer more closely reflects the fair market value because it mirrors the carriage agreement between MASN and four of the five largest MVPDs in North Carolina, as well as agreements that TWC has executed with other RSNs in markets similar to North Carolina.[72]

18. Finally, TWC claims that a decision requiring TWC to carry MASN would violate the First Amendment.[73] In addition, TWC puts forth a number jurisdictional claims, arguing that: (i) the *Adelphia Order* arbitration condition does not apply because there has been no "denial of carriage";[74] (ii) MASN's claims are time-barred;[75] (iii) the *Adelphia Order*

---

[65] *Petition for Review* at 47-52*; see also TWC Answering Statement* at 2.

[66] *MASN Arbitration Demand* at 19; *MASN Pre-Hearing Brief* at 13-14.

[67] *MASN Pre-Hearing Brief* at 30-46.

[68] *Petition for Review* at 63.

[69] *Id.* at 62-66; *see also In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case No. 12 494 E 000326 07, Time Warner Cable's Pre-Hearing Brief, at 54-55 ("*TWC Pre-Hearing Brief*").

[70] *MASN Opposition* at 71-78; *see also MASN Arbitration Demand* at 9.

[71] *Petition for Review* at 66-71.

[72] *MASN Opposition* at 78-94; *see also MASN Arbitration Demand* at 19.

[73] *Petition for Review* at 72-77; *see also TWC Pre-Hearing Brief* at 55-59.

[74] *Petition for Review* at 77-81; *see also TWC Pre-Hearing Brief* at 60-63.

[75] *Petition for Review* at 81-85; *see also TWC Pre-Hearing Brief* at 63-67.

arbitration condition does not apply because MASN is not an RSN in North Carolina;[76] and (iv) the Commission is not authorized to require mandatory arbitration.[77]

III. DISCUSSION

19. Based upon our *de novo* review of the evidence and arguments in the arbitration proceeding, we conclude that: (i) TWC violated the program carriage statute and rules by discriminating against MASN on the basis of affiliation, and that such discrimination unreasonably restrained the ability of MASN to compete fairly; and (ii) MASN's final offer more closely approximates the fair market value of the programming carriage rights at issue than the final offer presented by TWC. We conclude that these rulings are amply supported by the arbitration record, which establishes a preponderance of evidence in favor of MASN. Below, we discuss the standard of review governing petitions for review filed pursuant to the RSN condition in the *Adelphia Order*. We then analyze the record evidence to determine whether TWC discriminated unlawfully against MASN. Next, we address which of the final offers presented more closely approximates the fair market value of the programming carriage rights at issue. Finally, we address First Amendment and jurisdictional claims put forth by TWC.

A. *De Novo* Review Standard

20. As noted above, to constrain TWC's ability to unlawfully refuse carriage to unaffiliated RSNs, the *Adelphia Order* established a remedy based on commercial arbitration.[78] Appendix B of the *Adelphia Order* provides, in relevant part, that "[a] party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award."[79] Pursuant to this condition, the Commission may not hold another evidentiary hearing or allow the parties to adduce new evidence. Rather, the *Adelphia Order* provides that "[i]n reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue."[80] Although the Commission thus is compelled to review the award, including the arbitrator's ruling on both the discrimination and fair market value issues, the Commission may depart from the arbitrator's findings based on its *de novo* review of the existing evidentiary record.

B. Program Carriage Discrimination

1. Legal Framework

21. Based upon our review of the record, we agree with the arbitrator's conclusion that TWC discriminated against MASN within the meaning of the *Adelphia Order* and the Commission's program carriage requirements. In considering this issue, the arbitrator addressed the threshold question of what legal framework should apply to disputes brought pursuant to the RSN arbitration condition. The arbitrator determined that it should adjudicate such disputes by

---

[76] *Petition for Review* at 86-92; *see also TWC Pre-Hearing Brief* at 67-70.

[77] *Petition for Review* at 92-93.

[78] *Adelphia Order*, 21 FCC Rcd at 8287-8288, ¶¶ 189-191.

[79] *Id.* at 8339, Appendix B, § B.4.a.

[80] *Id.*, Appendix B, § B.4.c.

reference to the Commission's program access and program carriage decisions.[81] The arbitrator specifically concluded that, pursuant to those decisions, "the claimant must establish a *prima facie* case of discrimination as defined by the applicable statute, at which point the burden shifts to the respondent to justify treatment of [the] non-affiliated programmer."[82]

22. The arbitrator correctly concluded that the Commission's program carriage scheme provides the relevant legal framework for disputes arising under the RSN condition. As noted above, the arbitration remedy established in the *Adelphia Order* was intended, among other things, to provide an alternative to the Commission's program carriage complaint procedures.[83] Thus, our analysis of the instant dispute must be guided by the framework set forth in Section 616 of the Act, and the Commission's implementing rules and decisions. Pursuant to Section 616, the Commission must "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."[84] The statute was intended, among other things, to prohibit multichannel video programming distributors from discriminating against video programming vendors based on their affiliation or non-affiliation, and thus required the Commission to adopt regulations that:

> 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.[85]

23. In light of our finding above, we reject TWC's assertion that the applicable standard for assessing discrimination under Section 616 is derived from "the body of law that has arisen under Title VII [of the Civil Rights Act of 1964]'s prohibition on racial discrimination, the [Age Discrimination in Employment Act of 1967]'s prohibition on age discrimination, and other similar statutes," because "[t]hat body of law addresses discrimination in 'normal business practices' such as hiring and firing employees."[86] As the arbitrator noted, the vague reference in the legislative history of the 1992 Cable Act to "discrimination in normal business practices" is not persuasive evidence of Congress' intent to apply employment law standards to program carriage disputes, an area wholly unrelated to economic-based discrimination like that at issue in

---

[81] *Decision and Award* at 6-7.

[82] *Id.* at 7.

[83] *Adelphia Order*, 21 FCC Rcd at 8287-8288, ¶¶ 189-191.

[84] 47 U.S.C. § 536.

[85] 47 U.S.C. § 536(a)(3); *see* 47 C.F.R. § 76.1301(c) (implementing discrimination provision).

[86] *Decision and Award* at 7, *citing In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Nos. 12 494 E 000326 07, 71 472 E 00697 07, Time Warner Cable's Stage 1 Opening Brief, May 8, 2008, at 4 ("*TWC Stage 1 Opening Brief*").

this case.[87] This is particularly true where, as here, the Communications Act and the Commission's rules set forth specific criteria for identifying program carriage discrimination.[88]

24. We reject TWC's assertion that the arbitrator's legal standard effectively imposes common carrier obligations on MVPDs insofar as it would require MVPDs to "treat all comers equally."[89] In contrast to Title II of the Act, which imposes on common carriers an obligation to provide service upon reasonable request, the carriage obligations imposed by Section 616 attach only where a vertically-integrated MVPD is carrying an affiliated programming network.[90] In such cases, the MVPD is not precluded from treating unaffiliated programmers disparately from affiliates, so long as it can demonstrate that such treatment did not result from the programmer's status as an unaffiliated entity.[91] We thus find, contrary to TWC's assertion, that Congress' intent to distinguish discrimination in the program carriage and common carrier contexts[92] is entirely consistent with the legal standard applicable to program carriage disputes such as that presented here.

25. We further find that the burden of establishing a *prima facie* showing is not as onerous as TWC suggests.[93] As we noted in the *Adelphia Order,* vertically-integrated MVPDs have a strong incentive to force unaffiliated RSNs out of business, or to discourage potential rivals from entering the market, thereby allowing such MVPDs to obtain valuable programming for affiliated RSNs.[94] Given this incentive, we find it unlikely, as TWC suggests, that direct evidence of affiliation-based discrimination would exist and thus be accessible to complainants. In addition, because MVPDs have superior access to information justifying their carriage decisions, we conclude that it would be unreasonable to require a complainant to provide direct evidence that its affiliation status had a determinative influence on the denial of its carriage

---

[87] *Decision and Award* at 7, *citing* H.R. Rep. No. 628, 102nd Cong., 2nd Sess., at 110 (1992).

[88] *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c) (prohibiting discrimination "on the basis of affiliation or nonaffiliation of vendors in the selection, terms or conditions for carriage").

[89] *Petition for Review* at 55.

[90] *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[91] *See MASN Opposition* at 40.

[92] *See Petition for Review* at 55, *citing* H.R. Rep. No. 628, 102nd Cong., 2nd Sess., at 110 (1992) ("The Committee intends that the term 'discrimination' is to be distinguished from how that term is used in connection with actions by common carriers subject to Title II of the Communications Act").

[93] *See Petition for Review* at 34-35. In particular, TWC asserts that:

> [Section 616 and the program carriage rules] strike only at carriage decisions that are made 'one the basis of' affiliation – *i.e.*, that are *motivated by* considerations of affiliation. Thus, a cable operator discriminates on the basis of affiliation if, in making a decision not to carry a particular video-programming service, the cable operator places weight on the service's affiliation status. Courts have consistently interpreted [similar statutes] to require intentional discrimination, *i.e.*, that the prohibited factor played a role in the decision making process and had a determinative influence on the outcome.

Id.

[94] *Adelphia Order,* 21 FCC Rcd at 8287, ¶ 189.

request.[95] We find that interpreting Section 616 of the Act to impose a more exacting burden on the complainant, as TWC maintains, not only would be at odds with the statute's underlying purpose, but would foreclose legitimate complaints regarding prohibited conduct by vertically-integrated cable operators. For these reasons, we reject TWC's assertion that MASN was required to meet a higher evidentiary burden.

2. Finding of Discrimination Against MASN on the Basis of Affiliation

26. In applying the program carriage framework and reviewing the record evidence, we conclude that TWC discriminated against MASN on the basis of affiliation in violation of the *Adelphia Order* and the Commission's program carriage provisions. As an initial matter, we find that MASN established a *prima facie* showing of unlawful discrimination on the basis of affiliation.[96] The Commission's *Program Carriage Second Report and Order* implementing Section 616 of the Act offers guidance on the specific elements needed for a complainant to satisfy its evidentiary burden:

> A complainant alleging a violation of Section 616(a)(3) [involving discrimination] must demonstrate that the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly. . . . [T]he complaint must identify the relevant Commission regulation allegedly violated, and must describe with specificity the behavior constituting the alleged violation. The complainant must establish that it is a video programming vendor, as defined in Section [76.1300(e)] of the Commission's rules, and that the defendant is a multichannel distributor as defined in Section [76.1300(d)]. For complaints alleging discriminatory treatment that favors "affiliated" programming vendors, the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in [Section 76.1300(b)]. The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an authorized representative or agent of the complaining programming vendor) setting forth the basis for the complainant's allegations.[97]

27. Our review of the record satisfies us that MASN has established a *prima facie* case of discrimination. First, the record supports MASN's contention that it is a "Regional Sports Network" as that term is defined in the *Adelphia Order*:

> any non-broadcast programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team

[95] *See MASN Opposition* at 33.

[96] *Decision and Award* at 11-13.

[97] *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage,* 9 FCC Rcd at 2642, 2648 ¶ 14, 2654 ¶ 29 (1993) ("*Program Carriage Second Report and Order*"). These evidentiary requirements are reflected in the Commission's procedural rules governing program carriage complaints. For example, such rules require that the complainant identify the aggrieved programmer, provide evidence that the MVPD meets the relevant attribution standards, and demonstrate that the conduct complained of unreasonably restrained the complainant's ability to compete fairly. *See* 47 C.F.R. §§ 76.1302(c)(1)-(c)(3).

> that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.[98]

Because MASN carries virtually all of the regular season games of the Baltimore Orioles and Washington Nationals, and provides "live distribution" of the requisite sporting events in a limited geographic region, MASN satisfies both parts of the above definition.[99] Our analysis is consistent with the Commission's findings in the *Adelphia Order,* wherein the Commission stated:

> [f]or RSNs, the relevant unit of analysis encompasses the area where particular highly valued sports programming is available to consumers. Sports programming generally is available only to consumers located within the authorized viewing zone for a team's programming. . . . Because individual DMAs usually are entirely encompassed within the authorized viewing zone for a team's games and contain those fans that value its programming most highly, we find it reasonable to define the relevant geographic market for the analysis of harms concerning access to RSNs as any DMA that is home to a sports team.[100]

Thus, we agree with the arbitrator's finding that MASN constitutes an RSN.[101]

28. We disagree with Time's Warner's assertion that an entity does not constitute an RSN under the *Adelphia Order* in areas, such as North Carolina, that are remote from the city in which the RSN's team plays, because the competitive concerns identified in the *Order* are not implicated, *i.e.*, TWC would not be able to drive MASN out of business by denying carriage in North Carolina.[102] First, TWC's narrow reading of the relevant geographic market finds no support in the text of the *Adelphia Order*.[103] In addition, the Orioles and Nationals have been

---

[98] *Adelphia Order*, 21 FCC Rcd at 8336, Appendix B, § A.

[99] *MASN Opposition* at 107.

[100] *Adelphia Order,* 21 FCC Rcd at 8259, ¶ 126.

[101] As an RSN, MASN also constitutes a "video programming vendor" as defined in Section 76.1300(e) of the Commission's rules. *See* 47 C.F.R. § 76.1300(e); *TAC Order,* 22 FCC Rcd at 17944-17945, ¶¶ 18-23 ("[W]e see no need to draw a distinction between a 'video programming vendor' under the Commission's program carriage rules and a person who provides a 'video programming service' as that term is used in the *Adelphia Order's* definition of an RSN.").

[102] *Petition for Review* at 87.

[103] *See Adelphia Order,* 21 FCC Rcd at 8258-8262, ¶¶ 122-129 (discussing the relevant geographic market for potential harms deriving from access to regional programming).

designated by MLB as "home teams" in most of North Carolina.[104] Finally, we note that while the Commission, in the *Adelphia Order*, expressed concern that TWC could force unaffiliated RSNs out of business, it was equally concerned with the possibility that a carriage denial might "discourag[e] potential rivals from entering the market, thereby allowing . . . Time Warner to obtain the valuable programming for its affiliated RSNs."[105] Thus, we find TWC's RSN definition to be too narrowly defined and inconsistent with the competitive concerns identified in the *Adelphia Order*.[106]

29. The record also reflects that, during the period that MASN sought carriage, TWC owned News 14,[107] an RSN that broadcast a significant number of the games of the Charlotte NBA franchise, the Bobcats, in North Carolina.[108] MASN's programming was at least as popular as the sports programming distributed by News 14, and thus comparable in terms of demand.[109] Yet, TWC carried its affiliated RSN on an analog tier but refused to carry comparably popular unaffiliated programming at all. Indeed, TWC has carried all of its affiliated RSNs nationwide, including News 14 and Turner South, on basic or expanded basic tiers.[110] By placing News 14

---

[104] *MASN Pre-Hearing Brief* at 4. As noted above, in defining the relevant geographic market for purposes of analyzing potential harms deriving from access to regional programming, the Commission stated in the *Adelphia Order* that the relevant unit of analysis is the area where particular highly valued sports programming is available to consumers, and encompassed the authorized viewing zone for a team's programming, which is typically established by teams or leagues. *Adelphia Order,* 21 FCC Rcd at 8259, ¶ 125 and n.422.

[105] *Id.* at 8287, ¶ 189. Because we find that MASN is an RSN under the *Adelphia Order*, we reject TWC's assertion that the *Decision and Award* constituted an improper exercise of the arbitrator's jurisdiction under the *Adelphia Order*. *See Petition for Review* at 86-92.

[106] We further find that the issue of "remoteness" is more appropriately considered in evaluating an MVPD's proffered justification for refusing to carry an unaffiliated RSN.

[107] TWC held an "attributable interest" in News 14 during the period that MASN sought carriage on TWC's systems. The existence of an attributable interest in an allegedly favored RSN is sufficient to establish an "affiliation" for purposes of making a *prima facie* showing. *Program Carriage Second Report and Order*, 9 FCC Rcd at 2654, ¶ 29 ("For complaints alleging discriminatory treatment that favors 'affiliated' programming vendors, the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in Section 76.1300. . . .") Thus, we reject TWC's suggestion that the *Adelphia Order* and the Commission's program carriage rules dictate a more subjective comparison of the affiliated and unaffiliated RSNs at issue in a program carriage dispute. *See, e.g., Petition for Review* at 3, 22, 53.

[108] *TWC Proposed Findings of Fact* at 12; Declaration of Carol Hevey, July 2, 2007, at ¶¶ 29-30. News 14 televised 50 Bobcats games, or approximately 150 hours of programming, which equates to more than ten percent of the team's regular season games. *See In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, vs. Time Warner Cable Inc., Respondent*, Transcript of December 17, 2007 Hearing, at 32:9-20 (Mr. Frederick). Thus, News 14 constituted an RSN during the relevant time period.

[109] Supplemental Declaration of Mark C. Wyche, November 9, 2007, at ¶¶ 3-5 ("*Wyche Supplemental Declaration"*). MASN presented evidence that Nielsen ratings for games of the Baltimore Orioles during the 2006 MLB season were higher than games for the Charlotte Bobcats during the 2005-2006 NBA season. *Id.*

[110] Wyche Declaration at ¶ 20. As noted above, at the time MASN requested carriage, TWC was also affiliated with Turner South, an RSN that held the distribution rights for several professional sports teams, including the Atlanta Thrashers NHL team, the Atlanta Hawks NBA team, and the Atlanta Braves MLB team, which TWC carried on an analog tier in North Carolina. *MASN Proposed Findings of Fact* at 8. Although TWC is no longer affiliated with Turner South and has sold its rights to distribute the Bobcats games, this does not render moot or discredit MASN's discrimination claim. We find that TWC, as a vertically-integrated MVPD, continues to have an incentive and
(Continued on next page)

on an analog tier, TWC delivered Bobcats games to all of its subscribers in North Carolina's three largest markets, including Greensboro-High Point-Winston Salem, Charlotte, and Raleigh-Durham.[111] Thus, TWC made available its affiliated RSN to approximately 85 percent of its North Carolina subscribers in MASN's territory.[112] Based on this evidence, we conclude that TWC treated MASN differently from its affiliates.[113]

3. Finding that Discrimination Unreasonably Restrained the Ability of MASN to Compete Fairly

30. We further find that TWC's conduct in denying MASN carriage on an analog tier "unreasonably restrain[ed] the ability of an unaffiliated video programming vendor to compete fairly"[114] within the meaning of the Commission's program carriage provisions and the *Adelphia Order*. As a threshold matter, we disagree with TWC that Section 616 requires a showing that "without carriage, [a complainant] cannot compete at all, *i.e.,* would exit the industry, operate at a loss, or suffer some similar major disadvantage."[115] Neither the text of Section 616, nor its legislative history, support such a restrictive interpretation. To the contrary, the language of Section 616 is broadly directed at conduct that has the "effect of . . . restrain[ing] . . . the ability of a programm[er] . . . to compete fairly."[116] In addition, the legislative history indicates Congress' general concern about the incentive and ability of vertically-integrated MVPDs, like TWC, to favor their affiliated programming services by, among other things, bestowing on them "more desirable channel position[s]" than other programmers.[117] Thus, while a programmer's

---

ability to acquire the programming rights of unaffiliated RSNs, like MASN, for future distribution through other outlets. *See Adelphia Order,* 21 FCC Rcd at 8287, ¶ 189. In addition, the sale of Turner South and the Bobcats rights is not relevant to the issue of whether TWC engaged in unlawful discrimination during the period of its negotiations with MASN. 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. *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 (2001).

[111] *MASN Pre-Hearing Brief* at 19.

[112] *Id.*

[113] *Decision and Award* at 12.

[114] 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c). In particular, Section 616 of the Act directs the Commission to establish regulations governing program carriage agreements between cable operators and video programming vendors that:

> contain provisions designed to prevent a multichannel video programming distributor 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 of carriage of video programming provided by such vendors.

47 U.S.C. § 536(a)(3).

[115] *Petition for Review* at 63.

[116] 47 U.S.C. § 536(a)(3).

[117] S. Rep. No. 102-92 at 25 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158.

exit from the market or loss of significant revenue might be the most straightforward evidence of its inability to "compete fairly," we believe that both the language and policy underlying Section 616 compel a more expansive interpretation.

31. In accordance with this interpretation, we conclude that the evidence and testimony produced by MASN in the arbitration support a finding that TWC's conduct restrained MASN's ability to compete fairly for viewers, advertisers, and sports programming rights.[118] MASN put forth evidence that virtually all RSNs that are comparable to MASN in terms of programming content and audience size are carried on a basic or expanded basic tier.[119] In addition, as MASN points out, regional sports programming is among the most expensive programming in the industry, and RSNs must recover the costs of such programming through per-subscriber fees and the sale of advertising.[120] Because RSNs, unlike national networks, are regional in nature, they require access to the maximum number of subscribers within their footprints, including the RSN's extended inner markets, in order to compete effectively.[121] MASN's inability to obtain analog carriage in North Carolina from TWC – the most widely penetrated MVPD in the state -- forecloses access to approximately **[REDACTED]** subscribers, thus hampering MASN's ability to compete with other RSNs in North Carolina, a state within MASN's "home territory." First, we find that MASN's foreclosure from the North Carolina market by TWC restrains MASN's ability to compete with more widely distributed RSNs for advertising revenues. As MASN asserts, broad penetration is important to advertising revenues because RSNs "need to get the eyeballs to sell advertising."[122] In addition, MASN's inability to obtain analog carriage on TWC systems in North Carolina hampers its ability to compete for sports programming rights, especially those involving North Carolina teams. Indeed, MASN's failure to win the distribution rights to the Carolina Hurricanes resulting from TWC's denial of broad carriage in North Carolina is persuasive evidence that TWC's conduct unreasonably restrained MASN's ability to compete fairly.[123] We thus conclude that TWC's conduct in

---

[118] *See Decision and Award* at 13 ("With respect to the requirement that MASN demonstrate that the effect of TWC's discrimination is to unreasonably restrain MASN's ability to compete fairly, MASN demonstrates that it must compete with TWC affiliates for advertising dollars directed at sports fans, for sports broadcasting rights, and for the viewership of North Carolina sports fans.").

[119] Wyche Declaration at ¶ 14.

[120] *Id; see also* Transcript of May 20, 2008 Hearing, 220:8-22 (Mr. Wyche) (RSN rights fees for professional sports programming are "some of the highest in the . . . country on any network," and thus RSNs "need a huge subscriber base and need to be penetrated throughout their home territory.").

[121] *MASN Opposition* at 71, n.243.

[122] Transcript of May 20, 2008 Hearing, 221:1-2 (Mr. Wyche).

[123] *MASN Opposition* at 72-73, *citing* Transcript of May 20, 2008 Hearing, 270:14-271:9 (Mr. Cuddihy) ("When you go into places like the offices of the Carolina Hurricanes . . . basically, it's well, thanks for visiting us, we appreciate your interest, are you carried on [TWC]. If you're not carried on [TWC] in North Carolina, they don't want to talk to you about giving you their rights. . . . [The Carolina Hurricanes] were happy to hear from us. They welcomed our conversation and our ideas. But . . . at the end of the conversation, if you're not carried by [TWC], you have very little chance."). While TWC asserts that MASN's claims lack merit because the relevant comparison for the purpose of assessing competitive harm is analog versus digital carriage, rather than analog versus no carriage, we note that it was not until the parties' carriage dispute reached arbitration that TWC, for the first time, put forth a firm offer of digital basic carriage. *MASN Opposition* at 74-75. Even if TWC had put forth such an offer prior to

(Continued on next page)

carrying affiliated RSNs on an analog tier, while denying MASN carriage on such a tier, amounted to a *prima facie* case of discrimination.[124]

4. Failure of TWC to Rebut MASN's *Prima Facie* Case

32. Consistent with the *Decision and Award*, we conclude that TWC has failed to provide evidence sufficient to rebut MASN's *prima facie* case. In defense of its claims, TWC argues that its denial of analog carriage was a reasonable exercise of editorial discretion and business judgment and, therefore, it did not discriminate "on the basis of affiliation" as barred by Section 616 of the Act. TWC asserts that it conducted a cost-benefit analysis and determined that the benefits of adding MASN to an analog tier in North Carolina would not outweigh the substantial costs.[125] TWC principally points to MASN's poor ratings in North Carolina, low demand for MASN's programming among state residents, MASN's high cost, and MASN's rejection by other North Carolina cable systems.[126] Although TWC has produced some evidence

arbitration, we, nevertheless, find that TWC's carriage of MASN on a digital basic tier would have restrained MASN's ability to compete fairly for the reasons discussed above.

[124] *Decision and Award* at 11-13.

[125] *Petition for Review* at 37-40.

[126] *Id.* at 23-25, 38-39, 41-47.

to buttress its claim,[127] we agree with the arbitrator that this evidence, when weighed against MASN's evidentiary showing, fails to overcome MASN's *prima facie* case.[128]

33. First, we find unpersuasive TWC's assertion that MASN's ratings in North Carolina were so poor as to justify its denial of analog carriage. The record reflects that, during the 2006 MLB season, Orioles' games achieved average ratings of **[REDACTED]** in the Charlotte and Greensboro/High Point/Winston Salem DMAs, respectively.[129] The Orioles garnered those ratings despite the fact that: (i) both of those DMAs are located in central North Carolina and thus are more distant from Baltimore and Washington D.C. than DMAs in the eastern region; (ii) the Orioles share viewing territory with the Atlanta Braves and Cincinnati

[127] In support of its defense, TWC advanced evidence that principally included testimonials by TWC executives involved in developing a response to MASN's carriage request. *See, e.g.,* Declaration of Carol Hevey, Executive Vice President of Operations, Time Warner Cable, July 2, 2007; Supplemental Declaration of Carol Hevey, November 29, 2007; Third Declaration of Carol Hevey, May 7, 2008; Declaration of Mickey Carter, formerly Senior Director, Programming, Time Warner Cable, November 29, 2007. We note that the only pre-litigation documentary evidence that TWC offered attesting to its deliberation of MASN's request was e-mail correspondence by a TWC executive seeking to confirm his "gut" instinct that North Carolina "can't have many Orioles fans." *See* e-mail Correspondence between Tom Smith, Time Warner Senior Marketing Executive, and Mickey Carter, formerly Senior Director, Programming, Time Warner Cable, September 5, 2006, Appendix of Exhibits Accompanying Time Warner Cable's Pre-Hearing Brief, November 30, 2007, § J.1. Although TWC notes that neither the *Adelphia Order* nor our program carriage rules require that defendants document their decisions, *Petition for Review* at 21, the dearth of evidence confirming TWC's good-faith investigation into the potential demand for MASN programming in North Carolina calls into question whether TWC accorded any serious consideration to MASN's proposal. Given MASN's history of litigating program carriage disputes, MASN's early expression of its intent to invoke arbitration in the event of a carriage denial, and the parties' multiple meetings and discussions over a two-year period, the lack of more substantial documentation lends credence to MASN's claim that TWC's efforts in responding to its carriage request were, at best, perfunctory, or, at worst, a pretext for discrimination. In this regard, we note that the TWC executive charged with assessing and responding to carriage requests in the Carolinas region put forth testimony that, while she was generally aware of the *Adelphia Order's* RSN condition, she "wasn't familiar with the details or the potential implications that [the *Adelphia Order*] might have." Transcript of May 20, 2008 Hearing, 255-256 (Ms. Hevey). Although it is unclear whether such testimony was intended to show a lack of discriminatory intent or otherwise, we find that TWC's failure to educate its employees about the company's specific regulatory obligations is a serious dereliction of TWC's responsibilities under the program carriage provisions and the *Adelphia Order*. TWC's failure is particularly egregious in view of the fact that TWC agreed to the RSN condition as part of the Commission's approval of the Adelphia transaction. *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189 ("[T]o prevent [anticompetitive conduct], we adopt a . . . condition requiring . . . [TWC] to engage in commercial arbitration with any unaffiliated RSN that is unable to reach a carriage agreement with [TWC], should the RSN elect to use the arbitration remedy.").

[128] *See Decision and Award* at 13-16.

[129] *See* Wyche Supplemental Declaration at ¶ 5. Nielsen ratings are expressed in terms of the percentage of TV households that watch a given channel at a particular time in a certain geographic area. Declaration of Joanne Wayne, June 29, 2007, at ¶ 3. Thus, for example, a Nielsen rating for a particular television program of "5.3" indicates that 5.3 percent of the households that owns one or more television sets watched the program. *Id.* For the purpose of its showing on the issue of ratings, TWC evaluated MASN's ratings in the two most heavily populated North Carolina DMAs during different parts of the day: prime time weekday (Monday to Friday, 7 p.m. to 10 p.m.), late night weekday (Monday to Friday, 10 p.m. to 1 a.m.), weekend afternoon (Saturday/Sunday, 1 p.m. to 4 p.m.), weekend late afternoon (Saturday/Sunday, 4 p.m. to 7 p.m.), and Saturday late night (10 p.m. to 1 a.m.). Supplemental Declaration of Joanne Wayne, November 30, 2007, at ¶ 2. TWC's ratings assessment reflects MASN's "highest average" ratings, which expresses the day part in which MASN received the highest ratings. *Id.* This assessment reflects ratings for MASN's entire programming schedule, including Orioles programming. *Id.*

Reds in the central region – MLB teams that are popular in the state; and (iii) the RSNs that previously owned carriage rights to the Orioles in North Carolina put forth few promotional efforts.[130] Indeed, as noted above, the 2006 ratings for Orioles' games in the Charlotte DMA surpassed ratings for the Bobcats in the same market during the 2005-2006 season (but TWC nonetheless put its affiliated RSN carrying the Bobcats games on the analog tier).[131] While we note that the parties dispute the method by which MASN's popularity should be gauged, and we agree with the arbitrator that there are difficulties comparing programming that is unique and subject to variables that cannot be readily measured or predicted, such as team performance and local preference,[132] the above ratings evidence, when viewed in conjunction with TWC's carriage on an analog tier of less highly rated affiliated programming, and TWC's apparent failure to apply similar ratings standards to other RSNs, leads us to find unconvincing TWC's claim that MASN's ratings were so "abysmal" as to warrant its relegation to a digital tier.[133] We note that both Section 616 of the Act and the Commission's rules bar an MVPD from discriminating in video programming distribution on the basis of affiliation or nonaffiliation "in the *selection*, terms, or conditions for carriage. . . ."[134] These program carriage provisions thus prohibited TWC from applying to unaffiliated programming services more stringent standards, including ratings standards, than those it applied to affiliates.

34. We also find unconvincing TWC's evidence purporting to show a low demand for MASN's programming among North Carolina residents. Although disputed by the parties, the Orioles appear to have a longstanding fan base in North Carolina, as reflected by the fact that Orioles games have been broadcast in North Carolina for nearly two decades prior to the 2007 MLB season, when MASN began to produce and exhibit the games.[135] In addition, as noted above, TWC's carriage on an analog tier of Bobcats games – programming that yielded lower ratings than Orioles' games during 2006 – calls into question TWC's contention that the purported low demand for MASN figured prominently in its carriage decision. Moreover, contrary to TWC's assertions, we find that the decision of MLB to designate the Orioles and Nationals as "hometown" teams in a large portion of North Carolina suggests the existence of current or potential fan interest in the state.[136] In terms of geographic distance, the Orioles are roughly equidistant to North Carolina as the Braves and Reds, and the Washington Nationals are even closer.[137] The proximity of the Nationals to North Carolina, and their status as a relatively

[130] *See* Declaration of James Cuddihy, June 4, 2007, at ¶¶ 4, 9 ("Cuddihy Declaration").

[131] *See Decision and Award* at 13, *citing* Wyche Supplemental Declaration at ¶¶ 3-5.

[132] *Decision and Award* at 14.

[133] *Petition for Review* at 24.

[134] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c) (emphasis added).

[135] Wyche Declaration at ¶ 7; Cuddihy Declaration at ¶ 4. The Orioles constituted "core programming" for two of the three RSNs that telecast Orioles games in North Carolina between 1985 and 2006. Amended Second Supplemental Declaration of James Cuddihy, November 9, 2007, at ¶ 11 ("Cuddihy Amended Second Supplemental Declaration").

[136] Cuddihy Declaration at ¶¶ 4-5. Since at least 1981, MLB has determined that most of North Carolina should be the television territory of the Orioles. *Id.*

[137] *MASN Pre-Hearing Brief* at 6; *see also* Cuddihy Declaration at ¶¶ 5-6.

new franchise, suggest a much greater potential for MASN's popularity than that posited by TWC.[138] We also find, contrary to TWC's contention, that the decision by four of the five largest MVPDs (other than TWC) in North Carolina to carry MASN on a widely available tier suggests the existence of actual or potential demand for MASN,[139] which telecasts not only Orioles and Nationals games, but also other sports programming of potential interest to North Carolina residents.[140] Indeed, over **[REDACTED]** of non-TWC pay television subscribers in the state receive MASN on a widely available tier.[141] Moreover, we note that Fox has expressed an interest in carrying Orioles and Nationals games on its two RSNs in North Carolina in the event that MASN's launch in the state did not succeed.[142] TWC's claim regarding the absence of actual and potential demand for MASN in North Carolina is further belied by the complaints that MASN produced in the arbitration proceeding filed by North Carolina residents about TWC's denial of analog carriage to MASN.[143] Because TWC subscribers throughout North Carolina lack regular access on analog cable to the games of any American League team (including games against popular American League teams such as the New York Yankees and Boston Red Sox)[144] and TWC subscribers in the eastern part of North Carolina do not have regular access on analog

---

[138] It is noteworthy that, prior to the expansion of the NFL and the establishment of the Carolina Panthers franchise, the Washington Redskins franchise was the "home team" for all of North Carolina. Cuddihy Declaration at ¶ 7.

[139] The one exception is Suddenlink. *TWC Pre-Hearing Brief* at 40. MASN presented evidence that Suddenlink was in the process of selling some of its systems and was reluctant to take on additional carriage obligations when it denied MASN carriage. Supplemental Declaration of David Gluck, May 17, 2008, at ¶ 5 ("Gluck Supplemental Declaration"). Although TWC attempts to discredit Charter and Mediacom's carriage of MASN on an analog tier by asserting that those MVPDs carry MASN only in the northeastern corner of North Carolina, a vacation destination popular among residents of Baltimore and Washington, DC, *Petition for Review* at 41, some of those systems are not situated on the coast, but rather, offer service further inland. Transcript of May 21, 2008 Hearing, 541:11-18 (Arbitrator Margolis and Mr. Brands). Indeed, approximately 98% of all Charter subscribers that receive MASN are not geographically close to Baltimore or Washington, DC. Wyche Supplemental Declaration at ¶ 23. Similarly, Mediacom's systems outside North Carolina are located in Delaware's Sussex County, which is roughly as close in proximity to Philadelphia as to Baltimore, and where the Orioles and Nationals must share viewing rights with the Philadelphia Phillies. *Id.* ¶ 24.

[140] Such programming includes Hooters Pro Cup Series stock car racing; basketball, lacrosse, baseball, softball and wrestling events of local NCAA Division I teams such as UNC-Charlotte, UNC-Wilmington, UNC-Greensboro, UNC-Chapel Hill, North Carolina State, Winston Salem State University, and Duke University; and football and basketball coaches' programs for North Carolina State University and East Carolina University. Cuddihy Declaration at ¶ 10.

[141] Third Supplemental Declaration of Mark C. Wyche, May 8, 2008, at ¶ 14 ("Wyche Third Supplemental Declaration"). Although TWC argues that subscribers interested in Orioles and Nationals games can switch to a DBS operator to obtain MASN, *Petition for Review* at 56-57, the fact that a competing MVPD may offer the programming at issue does not lessen or preempt a cable operator's program carriage obligations.

[142] Wyche Declaration at ¶ 7.

[143] These complaints were filed by various North Carolina residents, including state and local officials, North Carolina's minor league baseball teams, MASN affiliates (including local colleges and universities advocating broader distribution of local athletics), and consumers who have filed complaints with the North Carolina Attorney General. *See MASN Pre-Hearing Brief,* Exhibits 16-27.

[144] North Carolina's other two "hometown" MLB teams, the Atlanta Braves and Cincinnati Reds, are in the National League. *See* www.mlb.com.

cable to the home market games of *any* MLB franchise,[145] we disagree with TWC that the prospects for MASN's success in North Carolina are so low as to justify its denial of carriage on an analog tier.

35. Moreover, even if we were to credit TWC's claim that the Orioles and Nationals currently generate low interest among North Carolinians, we agree with MASN that demand for programming, particularly sports programming, depends on the ability of fans "to follow a team closely day in and day out . . ., to follow a season's highs and lows, and to develop an identification with the team's star players."[146] Thus, while a team's fan base in a particular state might be relatively weak, this is not necessarily indicative of the team's future popularity or appeal in that state. Rather, we believe the level of fan interest in a sports team is tied to a host of factors, including the accessibility of the team's events to its target market, and that carriage on an analog tier with a wide audience is likely to strengthen viewers' interest in the team's programming. We agree with MASN that it is unreasonable for TWC to foreclose broad carriage of MASN – and the opportunity to grow its fan base – and then rely on a lack of fan interest as a basis for its conduct. As MASN points out, such circular reasoning would almost always justify an MVPD's decision to deny carriage to new sports programming networks.[147]

36. Finally, we reject TWC's claim that both the out-of-pocket and opportunity costs of placing MASN on an analog tier in North Carolina are so significant as to justify TWC's denial of carriage.[148] First, as we discuss in greater detail *infra*, the fee that MASN proposes to charge in North Carolina is objectively reasonable relative to fees that TWC has agreed to pay for RSN programming in other markets nationwide, including extended inner markets.[149] In addition, as MASN points out, TWC's net out-of-pocket cost estimates appear overstated because they fail to account for TWC's ability to recoup a portion of those costs from the sale of advertising spots, and TWC's ability to offset those costs from the advertising launch support that TWC would receive under the terms of MASN's proposed contract.[150] With regard to TWC's claim that analog carriage of MASN would impose a substantial opportunity cost by foreclosing TWC's ability to carry other services of greater interest to North Carolinians, such as three High Definition ("HD") services,[151] TWC has put forth no evidence purporting to quantify such cost or to demonstrate that the net revenue derived from carriage of MASN would be less than the opportunity cost imposed by TWC's inability to offer more desirable programming services, including HD services.

---

[145] This area encompasses the Greenville-New Bern-Washington, Myrtle Beach-Florence, Norfolk-Portsmouth-Newport News, Raleigh-Durham (Fayetteville), and Wilmington DMAs. *See* Wyche Supplemental Declaration at ¶¶ 13-16.

[146] *MASN Pre-Hearing Brief* at 34; *see* Wyche Supplemental Declaration at ¶ 25.

[147] *MASN Pre-Hearing Brief* at 46.

[148] *See Petition for Review* at 38-39.

[149] *See* Section III.C *infra* (discussing the fair market value of the rights to carry MASN).

[150] *MASN Opposition* at 63.

[151] According to TWC, one 6 MHz channel can accommodate only one Standard Definition ("SD") service when analog transmission is used, but can accommodate 16 SD services and up to three HD services when digital transmission is used. *Petition for Review* at 9.

37. Our review of the record persuades us that TWC also had an economic incentive to thwart MASN's widespread availability in North Carolina. During the period that MASN sought carriage, TWC and MASN competed head-to-head for sports programming rights in North Carolina. The record reflects that, on several occasions in 2007, TWC competed with MASN for – and won – the rights to twelve collegiate basketball games involving various North Carolina colleges and universities.[152] In addition, TWC's affiliation with the Atlanta Braves franchise and Turner South, an RSN that broadcast a significant number of Braves games in North Carolina at the time MASN first requested carriage, gave TWC an incentive to foreclose the broad availability of MASN in the state.[153] That MASN and News 14 both had expressed an interest in carrying games of the relatively new NFL franchise, the Carolina Panthers, is further evidence that the two RSNs were direct competitors in the North Carolina sports programming market.[154]

38. We also find that TWC's financial interest in two premium MLB channels that the company plans to offer in North Carolina also provided it with an incentive to discriminate against MASN. In 2007, iN DEMAND, a consortium that includes TWC and two other major cable operators, executed an agreement with MLB to carry MLB's Extra Innings, a premium sports package that offers a broad range of out-of-market MLB games.[155] In exchange, each of iN DEMAND's cable partners, including TWC, has agreed to carry the MLB Channel on an analog tier when the network launches in 2009.[156] We conclude that TWC's iN DEMAND deal provides a substantial incentive for TWC to limit MASN's reach within North Carolina. TWC subscribers might be less likely to watch the MLB Channel, and less willing to pay for MLB's Extra Innings package, if they can view all of the games played by the Orioles and Nationals – MLB "home teams" in North Carolina -- on MASN. In addition, the availability on MASN of MLB games that feature popular out-of-market teams such as the Boston Red Sox and the New York Yankees might lessen the value of the MLB Channel and the Extra Innings package for subscribers interested in MLB programming.

39. These incentives for discrimination, and TWC's ability, by virtue of its status as a vertically-integrated MVPD, to engage in anticompetitive conduct, are precisely the concerns that formed the basis for the arbitration condition and the Commission's program carriage rules. In the *Adelphia Order*, the Commission found that:

---

[152] Cuddihy Supplemental Declaration at ¶¶ 3-13.

[153] *MASN Pre-Hearing Brief* at 25.

[154] Cuddihy Declaration at ¶ 11; *MASN Opposition* at 72-73, *citing* Transcript of May 20, 2008 Hearing, 270:14-22 (Mr. Cuddihy).

[155] Wyche Declaration at ¶¶ 23-24.

[156] *MASN Pre-Hearing Brief* at 25.

> [w]ith respect to regional sports programming . . . the transactions will increase the incentive and ability of . . . Time Warner to deny carriage to RSNs that are not affiliated with them. . . . [T]he programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated. Moreover, as a result of the transaction, the sports rights with a regional interest become more valuable to [Time Warner]. Accordingly, post-transaction Time Warner . . . will have an increased incentive to deny carriage to rival unaffiliated RSNs with the intent of forcing the RSNs out of business,. . . . thereby allowing . . . Time Warner to obtain the valuable programming for its affiliated RSNs. . . .[157]

40. Indeed, the history behind TWC's acquisition of the Charlotte Bobcats rights reveals that TWC understands the adverse impact that digital, rather than analog, carriage can have on an RSN. In 2004, the Bobcats, then a newly-formed NBA team, created its own RSN called Carolinas Sports and Entertainment Television ("C-SET").[158] Although TWC agreed to carry C-SET, it denied C-SET access to its analog programming tiers, and instead relegated the channel to its digital tier.[159] C-SET was forced to cease operations within one year.[160] Shortly thereafter, TWC acquired the Bobcats rights, and placed the Bobcats programming on its analog tier channel, News 14.[161]

41. For the foregoing reasons, based on our *de novo* review of the record, we conclude that TWC engaged in discriminatory conduct which had the effect of restraining MASN's ability to compete fairly in violation of the *Adelphia Order* and the Commission's program carriage rules. When viewed against MASN's evidentiary showing, the scant documentary evidence memorializing TWC's good-faith consideration of MASN's carriage request, combined with TWC's economic incentive to prevent MASN's widespread availability in North Carolina, weigh in favor of a finding that TWC favored its own affiliates.[162] Based on a preponderance of evidence, therefore, we find that TWC discriminated unlawfully against MASN in violation of Section 616 of the Act and the Commission's program carriage rules.

C. Fair Market Value

42. Based upon our review of the record, we conclude that MASN's carriage offer "more closely approximates the fair market value of the carriage rights at issue than the final

---

[157] *Adelphia Order,* 21 FCC Rcd at 8287, ¶ 189.

[158] Wyche Declaration at ¶ 19.

[159] *Id.*

[160] *Id.*

[161] *Id.* The record reflects that, unlike most cable programming networks, which are delivered via satellite, News 14 is delivered on terrestrial facilities. Thus, MASN asserts that TWC sought to capitalize on a "loophole" in Section 628(c) of the Act that allowed TWC to refuse access to News 14 by competing MVPDs. *MASN Arbitration Demand* at 15.

[162] Because our finding of discrimination is based upon our *de novo* review of the record as a whole, we need not address TWC's policy arguments advocating for a finding that the burden of proving a program carriage violation remains at all times with the claimant. *See TWC Reply* at 17-21.

offer made by [TWC]."[163] In the arbitration proceeding, MASN and TWC submitted final offers that proposed the same per subscriber rates, but provided for carriage on different tiers of service. MASN proposed carriage on a tier with **[REDACTED]**; TWC offered digital basic carriage at the same license fee and escalation rate.[164] Despite these identical rates, TWC's offer presents a fundamentally different value proposition for MASN because it proposes carriage on TWC's less widely penetrated digital tier.[165]

43. MASN puts forth several reasons in support of its assertion that its final offer more closely reflects fair market value. First, MASN points to the willingness of other large MVPDs in North Carolina to carry MASN on the same terms as MASN's final offer, including carriage on a widely penetrated tier.[166] In addition, MASN asserts that its offer compares favorably to the terms on which TWC carries the vast majority of RSNs within its footprint, including other RSNs in North Carolina, as determined using a per-subscriber-per-major-pro-event ("PSPPE") metric.[167] Finally, MASN contends that the fair market value of its programming as carried on an analog tier is substantially higher than the rate proposed in its final offer, as demonstrated by a regression analysis that compares MASN's proposed subscriber rate to the rates of RSNs carried by TWC throughout its national footprint.[168]

---

[163] *Decision and Award* at 22; *see also Adelphia Order,* 21 FCC Rcd at 8339, Appendix B.4.c. ("In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue").

[164] *See In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case Nos. 12 494 E 000326 07, 71 472 E 00697 07, Time Warner Cable's Stage 2 Opening Brief, May 9, 2008, Attachment B ("*TWC Stage 2 Opening Brief*").

[165] The percentage of TWC's North Carolina customers that subscribe to TWC's digital tier in the three DMAs for which TWC provided data ranges from approximately **[REDACTED]**. Wyche Third Supplemental Declaration at ¶ 12.

[166] These MVPDs include two satellite providers, DirecTV and EchoStar, and two cable providers, Charter Cable and Mediacom Cable. Together, these MVPDs represent more than **[REDACTED]** non-TWC subscribers to paid television service in North Carolina. *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case Nos. 12 494 E 000326 07, 71 472 E 00697 07, Claimant's Pre-Hearing Arbitration Brief – Phase II, May 9, 2008, at 13 ("*MASN Phase II Pre-Hearing Brief*"); Wyche Supplemental Declaration at ¶ 12.

[167] In order to determine the value of programming offered by RSNs across the industry, industry experts (including those engaged in negotiating RSN affiliation agreements) often employ normalized metrics that account for variations in the precise mix of programming offered by RSNs. Wyche Third Supplemental Declaration at ¶ 17. Although disputed by TWC, *TWC Stage 2 Opening Brief* at 21-22, MASN asserts that one such measure, the PSPPE metric, is accepted and considered objective. Wyche Third Supplemental Declaration at ¶ 17. The PSPPE measure is calculated by dividing the RSN's annual per-subscriber license fee by the total number of live major professional sporting events that the RSN televises each year. MASN claims that the PSPPE is an objective measure that has several advantages: (i) it is readily calculated from the RSN affiliate contracts and other materials produced by TWC in the arbitration proceeding; (ii) it is based upon the actual terms of carriage contracts negotiated between TWC and the various RSNs at issue, and thus derived from actual arms-length agreements; (iii) it is comparable across RSNs, whose events are typically drawn from one of three major professional sports leagues, including MLB, the NBA and the NHL; and (iv) it accounts for variation in the per-subscriber fees that apply across different regions or zones within an RSN's geographic programming area. *Id.* at ¶¶ 18-21.

[168] *MASN Phase II Pre-Hearing Brief* at 19-20. Regression analysis controls for the effects of certain variables, including the demographic characteristics of a particular zone or market area specified in TWC's RSN affiliation

(Continued on next page)

44. TWC likewise asserts that its final offer more accurately reflects the fair market value of MASN's programming. TWC claims that, in recent years, new services have rarely debuted on analog tiers.[169] Thus, the company asserts, the subscriber and advertising revenue derived from carrying a service on an analog tier must outweigh "by a substantial margin" the direct and opportunity costs (including license fees and TWC's inability to reclaim analog spectrum) in order to justify carriage.[170] Employing this cost-benefit analysis, TWC argues that the substantial costs of carrying MASN on an analog tier far outweigh the purported benefits, given the low demand for MASN's programming in North Carolina, and MASN's "abysmal" ratings in the state.[171] TWC claims that its estimate of MASN's value is confirmed by: (i) the decision of other North Carolina cable operators who either have declined to carry MASN's programming, or have selected to distribute MASN only in certain areas close to the Baltimore-Washington area; (ii) **[REDACTED]**; (iii) MASN's high cost per ratings point; and (iv) MASN's high cost relative to more popular cable programming services.[172]

45. TWC disputes MASN's claim that it requires analog carriage to remain competitive, arguing that "any revenue that MASN earns from carriage in North Carolina would be a pure windfall on top of its already high profits."[173] In addition, TWC states that the acceptance of MASN's terms by DBS operators is inapposite because: (i) DBS operators have many subscribers in Washington, DC and Baltimore where MASN is valuable programming and, in order to obtain the right to carry MASN in those areas, MASN likely required DBS operators to carry it throughout MASN's territory, including North Carolina;[174] (ii) once DBS operators put MASN on their satellites, the service is automatically available in North Carolina;[175] and (iii) once the DBS operators agreed to carry MASN in North Carolina, they were indifferent about the allocation of value between these markets, so long as the overall rate remained the same.[176] Finally, TWC rejects MASN's PSPPE measure on the basis that it fails to take into account "a crucial factor determining a programming service's value to a cable operator: whether the service is attractive to viewers."[177]

46. Based upon our review of the record, we agree with the arbitrator's conclusion that MASN's final offer more closely approximates the fair market value of the carriage rights at issue than TWC's final offer. Although an arbitrator, in assessing the parties' respective offers,

---

agreements, the distance between home stadiums and those particular zones or market areas, and team performance. *Id.*

[169] *TWC Stage 2 Opening Brief* at 3-6.

[170] *Id.* at 8.

[171] *Id.* at 8-12.

[172] *Id.* at 12-16.

[173] *Id.* at 16-18.

[174] Declaration of Joe King, June 19, 2007, at ¶ 15 ("King Declaration"); *TWC Stage 2 Opening Brief* at 18-20.

[175] *TWC Stage 2 Opening Brief* at 18-20.

[176] *Id*.

[177] *Id.* at 20-22.

has broad discretion under the *Adelphia Order* to consider "any relevant evidence,"[178] we find that the best and most persuasive evidence of fair market value is the objective price that RSN programming yields in the marketplace,[179] and TWC concedes as much.[180] In this regard, MASN has offered ample evidence and empirical analyses, including its PSPPE calculations and regression analyses, to demonstrate that the fee it proposes to charge in North Carolina is reasonable and less than the average fee that TWC has agreed to for carriage of RSN programming in North Carolina and in various markets nationwide, including extended inner market areas.[181] By contrast, TWC's fair market value showing focused largely on MASN's

---

[178] Such evidence includes, but is not limited to:

> [1] current or previous contracts between MVPDs and RSNs in which . . . Time Warner [does] not have an interest as well as offers made in such negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
>
> [2] evidence of the relative value of such programming compared to the Covered RSN programming at issue (*e.g*., advertising rates, ratings);
>
> [3] contracts between MVPDs and RSNs on whose behalf . . . Time Warner [has] negotiated, made before . . . Time Warner acquired control of the systems swapped and acquired in the Adelphia transactions;
>
> [4] offers made in such negotiations;
>
> [5] internal studies or discussions of the imputed value of Covered RSN programming in bundled agreements;
>
> [6] other evidence (including internal discussions) of the value of Covered RSN programming;
>
> [7] changes in the value of programming agreements for RSNs in which Time Warner . . . [does] not have an attributable interest; [and]
>
> [8] changes in the value or costs of the Covered RSN's programming, or in other prices relevant to the relative value of the Covered RSN programming (*e.g*., advertising rates).

Adelphia Order, 21 FCC Rcd at 8339, Appendix B.4.c. (footnotes omitted). Appendix B is worded to resolve program access disputes, but the procedures apply to program carriage complaints, as well. *TAC Order,* 22 FCC Rcd at 17948, n.9. Thus, the criteria set forth in Appendix B.4.c. are useful in assessing the fair market value of program carriage rights such as those at issue here.

[179] *See In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case Nos. 12 494 E 000326 07, 71 472 E 00697 07, Claimant's Phase II Reply Brief, May 17, 2008, at 1 ("*MASN Phase II Reply Brief*").

[180] *Petition for Review* at 67-68 ("[T]he best measure of fair market value is what the marketplace is actually willing to pay.").

[181] *MASN Phase II Pre-Hearing Brief* at 12-20. Indeed, the record reflects that TWC pays **[REDACTED]**. *MASN Phase II Reply Brief* at 10. The PSPPE rate in MASN's final offer **[REDACTED]** is significantly lower than the average PSPPE rate **[REDACTED]** that TWC has agreed to pay for carriage (on an analog tier) of RSN programming in other extended markets throughout its nationwide footprint. Indeed, no RSN among the 17 sampled in MASN's PSPPE analysis had a lower "farthest market" PSPPE rate than that proposed by MASN in its final offer. Wyche Third Supplemental Declaration at ¶¶ 25-26. Similarly, for RSN programming in North Carolina, TWC has agreed to pay a substantially higher per-subscriber rate **[REDACTED]** for analog carriage of each of the games of the Atlanta Braves and the Cincinnati Reds, which are played more than 300 miles from TWC's Greensboro cable systems. *Id.* at ¶¶ 28-33; Fourth Supplemental Declaration of Mark Wyche, May 17, 2008, at ¶ 10 ("Wyche Fourth Supplemental Declaration"). In addition, the PSPPE rate proposed by MASN is less than all of the PSPPE rates that TWC paid for the rights to telecast Bobcats games on News 14 during the 2007-2008 NBA season.

(Continued on next page)

value to TWC itself, taking into account the alleged lack of demand for MASN's programming and MASN's purported low ratings, rather than the RSN's estimated value in the sports programming market.[182] While such evidence may be relevant to a determination of fair market value, we find that the more objective evidence proffered by MASN militates in favor of a finding that MASN's final offer more closely approximates the fair market value of the right to carry MASN. In so doing, we agree with the arbitrator's assessment of MASN's economics experts as "qualified and credible,"[183] in contrast to TWC's economics expert, who, the arbitrator stated, merely "reiterate[ed] . . . the arguments advanced by TWC's counsel in their briefs," and was "lacking in credibility."[184]

47. Contrary to TWC's assertions, we find that the carriage decisions of four of the largest MVPDs operating in North Carolina -- that serve the overwhelming majority of non-TWC subscribers to paid television service in North Carolina -- are an appropriate reference point for assessing fair market value. We reject TWC's assertion that MASN's carriage on a widely available tier by DirecTV and Echostar bear no significance because DBS operators possess different economic motivations from cable operators that are derived from differences in cost structure and technology. MASN presented testimony that the actions of these carriers -- two of TWC's most direct competitors in North Carolina[185] -- offer a more appropriate meter for gauging programming demand than those of smaller cable operators because they provide service throughout the state, rather than to scattered pockets of subscribers like the smaller cable operators that TWC cites.[186] In addition, TWC itself has acknowledged that DBS carriers face similar bandwidth constraints as cable operators that limit the number of channels they can broadcast.[187] The record further reflects, contrary to TWC's suggestion, that DirecTV engaged in intense negotiations with MASN over price in all of MASN's contractual zones, including North Carolina, and subsequently devoted all of the launch support resources provided for in its carriage agreement to a promotional campaign targeted exclusively to North Carolina

---

Wyche Third Supplemental Declaration at ¶¶ 32-33. Thus, we find that MASN's proposed rate is reasonable because it is less than rates that TWC has agreed to pay for carriage of RSNs that telecast fewer live regular season sporting events than MASN in extended inner markets like North Carolina.

[182] *TWC Stage 2 Opening Brief* at 3-12. Although TWC accords significant weight to MASN's low ratings in the state, TWC has offered no evidence in this proceeding to demonstrate that it routinely examines ratings information when considering carriage requests, and its affiliation agreements are devoid of any terms or conditions relating to ratings. To the contrary, TWC's affiliation agreements provide for **[REDACTED]**. Wyche Fourth Supplemental Declaration at ¶ 6, which contradicts TWC's claim that the PSPPE measure offered by MASN "is an extraordinarily poor measure of an RSN's value." *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case Nos. 12 494 E 000326 07, 71 472 E 00697 07, Time Warner Cable's Stage 1 and Stage 2 Reply Briefs, May 17, 2008, at 4 ("*TWC Reply Brief*").

[183] *Decision and Award* at 18.

[184] *Id.* at 20 n.14.

[185] *See* Transcript of May 20, 2008 Hearing, 351:12-17 (Mr. Kelly).

[186] Transcript of May 20, 2008 Hearing, 298:6-19 (Dr. Singer).

[187] Transcript of May 21, 2008 Hearing, 431:2-9 (Mr. Conway).

residents.[188] For the reasons discussed *supra,* we likewise reject TWC's assertion that the decisions of Charter and Mediacom to carry MASN on the same terms as those proposed in its final offer are inapposite.[189]

48. Finally, we reject as unfounded TWC's assertions that: (i) **[REDACTED]** evidences that MASN's final offer is above fair market value;[190] and (ii) MASN is costly as compared with more popular programming services. **[REDACTED]** With regard to TWC's assertion regarding MASN's high cost relative to other programming services, we find that the per-subscriber rate charged for non-RSN programming provides no relevant benchmark for valuing RSN programming such as that offered by MASN.[191] Based on a preponderance of evidence, therefore, we agree with the arbitrator that MASN's showing on the issue of fair market value is more compelling than that presented by TWC.

D. First Amendment Claims

49. We reject TWC's assertion that any decision requiring an MVPD to carry a particular programming network is violative of the First Amendment.[192] As an initial matter, we note that TWC, as part of the Commission's grant of its applications in the Adelphia transaction, voluntarily assented to a condition that it knew might result in mandatory carriage. Consequently, TWC is now foreclosed from challenging the very conditions that were prerequisite to that grant. In addition, we reject TWC's argument that a mandatory carriage requirement is subject to strict scrutiny under the First Amendment.[193] We note that Section 616(a)(5) of the Act, the *Second Report and Order*, and our program carriage rules already contemplate mandatory carriage of a complainant's programming as a possible remedy in a program carriage complaint proceeding.[194] In *Time Warner v. FCC*, the United States Court of Appeals for the District of Columbia Circuit found that the leased access provisions of the 1992 Cable Act were not content-based because they did not favor speech on the basis of the ideas contained therein, but rather on the basis of affiliation with a cable operator.[195] We find that the same conclusion applies with regard to program carriage requirements, which, similar to the leased access requirements, regulate speech based on affiliation with an MVPD.[196] The Court in

---

[188] Gluck Supplemental Declaration at ¶ 8; Wyche Fourth Supplemental Declaration at ¶ 11; *MASN Opposition* at 61; Cuddihy Second Supplemental Declaration at ¶ 3.

[189] *See supra* ¶ 34 n.139.

[190] *Petition for Review* at 68. **[REDACTED]** *See* Declaration of Andrew Rosenberg, April 29, 2008, ¶ 6. **[REDACTED]** *Petition for Review* at 68.

[191] *Id.* at 93-94.

[192] *Petition for Review* at 72-77.

[193] *Id.*

[194] *See* 47 U.S.C. § 536(a)(5); 47 C.F.R. § 76.1302(g)(1); *Program Carriage Second Report and Order*, 9 FCC Rcd at 2653, ¶ 26.

[195] *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 969 (1996).

[196] For similar reasons, we reject TWC's claim that strict scrutiny applies because our decision requires a content-based analysis comparing content carried by an MVPD to content not carried by the MVPD. *See Petition for Review* at 75-77. Our decision does not favor speech on the basis of the ideas contained therein, but on the basis of affiliation with an MVPD. Thus, our decision is not content-based. *See Time Warner*, 93 F.3d at 969.

Time Warner held that the provisions of the Cable Act that regulate speech based on affiliation with a cable operator are subject to intermediate scrutiny and are constitutional if the government's interest is important or substantial, and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim.[197] In this regard, the *Time Warner* Court found that there is a substantial government interest in promoting diversity and competition in the video programming marketplace.[198] The program carriage rules similarly promote diversity in video programming by promoting fair treatment of unaffiliated programmers by providing these programmers with an avenue to seek redress of anticompetitive carriage practices of MVPDs. Moreover, because MVPDs have an incentive to protect their affiliated networks from competition with unaffiliated networks for viewers, advertisers, and programming rights, the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programmers. We find that the substantial government interest in promoting diversity and competition in the video programming marketplace remains today. As the Commission concluded in the *2007 Program Access Order*, competition and diversity in the video programming market have not yet reached the level which Congress intended in passing the 1992 Cable Act.[199] We also conclude that the statutory and regulatory requirement for nondiscriminatory carriage is no broader than necessary because the Commission will only order carriage where the complaining programmer proves that an MVPD has discriminated against it on the basis of its nonaffiliation with the MVPD and that such discrimination has restrained its ability to compete fairly with affiliated programmers. Thus, the carriage requirement will burden no more speech than necessary to vindicate the government's goal of protecting diversity and competition.

E. Jurisdictional Claims

50. We disagree with TWC's assertion that the Commission should vacate the *Decision and Award* on the basis that the carriage dispute was not subject to the *Adelphia Order's* arbitration condition in the first instance. In particular, we reject TWC's claim that its refusal to offer MASN carriage on an analog tier did not constitute a "denial of carriage" for the purpose of triggering the *Adelphia Order's* RSN condition. To buttress its claim, TWC points to language in the *Adelphia Order* purporting to show that an arbitration remedy is available only in cases where an RSN "has been denied carriage."[200] We reject TWC's interpretation as overly restrictive and fundamentally at odds with the text of the *Order*, which makes available the remedy to "any unaffiliated RSN that is *unable to reach a carriage agreement*" with TWC, as well as the *Order's* underlying policy to provide unaffiliated RSNs an alternative path to the Commission's program carriage complaint procedures. Given the Commission's finding that post-transaction TWC would have an increased incentive and ability to engage in anticompetitive

---

[197] *See Time Warner*, 93 F.3d at 969.

[198] *See id.*

[199] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Report and Order, 22 FCC Rcd at 17810 ¶ 29, 17837 ¶ 65 (2007) ("*2007 Program Access Order*"), *appeal pending sub nom. Cablevision Systems Corp. et al. v. FCC*, No. 07-1425 *et al*. (D.C. Cir.).

[200] *Petition for Review* at 78 (*citing Adelphia Order*, 21 FCC Rcd 8287-8288, ¶ 190).

conduct to the detriment of rival RSNs, we find it unreasonable to construe the condition as TWC suggests, as it would impose a more exacting threshold for seeking redress than the Commission's complaint process itself. Under TWC's interpretation, TWC could foreclose arbitration as a potential remedy simply by putting forth a patently unreasonable carriage offer, so long as such offer did not rise to the level of an outright denial. As a policy matter, such a narrow interpretation would render the condition virtually meaningless.

51. We also reject TWC's assertion that, even if the carriage dispute was properly subject to arbitration, MASN's claim was foreclosed as untimely. TWC claims that, although the *Adelphia Order* requires an aggrieved RSN to submit its carriage claim to arbitration within 30 days after a carriage denial, MASN filed its claim eleven days late.[201] TWC asserts that, after attempting to negotiate carriage for approximately two years, MASN, on April 24, 2007, sent a letter to TWC stating that it intended to "[treat] Time Warner's actions as a denial of carriage under applicable statutes and FCC rules," and thereby triggered the *Adelphia Order's* 30-day filing deadline as of that date.[202] However, in its response to MASN on April 26, 2007, TWC questioned MASN's "premise . . . [that] negotiations had reached an impasse or end," and stated that "there may be opportunity for further negotiation."[203] Although TWC argues that its April 26 offer to continue negotiations was limited to "carriage . . . on a digital tier,"[204] and thus made clear that TWC's decision regarding analog carriage remained unchanged,[205] we find that the April 26 letter was sufficiently ambiguous as to justify MASN's deferral of its arbitration demand and to find that the relevant denial of carriage did not occur on April 24, 2007. Our view that TWC's April 26 letter was ambiguous is confirmed by MASN's subsequent letter of May 4, 2007, in which MASN stated to TWC: "We trust that [our meeting scheduled for May 7] will clarify Time Warner's intentions with respect to carriage, so that we can initiate arbitration should that become necessary."[206] MASN states that "[i]t became evident at the May 7 meeting that TWC would not budge and that its final position was that it would not carry MASN under any circumstances on TWC's basic tiers."[207] For the purpose of assessing the timeliness of MASN's arbitration demand, therefore, we find that TWC's denial of carriage occurred on May 7, 2007, the date that TWC's final position with respect to analog carriage was made clear to MASN. Because MASN filed its arbitration demand on June 5, 2007, we find that MASN's arbitration demand was timely filed in accordance with the requirements of the *Adelphia Order*.

---

[201] *Id.* at 83.

[202] *See* Letter from David C. Frederick, Counsel for MASN, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C, to Henk Brands, Counsel for TWC, Paul, Weiss, Rifkind, Wharton and Garrison, L.L.P., April 24, 2007, *MASN Arbitration Demand*, Exhibit I. TWC thus contends that, because the 30-day filing deadline commenced on April 24, 2007, MASN had until May 25, 2007, to file its demand for arbitration. *Petition for Review* at 83. Yet, TWC claims, MASN filed its arbitration demand eleven days late, on June 5, 2007. *Id.*

[203] *See* TWC April 26 Letter.

[204] *Id.*

[205] *Petition for Review* at 83.

[206] *See* MASN May 4 Letter.

[207] *MASN Opposition* at 106.

52. We dismiss TWC's assertion that the Commission's imposition of mandatory arbitration violates the Alternative Dispute Resolution Act ("ADRA"), the Communications Act of 1934, as amended, and the Commission's own rules and policies.[208] As the Commission has previously found, the structure of the ADRA, the usage of the term "arbitration" in other provisions of the ADRA to refer to "binding arbitration," and the statute's legislative history, indicate that Congress intended the term "arbitration" in Section 573(a)(3) of the ADRA[209] to refer only to binding arbitration. The ADRA's prohibition thus does not apply where, as here, the arbitration is non-binding, *i.e.* either party may seek *de novo* review of the arbitration decision.[210] In any event, TWC, having accepted the conditional grant of its applications in the Adelphia transaction, cannot now challenge the very conditions that were prerequisite to that grant.[211] Finally, TWC concedes that, if the Commission applies true *de novo* review, it has "no objection to the Commission's pretermitting the argument" regarding the applicability of the ADRA.[212] Because we have applied *de novo* review, TWC's claims regarding the ADRA are moot.

53. We also reject TWC's claim that the arbitration condition violates the Act because nothing in the Act empowers the Commission to subcontract its program carriage responsibilities to a third party.[213] Under subdelegation principles, agencies may refer matters outside of the agency for fact-finding and the issuance of preliminary decisions, provided the decisions remain subject to final agency review.[214] Providing for *de novo* review of an arbitration award by the Commission satisfies this requirement.[215] Moreover, as with its claims regarding the ADRA, TWC, having accepted a conditional grant, cannot challenge the very conditions that were prerequisite to that grant.[216]

F. Damages

54. In its Opposition to TWC's Petition, MASN requests that the Commission institute a separate proceeding to determine damages and other relief to make MASN whole from

---

[208] *Petition for Review* at 92-93.

[209] 5 U.S.C. § 575(a)(3) ("[A]n agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.").

[210] *See TAC Order*, 22 FCC Rcd at 17948, n.13.

[211] *See id.* at 17948, n.13 (*citing Central Television v. FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987)).

[212] *TWC Reply* at 75.

[213] *Petition for Review* at 93; *TWC Reply* at 76.

[214] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004).

[215] *See National Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999) (rejecting as unlawful a procedure by which the agency "completely shift[ed] its responsibility" to an outside council and "retain[ed] virtually no final authority over the action -- or inaction -- of the Council").

[216] *See TAC Order*, 22 FCC Rcd at 17948, n.13 (*citing Central Television, Inc. v. FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987)).

TWC's conduct.[217] Because neither the *Adelphia Order* nor our program carriage rules expressly provide for the award of damages, we decline to institute a separate proceeding on damages.

IV. ORDERING CLAUSES

55. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), the *Petition for Review* filed by Time Warner Cable pursuant to the terms of the *Adelphia Order,* **IS DENIED**. TWC **IS ORDERED** to commence carriage of MASN on an analog tier in its North Carolina cable systems in accordance with the Term Sheet submitted by MASN in its Final Offer, within thirty (30) days of the release date of this *Order*.

56. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

[217] *MASN Opposition* at 115-116.