

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

In the Matter of)
)
 The Regional Sports Network Marketplace) MB Docket No. 11-128

REPORT

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By the Chief, Media Bureau:

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I. INTRODUCTION

1. Pursuant to the terms of the Commission’s 2006 order conditionally approving the purchase by Time Warner Cable Inc. (“TWC”) and Comcast Corporation (“Comcast”) (collectively, the “Applicants”) of Adelphia Communications Corporation’s cable systems, this Media Bureau (“Bureau”) Report addresses issues regarding access to and carriage of regional sports networks (“RSNs”).¹ In the order, the Commission adopted several conditions, including RSN access and carriage requirements, and committed to issue a report examining “regional sports network access and carriage issues both on an industry-wide basis and specifically with respect to the Applicants,” by January 13, 2012, six months prior to the expiration of the RSN conditions.²

¹ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

² *Id.* at 8277, 8336-39, ¶ 165, App. B. After this report is issued, the Commission, in its discretion, may determine if further action is warranted. *Id.* at 8277, ¶ 165.

2. The Bureau released a Public Notice seeking comment on the access of multichannel video programming distributors (“MVPDs”), other than the Applicants, to RSN programming in which the Applicants hold an interest, and on the ability of unaffiliated RSNs to obtain carriage of their programming on the Applicants’ systems.³ The Public Notice also inquired about access to and carriage of RSNs in the industry generally. The Public Notice requested comment on the Applicants’ compliance with the *Adelphia Order*’s RSN program access and carriage conditions as well.⁴

3. The Bureau received comments on a number of issues from a range of MVPDs, broadcasters, and other industry participants in response to the Public Notice, which we will briefly summarize after setting forth the *Adelphia Order* RSN conditions themselves. We will then describe the relevant regulatory and marketplace developments since the *Adelphia Order* was adopted, including those resulting from the Commission’s recent changes to the program access and carriage rules. Finally, we discuss enforcement of the *Adelphia Order*’s RSN conditions.

II. BACKGROUND

A. *Adelphia Order* RSN Conditions

4. In the *Adelphia Order*, the Commission found that the Applicants’ purchase of Adelphia’s cable systems would give them the ability and incentive to raise the price of RSN access for rival MVPDs by imposing uniform price increases.⁵ The Commission noted that the program access rules at the time would not themselves prohibit such price increases if they were not discriminatory or if the programming was delivered terrestrially.⁶ Accordingly, the Commission found that the proposed transactions would enable the Applicants to engage in a “stealth discrimination” strategy, raising the price of affiliated RSNs for rival MVPDs in a discriminatory manner without violating the Commission’s program access rules.⁷ The Commission also concluded that the transactions could facilitate the temporary or permanent withholding of programming.⁸

5. To address these concerns, the Commission adopted program access conditions. The

³ See *Media Bureau Seeks Comment on the Regional Sports Network Marketplace*, MB Docket No. 11-128, Public Notice, 26 FCC Rcd 10398, 10401 (MB, 2011). Comments and reply comments were filed on September 9, 2011, and September 26, 2011, respectively. See *id.* at 10398.

⁴ See *id.* at 10401.

⁵ See *Adelphia Order*, 21 FCC Rcd at 8258, ¶ 123. For purposes of the conditions adopted in the *Adelphia Order*, the Commission defined “Regional Sports Network” and “RSN” to mean, “any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team 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.” *Id.* at 8336, App. B, § A. In its comments, Hawaiian Telecom Services Co. (“HTSC”) asks the Commission to clarify its definition of an RSN. See HTSC Comments at 6-7.

⁶ See *Adelphia Order*, 21 FCC Rcd at 8273, ¶ 155; see also *id.* at 8267-68, ¶ 140.

⁷ As noted in the *Adelphia Order*, DIRECTV contended that Comcast used this strategy with respect to its CSN West network. According to DIRECTV, Comcast imposed a pricing structure for access to CSN West that appeared nondiscriminatory on its face, but ultimately had a discriminatory effect on DBS providers. See *id.* at 8263-64, ¶¶ 132-33.

⁸ See *id.* at 8258, 8263, 8275, ¶¶ 123, 132, 160.

Commission ensured rival MVPDs access to the Applicants' terrestrially delivered RSNs by imposing a condition that applied the program access rules applicable to satellite-delivered, cable-affiliated programming to the Applicants' affiliated RSNs, including terrestrially delivered RSNs.⁹ Specifically, the Commission prevented the Applicants from entering into exclusive distribution agreements with existing and future affiliated RSNs and from unduly or improperly influencing the sale of the RSN programming to unaffiliated MVPDs regardless of the means of delivery.¹⁰ The Applicants were also required to provide the programming of affiliated RSNs to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.¹¹

6. In addition, the Commission adopted a dispute resolution process, allowing aggrieved MVPDs to resolve their program access disputes with the Applicants on an expedited time table through arbitration.¹² The condition explicitly permits the aggrieved MVPD to continue carriage of the RSN

⁹ *See id.* at 8274, ¶ 156, n.525. The Commission partially exempted Comcast SportsNet Philadelphia from these requirements because that network was terrestrially delivered before Comcast purchased it. *See id.* at 8276, ¶ 163. Given this, the Commission concluded that the method of delivery was not chosen for anticompetitive purposes, and therefore decided not to subject Comcast SportsNet Philadelphia to its RSN conditions to the extent that the network was not already available to MVPDs. *See id.* The Commission clarified in the *Adelphia Order* that the program access conditions would apply to those MVPDs that had a license agreement for Comcast SportsNet Philadelphia pre-merger. *See id.* We note that Comcast SportsNet Philadelphia is now also subject to the complaint process adopted in the *2010 Program Access Order* discussed below. Any MVPD seeking access to Comcast SportsNet Philadelphia may file a complaint pursuant to the procedures established in the rules. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd 746, 793, ¶ 70 (2010) ("*2010 Program Access Order*"), *aff'd in part and vacated in part sub. nom. Cablevision Systems Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011). In addition, Comcast SportsNet Philadelphia is subject to the program access conditions adopted in the *Comcast-NBCU Order*. *See Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4356, 4358, App. A, § II (2011) ("*Comcast-NBCU Order*"); *see also* para. 17.

¹⁰ *See Adelphia Order*, 21 FCC Rcd at 8336, App. B, § B.1 ("Comcast and Time Warner will not enter into an exclusive distribution arrangement with any such Covered RSN, regardless of the means of delivery; Neither Comcast nor Time Warner (including any entity with which it is affiliated) shall unduly or improperly influence (i) the decision of any Covered RSN, regardless of the means of delivery, to sell programming to an unaffiliated MVPD; or (ii) the prices, terms, and conditions of sale of programming by a Covered RSN, regardless of the means of delivery, to an unaffiliated MVPD."). In the *Adelphia Order*, a "Covered RSN" is defined as "an RSN (i) that Comcast or Time Warner currently manages or controls, or (ii) in which Comcast or Time Warner, on or after the date of adoption of this Order and during the period of the conditions, acquires either an attributable interest, an option to purchase an attributable interest, or one that would permit management or control of the RSN." *Id.* at 8274, ¶ 156 n.525.

¹¹ *See id.* at 8336, App. B, § B.1 ("Comcast, Time Warner, and their existing or future Covered RSNs, regardless of the means of delivery, shall not offer any such RSN on an exclusive basis to any MVPD, and Comcast, Time Warner, and their Covered RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions."). The Commission also provided that the *Adelphia* conditions would reflect any modifications it made to its program access rules during the length of the conditions. *See id.* ("These exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their Covered RSNs for six years, provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission.").

¹² *See id.* at 8274, ¶ 156; *see also id.* at 8337-39, App. B, § B.2.

while arbitration is pending.¹³ The Commission explained that this remedy would limit the Applicants' ability to uniformly increase rates for RSN programming or otherwise disadvantage rival MVPDs using anticompetitive strategies.¹⁴ While the arbitration condition was primarily intended to address the potential for uniform price increases, the Commission also stated that the condition would provide protection, if necessary, against "stealth discrimination" and the permanent or temporary withholding of programming.¹⁵ These program access conditions expire on July 13, 2012, six years after the *Adelphia Order* adoption date of July 13, 2006.¹⁶

7. With respect to program carriage, the Commission concluded that the proposed transactions would increase Comcast's and TWC's incentive and ability to deny carriage to rival unaffiliated RSNs in order to force existing RSNs out of business and discourage new entrants.¹⁷ The Commission therefore adopted a condition permitting an unaffiliated RSN denied carriage by Comcast or TWC to submit its carriage claim to dispute resolution in lieu of filing a complaint with the Commission.¹⁸ Subsequently, the Commission suspended the program carriage condition in anticipation of revising its program carriage procedures.¹⁹

B. RSN Report Comments

8. *Access to RSNs*. Several commenters assert that ensuring access to RSNs remains a critical component of fostering a competitive MVPD marketplace.²⁰ Commenters reference consumer surveys supporting the proposition that a significant percentage of consumers will not even consider switching to an alternative video provider that does not offer regional sports programming, which, they assert, indicates the value of RSNs to any MVPD that wishes to attract large audiences.²¹ Competing MVPDs claim that, without access to these RSNs, they would be significantly limited in their ability to compete with incumbent cable operators given both the impossibility of replicating RSN programming and the significant subscriber demand for RSNs.²²

9. DIRECTV contends that some of the largest cable operators are using a clustering strategy to increase their regional market share.²³ Clustering occurs when a cable operator concentrates its

¹³ See *id.* at 8337, App. B, § B.2.c.

¹⁴ See *id.* at 8274, ¶ 156.

¹⁵ See *id.* at 8275, ¶ 160 & n.532.

¹⁶ See *id.* at 8274, ¶ 157.

¹⁷ See *id.* at 8287, ¶ 189.

¹⁸ See *id.* at 8287-88, ¶ 190.

¹⁹ See *Comcast Corporation Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, File No. CSR-7108, Order, 22 FCC Rcd 17938, 17938-39, 17946-47, ¶¶ 1, 24 (2007) ("TAC Order").

²⁰ See, e.g., DIRECTV Comments at 2-3; DISH Comments at 1, 3; Verizon Comments at 1-2; AT&T Comments at 1-2; ACA Comments at 1-2; see also Letter from Melissa E. Newman, Vice President — Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-128, at 1-3 (Nov. 14, 2011) (indicating that the Commission must retain the appropriate safeguards so that unaffiliated video distributors maintain access to affiliated RSN programming on nondiscriminatory terms and conditions).

²¹ See AT&T Comments at 2-3; Verizon Comments at 4-5.

²² See AT&T Comments at 2-3; DISH Comments at 3; Verizon Reply at 3-4.

²³ See DIRECTV Comments at 2-10.

operations by acquiring cable systems in regions where it already maintains a significant presence.²⁴ DIRECTV argues that clustering increases a cable operator's ability and incentive to increase the price of an affiliated RSN for other MVPDs. If the price of an affiliated RSN increases to a level where other MVPDs decide not to purchase the programming, consumers who value RSN programming may switch MVPDs for access to such programming. In areas where the affiliated cable operator serves a significant portion of the geographic area through clustering, consumers' best or only option maybe to switch to its cable systems to receive the RSN programming. This strategy may be profitable for the cable operator because it may gain more in revenues from the additional subscribers than it will lose by not selling its programming to another MVPD.²⁵ DIRECTV contends that clustering mitigates the affiliated programmer's potential losses from foregone distribution, potentially subjecting unaffiliated MVPDs to uniform or discriminatory price increases for RSNs.²⁶

10. Some commenters advocate industry-wide modification of the Commission's current program access rules, citing the costs they incur in seeking program access rule enforcement.²⁷ Commenters highlight the time it takes to resolve program access complaints and encourage the Commission to resolve such complaints quickly due to the relatively short duration of sports seasons.²⁸ ACA asserts that the Commission's program access rules do not protect smaller MVPDs that cannot obtain volume discounts; do not prevent vertically integrated programmers from charging themselves very high, supra-competitive prices; and do not provide automatic access to RSN programming while a complaint is pending.²⁹ Similarly, the Rural Associations contend that small and mid-size MVPDs face a number of barriers to obtaining RSN programming under reasonable terms and conditions. They encourage the Commission to streamline the program access complaint process, revise its rules to ensure access to programming under reasonable terms and conditions, and address the ability of an affiliated RSN to raise its price for competing MVPDs by charging itself higher fees.³⁰

11. The Applicants dispute many of the commenters' claims, arguing that the marketplace for RSN programming is intensely competitive and that no further regulation is needed.³¹ The Applicants submit that the substantial cost in obtaining the regional sports distribution rights and producing the RSN programming forces them to seek broad dissemination of affiliated RSNs through third-party platforms in order to maximize advertising and licensing revenues.³² TWC also claims that the Commission's expansion of its program access rules to include terrestrially delivered programming ensures that

²⁴ See *Adelphia Order*, 21 FCC Rcd at 8315, ¶ 264.

²⁵ See DIRECTV Comments at 5-6, n.21.

²⁶ See *id.*

²⁷ See, e.g., ACA Comments at 1-6; HTSC Comments at 4-6.

²⁸ See Verizon Comments at 14; AT&T Comments at 5-6;

²⁹ See ACA Comments at 6-12; see also HTSC Comments at 7 (encouraging the Commission to ensure that non-dominant MVPDs are given access to cable-affiliated RSNs at wholesale rates).

³⁰ See Rural Associations Reply at 2-5. The Rural Associations include: The Organization for the Promotion and Advancement of Small Telecommunications Cos.; the National Telecommunications Cooperative Association; the Independent Telephone and Telecommunications Alliance; the Western Telecommunications Alliance; and the Rural Independent Competitive Alliance.

³¹ See Comcast Comments at 2-5, 7-8; TWC Reply at 4-5, 8-9, 18.

³² See Comcast Comments at 3-4; TWC Reply at 5.

competitive MVPDs will retain nondiscriminatory access to RSNs in the event of a market failure.³³ Comcast states that there have not been notable increases in the number of terrestrially delivered RSNs despite predictions to the contrary.³⁴

12. Cablevision similarly argues that increased video programming distribution competition among cable operators, DBS providers, and telephone providers over the last five years demonstrates that government-mandated access to RSNs is not necessary to create a competitive market or increase consumer choice.³⁵ Cablevision also suggests that removing regulatory constraints on RSNs promotes consumer welfare by allowing RSN content to become a product differentiator, which enhances innovation, investment, and new services.³⁶

13. *Carriage of RSNs.* Comcast states that it faces competitive pressures from other MVPDs to carry unaffiliated programming, including RSNs, on its cable systems.³⁷ According to Comcast, it will carry an unaffiliated network when it is economically sound — when the value of the network to Comcast subscribers is compatible with the price of the network.³⁸ Comcast indicates that it carries 26 unaffiliated RSNs and claims that most of these carriage agreements were reached using marketplace negotiations.³⁹

14. *Application of the Adelphia Order RSN Conditions.* Several commenters contend that the *Adelphia Order* RSN conditions have been effective in preventing potential program access abuses with regard to RSN programming, including network withholding and discriminatory pricing practices, and should be extended.⁴⁰ These commenters note that the *Adelphia Order* RSN conditions provide additional safeguards beyond the Commission's program access rules that both help deter potential disputes and provide an avenue for redress of injuries in a reasonable timeframe.⁴¹

15. In contrast, the Applicants and Cablevision urge the Commission to allow the conditions to sunset.⁴² They argue there is no marketplace failure justifying an extension of the conditions and assert that the MVPD marketplace is competitive, making regulations governing access to RSNs unnecessary.⁴³ TWC contends that the Commission adopted key aspects of the *Adelphia Order* RSN conditions on an industry-wide basis in its *2010 Program Access Order* and that there is no basis to justify reconsidering that order or imposing additional regulation.⁴⁴ Comcast states further that only a few parties have invoked

³³ See TWC Reply at 7-8.

³⁴ See Comcast Comments at 4.

³⁵ See Cablevision Comments at 3-10.

³⁶ See *id.* at 11-13. In particular, Cablevision advocates for the removal of program access protections in local markets with robust MVPD competition. See *id.* at 13-18.

³⁷ See Comcast Comments at 2-3.

³⁸ See *id.* at 3.

³⁹ See *id.* Comcast further asserts that a majority of the programming carried on its cable systems is not affiliated with the company. See *id.* It states that six out of the seven channels carried on Comcast's cable systems remain unaffiliated with Comcast even after the combination of Comcast and NBCU. See *id.*

⁴⁰ See DIRECTV Comments at 10-12; DISH Comments at 4-6; AT&T Comments at 6; HTSC Comments at 5, 8.

⁴¹ See DIRECTV Comments at 12; DISH Comments at 5-6.

⁴² See Comcast Comments at 7-9; TWC Reply at 18; Cablevision Comments at 18-19.

⁴³ See Comcast Comments at 7; TWC Reply at 4-5; Cablevision Comments at 17-18.

⁴⁴ See TWC Reply at 7-9.

the program access or carriage arbitration remedies since the *Adelphia Order* and contends that private, marketplace negotiations remain the norm in reaching carriage agreements for RSN programming.⁴⁵

III. DISCUSSION

A. Marketplace and Regulatory Developments since the *Adelphia Order*

16. A brief survey of the developments since the adoption of the *Adelphia Order* demonstrates that the market for regional sports programming as well as the regulations affecting it have evolved substantially in that time.⁴⁶ As an initial matter, we note some restructuring in the industry. In 2009, the Bureau approved the assignment and transfer of control of several licenses from Time Warner Inc. (“Time Warner”) to TWC,⁴⁷ facilitating the split of Time Warner, the former parent of TWC, into three separate, independent companies — Time Warner, TWC, and AOL.⁴⁸ Time Warner now owns the principal content businesses, including Turner Broadcasting System, Warner Brothers Entertainment, HBO, and Time Inc.,⁴⁹ while TWC delivers cable and telecommunications services to its customers.⁵⁰ The RSNs subject to the *Adelphia Order* conditions remain affiliated with TWC.⁵¹ TWC has also obtained an attributable ownership interest in several RSNs since the *Adelphia Order* was adopted.⁵²

⁴⁵ See Comcast Comments at 5-7 (stating that it has negotiated over 300 agreements with unaffiliated distributors since the *Adelphia Order*).

⁴⁶ The Commission expects to consider the delivery of regional sports programming in its upcoming report addressing the status of competition in the market for the delivery of video programming. See *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Further Notice of Inquiry, 26 FCC Rcd 14091 (2011).

⁴⁷ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Time Warner Inc., and its Subsidiaries, Assignor/Transferor to Time Warner Cable, Inc., and its Subsidiaries, Assignee/Transferee*, MB Docket No. 08-120; WC Docket No. 08-157, Memorandum Opinion and Order, 24 FCC Rcd 879 (MB, WCB, WTB & IB, 2009) (“*TWC Separation Order*”).

⁴⁸ See Letter from Paul T. Cappuccio, Executive Vice President and General Counsel, Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 00-30, at 2 (Jan. 6, 2010).

⁴⁹ See Time Warner Inc., *Our Content*, <http://www.timewarner.com/our-content/> (visited Jan. 4, 2012).

⁵⁰ See *TWC Separation Order*, 24 FCC Rcd at 883, ¶ 8.

⁵¹ See *id.* at 883, 893, ¶¶ 8, 26 n.112 (indicating that TWC would maintain its ownership interest in RSNs after separating from Time Warner and remain subject to the *Adelphia Order*’s program access conditions); see also Time Warner Inc., *Time Warner Inc.-Time Warner Cable Separation Information*, <http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-twcseparation> (visited Jan. 4, 2012).

⁵² When the Commission adopted the *Adelphia Order*, TWC maintained an attributable ownership interest in two RSNs — Metro Sports (Kansas City) and SportsNet New York. See *Adelphia Order*, 21 FCC Rcd at 8211, ¶ 10 n.46. Currently, TWC maintains an attributable ownership interest in the following RSNs: Bright House Sports Network; Bright House Sports Network HD; SportsNet New York; SportsNet New York HD; TWC Sports (Albany); TWC Sports (Central NY); TWC SportsNet (Buffalo); TWC SportsNet (Rochester); Metro Sports (Kansas City); Metro Sports 2 (Kansas City); Metro Sports (Nebraska); TWC Connection/Sports (Mid-Ohio); TWC Connection/Sports (SW Ohio); TWC Sports 32; Texas Channel (translated to English); and YNN Non-Stop Sports. See TWC/Insight Application at Ex. F; *Adelphia Order*, 21 FCC Rcd at 8229, ¶ 47, n.188. TWC also recently launched an RSN featuring the University of Hawaii sports teams. See *Oceanic Time Warner Cable Announces Launch of OCSports*, HAWAII NEWS NOW, Aug. 18, 2011, at <http://www.hawaii.newsnow.com/story/15288224/oceanic-time-warner-cable-an> (visited Jan. 4, 2012). In addition, TWC has plans to launch two RSNs in California featuring the L.A. Lakers. See TWC Reply at 13-14; see also Joe (continued....)

17. More recently, in January 2011, the Commission adopted the *Comcast-NBCU Order*, which approved a joint venture between Comcast and NBC Universal, Inc. (“NBCU”), and included conditions applicable to RSNs that supersede those adopted in the *Adelphia Order* as applied to Comcast.⁵³ The Commission concluded that the transaction would give the joint venture the incentive and ability to block — temporarily or permanently — Comcast’s video distribution rivals from accessing programming owned by the joint venture and to raise the programming costs of its video distribution rivals.⁵⁴ The Commission determined that such exclusionary strategies would allow Comcast to achieve or maintain market power in video distribution, enabling it to charge higher prices to its video distribution rivals than it could have prior to the transaction.⁵⁵ The Commission also decided after reviewing the data that joint ownership of an RSN and an NBC owned and operated broadcast station (“NBC O&O”) in the same region could lead to significantly higher prices for the jointly owned programming relative to the cost of the networks under separate ownership.⁵⁶ Given the findings, the Commission adopted an arbitration remedy applicable to all Comcast-NBCU affiliated programming, including RSNs, to prevent these potential harms.⁵⁷ Under this remedy, if a rival MVPD fails to negotiate a mutually acceptable set of prices, terms, and conditions for access to Comcast-NBCU-affiliated programming, then the MVPD may elect commercial arbitration to resolve its dispute.⁵⁸

18. With respect to program carriage, the Commission found that the vertical integration of Comcast’s distribution network with NBCU’s programming assets increased Comcast’s ability and incentive to discriminate against or foreclose unaffiliated programming.⁵⁹ The Commission concluded that Comcast’s extensive distribution network provided it with the opportunity to harm other rival video programming firms as well as overall video programming competition.⁶⁰ The Commission also found that the transaction increased Comcast’s incentive to discriminate in favor of its affiliated programming.⁶¹ To remedy these harms, the Commission adopted a program carriage condition prohibiting Comcast from discriminating against programming vendors, including RSNs, on the basis of affiliation or nonaffiliation in the selection, price, terms or conditions of carriage.⁶² The *Comcast-NBCU* conditions generally remain

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Flint, *Time Warner Cable, Lakers Strike 20-Year TV Deal*, L.A. TIMES, Feb. 14, 2011, at <http://articles.latimes.com/2011/feb/14/sports/la-sp-0215-lakers-time-warner-20110215> (visited Jan. 4, 2012).

⁵³ See *Comcast-NBCU Order*, 26 FCC Rcd at 4364, App. A, § VI.

⁵⁴ See *id.* at 4250, ¶ 29.

⁵⁵ See *id.*

⁵⁶ See *id.* at 4295, ¶ 137.

⁵⁷ See *id.* at 4364-70, App. A, § VII.

⁵⁸ See *id.* at 4358, App. A, § II (“If negotiations fail to produce a mutually acceptable set of price, terms and conditions for a Carriage Agreement with one or more C-NBCU Programmers, an MVPD or Bargaining Agent may choose to submit a dispute to commercial arbitration.”).

⁵⁹ See *id.* at 4282, ¶ 110.

⁶⁰ See *id.* at 4284-85, ¶ 116.

⁶¹ See *id.* at 4285-86, ¶ 118.

⁶² See *id.* at 4287, ¶ 121; see also *id.* at 4358, App. A, § III.1 (“Comcast shall not discriminate in Video Programming distribution on the basis of affiliation or non-affiliation of a Video Programming Vendor in the selection, price, terms or conditions of carriage (including but not limited to on the basis of channel or search result placement).”).

in effect until January 20, 2018, seven years after the release of the *Comcast-NBCU Order*.⁶³

19. On the rulemaking front, the Commission issued a program access order in 2007 that improved the program access complaint procedures by permitting party-to-party discovery and increasing opportunities for parties in a program access dispute to participate in voluntary arbitration during the pendency of the complaint.⁶⁴ The Commission also extended the prohibition on exclusive contracts between cable-affiliated programming vendors and cable operators delivering satellite programming until October 5, 2012. The Commission determined that the prohibition was necessary to protect competition in the MVPD marketplace and to ensure that all MVPDs have access to “must have” cable-affiliated programming, such as RSNs.⁶⁵ Specifically, the Commission concluded that RSN programming was among the types of programming without an adequate substitute and MVPDs would be significantly limited in their ability to compete if denied access to this programming. In addition, the Commission found that vertically integrated programmers continued to favor their affiliated cable operators over rival MVPDs, and vertically integrated cable operators retained an incentive to withhold programming from their competitors.⁶⁶ In its *2007 Program Access Order*, the Commission indicated that it would conduct a review of its exclusive contract prohibition during the year before its expiration to determine if the rule is still needed to protect competition and diversity in the distribution of video programming.⁶⁷ The Commission therefore plans to issue a notice of proposed rulemaking on this matter shortly.

20. In 2010, the Commission further refined its program access rules. The Commission adopted rules allowing aggrieved MVPDs to file program access complaints pertaining to terrestrially delivered,

⁶³ See *id.* at 4381, App. A, § XX (“Except as expressly stated, these Conditions shall remain in effect for seven years following the date of [the *Comcast-NBCU Order*].”); see also *id.* at 4357, App. A, § I (defining the phrase “Order Date”).

⁶⁴ See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-29; MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17847-59, ¶¶ 83-113 (2007) (“*2007 Program Access Order*”), *aff’d sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010). In contrast to the program access rules, which allow the complainant and the respondent to enter into arbitration voluntarily (see 47 C.F.R. § 76.1003(i)), the *Adelphia Order* provides for mandatory arbitration if an MVPD invokes its right to arbitration. See *Adelphia Order*, 21 FCC Rcd at 8337, App. B, § B.2.f. Once an MVPD invokes its right to arbitration under the *Adelphia Order*, the terms and conditions of its existing contract (assuming its action concerns a contract renewal) automatically remain in place pending the outcome of the arbitration pursuant to a so-called “standstill” provision. See *id.* at § B.2.c. The program access rules, on the other hand, do not include an automatic standstill provision but instead allow a complainant to request that the terms and conditions of its existing contract remain in place pending the resolution of a complaint concerning contract renewal. See 47 C.F.R. § 76.1003(l).

⁶⁵ See *2007 Program Access Order*, 22 FCC Rcd at 17792-93, 17827-29, 17832, ¶¶ 1, 52, 59. In areas served by a cable operator, exclusive contracts between cable-affiliated programming vendors and cable operators for satellite cable programming or satellite broadcast programming are generally prohibited under Section 628(c)(2)(D) of the Communications Act of 1934, as amended. See 47 U.S.C. § 548(c)(2)(D). The exclusive contract prohibition applies only to cable-affiliated programming that is delivered to cable operators via satellite; it does not apply to cable-affiliated programming that is delivered to cable operators via terrestrial facilities. See *id.*; see also 47 U.S.C. § 548(i)(1) (incorporating the definition of “satellite cable programming” as used in 47 U.S.C. § 605); *id.* § 548(i)(3). The Commission, however, permits aggrieved MVPDs to file program access complaints alleging unfair acts involving terrestrially delivered, cable-affiliated programming. See para. 20.

⁶⁶ See *2007 Program Access Order*, 22 FCC Rcd at 17816-18, 17820, 17826-27, ¶¶ 38-39, 42, 50.

⁶⁷ See *id.* at 17845-46, ¶¶ 79-81.

cable-affiliated programming.⁶⁸ This decision affected the RSN marketplace in particular because several RSNs are delivered terrestrially. Under the *2010 Program Access Order*, the Commission adopted a rebuttable presumption that an unfair act involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect of significantly hindering or preventing an MVPD from providing programming to consumers in violation of Section 628(b) of the Communications Act of 1934, as amended.⁶⁹ The Commission reviews complaints alleging such acts on a case-by-case basis, and a defendant may attempt to put forth evidence to overcome this presumption.⁷⁰ The D.C. Circuit upheld the *2010 Program Access Order* in substantial part, including the rebuttable presumption with respect to terrestrially delivered, cable-affiliated RSNs.⁷¹

21. In September 2011, the Bureau addressed two program access complaints brought under the new program access rules for terrestrially delivered programming. The Bureau concluded in two separate orders that Madison Square Garden, L.P. (“MSG”) and Cablevision Systems Corporation (“Cablevision”) (collectively, the “Defendants”) violated Section 628(b) when they failed to give AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut (collectively, “AT&T”), as well as Verizon Telephone Companies and Verizon Services Corporation (collectively, “Verizon”), access to the high-definition (“HD”) version of two terrestrially delivered RSNs owned by the Defendants, known as MSG HD and MSG+ HD.⁷² The Bureau determined in both orders that the evidence put forth by the Defendants did not rebut the presumption pertaining to terrestrially delivered RSNs adopted in the *2010 Program Access Order*. The Bureau accordingly found that the Defendants’ withholding of MSG HD and MSG+ HD from Verizon and AT&T significantly hindered those two providers in offering a competitive video service, and therefore the Defendants were in violation of the Commission’s program access rules.⁷³ The Bureau required MSG to enter into separate agreements with AT&T and Verizon, respectively, to license the MSG HD and MSG+ HD networks on non-discriminatory rates, terms, and conditions within 30 days of the order’s release to remedy the

⁶⁸ See generally *2010 Program Access Order*. The Commission’s terrestrial program access rules do not trigger modifications to the *Adelphia Order* conditions. See *id.* at 792-93, ¶ 69.

⁶⁹ See *id.* at 782-83, ¶ 52.

⁷⁰ See *id.*

⁷¹ See *Cablevision*, 649 F.3d at 699, 716-18. In its decision, the court remanded one non-RSN-specific issue to the Commission. See *id.* at 722-23.

⁷² See *Verizon v. MSG*, File No. CSR-8185-P, Order, 26 FCC Rcd 13145, 13200, ¶ 68 (MB, 2011) (“*Verizon Program Access Order*”); *AT&T v. MSG*, File No. CSR-8196-P, Order, 26 FCC Rcd 13206, 13266-67, ¶ 69 (MB, 2011) (“*AT&T Program Access Order*”). In the *2010 Program Access Order*, the Commission concluded that HD programming is growing in significance to consumers and that consumers do not consider the standard definition (“SD”) version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content. See *2010 Program Access Order*, 25 FCC Rcd at 784-85, ¶¶ 54-55. The Commission therefore examines the HD and SD versions separately when determining whether an unfair act has the purpose or effect of significantly hindering or preventing an MVPD from providing programming to consumers under Section 628(b). See *Verizon Program Access Order*, 26 FCC Rcd at 13148-49, ¶ 4; *AT&T Program Access Order*, 26 FCC Rcd at 13209-10, ¶ 4. And in cases involving a terrestrially delivered, cable-affiliated RSN, withholding the HD feed is rebuttably presumed to cause “significant hindrance” even if an SD version of the RSN is made available to the complainant. See *2010 Program Access Order*, 25 FCC Rcd at 785, ¶ 55.

⁷³ See *Verizon Program Access Order*, 26 FCC Rcd at 13200, ¶ 68; *AT&T Program Access Order*, 26 FCC Rcd at 13266-67, ¶ 69.

Defendants' program access violations.⁷⁴ The Bureau also ordered Cablevision not to prevent or otherwise impede MSG from entering into these licensing agreements.⁷⁵ On November 10, 2011, the Commission affirmed the Bureau's orders and denied the Defendants' Applications for Review.⁷⁶

22. Following the suspension of the *Adelphia Order's* program carriage RSN condition,⁷⁷ the Commission revised its program carriage rules in an effort to remove uncertainty surrounding the filing and resolution of program carriage complaints.⁷⁸ In that 2011 order, the Commission codified the requirements to establish a *prima facie* program carriage violation; extended the amount of time a defendant has to respond to a program carriage complaint; created deadlines for the Bureau and Administrative Law Judge's actions in response to program carriage complaints; and established procedures pursuant to which the Bureau may consider a temporary standstill of an existing programming contract during a pending program carriage complaint.⁷⁹ The companion notice of proposed rulemaking solicits comment on additional revisions to the Commission's procedural and substantive program carriage rules in order to better facilitate the resolution of carriage disputes.⁸⁰

⁷⁴ See *Verizon Program Access Order*, 26 FCC Rcd at 13200, ¶ 70; *AT&T Program Access Order*, 26 FCC Rcd at 13267-68, ¶ 71. The Defendants filed a Petition for Stay and Application for Review with the Commission of both the *Verizon and AT&T Program Access Orders*. On its own motion, the Bureau retained its October 22, 2011 agreement deadline, but stayed its Orders to the extent they would require MSG to provide Verizon and AT&T the programming on or before November 14, 2011. See *AT&T v. MSG*, File No. CSR-8196-P, Order, 26 FCC Rcd 14293, ¶ 1 (MB, 2011); *Verizon v. MSG*, File No. CSR-8185-P, Order, 26 FCC Rcd 14295, ¶ 1 (MB, 2011). Cablevision and MSG petitioned the Second Circuit for a stay of the *Verizon and AT&T Program Access Orders*, but the court denied their request. See *Cablevision Sys. Corp. v. FCC*, No. 11-4104 (2d Cir.).

⁷⁵ See *Verizon Program Access Order*, 26 FCC Rcd at 13201, ¶ 71; *AT&T Program Access Order*, 26 FCC Rcd at 13268, ¶ 72.

⁷⁶ See *AT&T v. MSG*, File No. CSR-8196-P, Memorandum Opinion and Order, 26 FCC Rcd 15871, ¶ 1 (2011); *Verizon v. MSG*, File No. CSR-8185-P, Memorandum Opinion and Order, 26 FCC Rcd 15849, ¶ 1 (2011). The Commission also granted MSG an extension of 15 days after the release of its orders to provide MSG HD and MSG+ HD to AT&T and Verizon unless the parties had reached a prior agreement providing for a longer period of time. Cablevision and MSG petitioned the Second Circuit for a stay of the Commission's orders upholding the *Verizon and AT&T Program Access Orders*, but the Second Circuit denied their request for a stay on December 14, 2011. See *Cablevision Sys. Corp. v. FCC*, No. 11-4780 (2d Cir.). Verizon began providing MSG HD and MSG+ HD on December 15, 2011. See John Eggerton, *Second Circuit Denies Review of FCC Cablevision Decisions*, MULTICHANNEL NEWS, Dec. 14, 2011, at <http://www.multichannel.com/article/477929-Second-Circuit-Denies-Review-of-FCC-Cablevision-Decisions.php> (visited Jan. 4, 2012). AT&T began providing the networks on December 29, 2011. See Todd Spangler, *AT&T Posts Up MSG HD Nets On U-verse TV*, MULTICHANNEL NEWS, Dec. 30, 2011, at <http://www.multichannel.com/article/478377-AT-T-Posts-Up-MSG-HD-Nets-On-U-verse-TV.php> (visited Jan. 4, 2012).

⁷⁷ See para. 7.

⁷⁸ *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 11-131; MB Docket No. 07-42, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Rcd 11494 (2011) ("*2011 Program Carriage Order & NPRM*"). This order is currently on appeal in the Second Circuit. See *TWC v. FCC*, No. 11-4138 (2d Cir.).

⁷⁹ See *2011 Program Carriage Order & NPRM*, 26 FCC Rcd at 11500-21, ¶¶ 8-36.

⁸⁰ See *id.* at 11521-46, ¶¶ 37-81.

B. Enforcement of the *Adelphia Order* RSN Conditions

23. The Commission has applied the *Adelphia Order* RSN conditions on multiple occasions since their adoption. In particular, the Commission and the Bureau addressed several program carriage complaints regarding the Applicants' and unaffiliated RSNs since the Commission's approval of the *Adelphia Order* but before the *2011 Program Carriage Order & NPRM*. In 2007, the Commission concluded that The America Channel ("TAC") was an RSN as defined in the *Adelphia Order* and required Comcast to participate in arbitration to resolve its carriage dispute with TAC.⁸¹ The Bureau in 2008 upheld an arbitrator's decision to award Mid-Atlantic Sports Network ("MASN") carriage on TWC's North Carolina cable systems. The Bureau determined that TWC unlawfully discriminated against MASN and that such discrimination hindered MASN's ability to compete fairly.⁸² Subsequently, the Commission reversed the Bureau's decision after determining that TWC had valid and non-discriminatory reasons for declining to carry MASN on its North Carolina cable systems.⁸³

24. As we previously indicated, several commenters favor extending the *Adelphia Order* RSN conditions.⁸⁴ We reiterate that the *Adelphia Order* conditions no longer apply to Comcast as they have been superseded by the conditions adopted in the *Comcast-NBCU Order*. Those more recently adopted conditions generally remain in effect until January 20, 2018.⁸⁵ We also recognize that there have been market changes and significant regulatory changes to the Commission's program access and carriage rules since the adoption of the *Adelphia Order*, as described above. In the absence of additional Commission action, TWC will remain subject to the *Adelphia Order* conditions until July 13, 2012.

IV. CONCLUSION

25. With this Report, the Media Bureau satisfies the Commission's commitment in the *Adelphia Order* to issue a report on RSN access and carriage issues on both an industry-wide basis and with respect to the Applicants.

FEDERAL COMMUNICATIONS COMMISSION

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⁸¹ See *TAC Order*, 22 FCC Rcd at 17938-39, ¶ 1.

⁸² See *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, 15784, ¶ 1 (MB, 2008).

⁸³ See *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099, ¶ 1 (2010). This decision is currently on appeal in the Fourth Circuit. See *TCR Sports Broadcasting Holding, LLP v. FCC*, No. 11-1151 (4th Cir.).

⁸⁴ See para. 14.

⁸⁵ See note 63.