

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

In the Matter of)	
)	
Word Network Operating Company d/b/a The Word Network)	MB Docket No. 17-166
)	
v.)	File No. CSR-8938-P
)	
Comcast Corporation and Comcast Cable Communications, LLC)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2018

Released: May 23, 2018

By the Chief, Media Bureau:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we dismiss to the extent indicated herein the above-captioned complaint filed by Word Network Operating Company d/b/a The Word Network (TWN) against Comcast Corporation and Comcast Cable Communications, LLC (collectively, Comcast).¹ In its complaint, TWN, an independently owned and operated religious programming network, alleges that Comcast, a vertically-integrated multichannel video programming distributor (MVPD), violated the exclusivity and unfair practices conditions set forth in the Commission's order approving Comcast's acquisition of NBCUniversal (NBCU) by demanding exclusive digital rights (i.e., rights to distribute TWN's programming content online) to TWN's programming.² After reviewing the complaint, we conclude that TWN has failed to establish a *prima facie* case of a violation of the exclusivity condition or

¹ Complaint of Word Network Operating Company d/b/a The Word Network against Comcast Corporation and Comcast Cable Communications, LLC, MB Docket No. 17-166, File No. CSR-8938-P (filed June 8, 2017) (Complaint).

² *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4361, Appx. A, Sec. IV(B)(3) (exclusivity condition), 4363, Appx. A, Sec. IV(G)(1)(a) (unfair practices condition) (2011) (*Comcast-NBCU Order*). In its complaint, TWN also alleged that Comcast violated the *Comcast-NBCU Order's* non-discrimination condition by reducing distribution of TWN without a valid business justification and by demanding exclusive digital rights to TWN's programming. *Id.* at 4287, para. 121, 4358, Appx. A, Sec. III(1). In addition, TWN alleged that Comcast violated the financial interest provision of Section 616(a)(1) of the Communications Act of 1934, as amended, (Act), 47 U.S.C. § 536(a)(1), and Section 76.1301(a) of the Commission's rules, 47 CFR § 76.1301(a), by refusing to negotiate with TWN unless TWN granted Comcast exclusive digital rights to TWN's programming. On October 27, 2017, the Bureau released a Memorandum Opinion and Order dismissing TWN's complaint with respect to these allegations, concluding that TWN failed to establish a *prima facie* case that Comcast violated either the non-discrimination condition or the financial interest provision. *Word Network Operating Company d/b/a The Word Network v. Comcast Corporation and Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 32 FCC Rcd 7704 (MB).

the unfair practices condition. Accordingly, we dismiss TWN's complaint with respect to these allegations.³

II. BACKGROUND

2. When the Commission approved Comcast's acquisition of NBCU, it imposed certain conditions on Comcast to address potential harms resulting from the combination. Section IV of the conditions is entitled "Online Conditions." Among other things, these conditions were intended to mitigate Comcast-NBCU's "increased leverage" resulting from the transaction "to negotiate restrictive online rights from third parties" in exchange for carriage, resulting in harm to competition, consumer choice, diversity, and broadband investment.⁴ Among these conditions is the exclusivity condition, which prohibits Comcast from "enter[ing] into or enforc[ing] any agreement or arrangement for carriage on Comcast's MVPD system that forbids, limits, or creates incentives to limit a broadcast network or cable programmer's provision of its Video Programming to one or more OVDs."⁵ This section also includes an unfair practices condition which prohibits Comcast from "engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any MVPD or OVD from providing Video Programming online to subscribers or consumers."⁶

3. Launched in February 2000, TWN is an independently owned and operated cable programming network, unaffiliated with any MVPD, that provides original African-American oriented ministry programming.⁷ Comcast began distributing TWN on certain Comcast systems in 2000 pursuant to an agreement executed on September 8, 2000.⁸ This agreement, which {REDACTED},⁹ TWN does not charge Comcast a per-subscriber fee for distribution and provides its programming to Comcast free of charge.¹⁰ TWN is also distributed by DIRECTV, AT&T, Spectrum/Charter, Verizon, Cox, Cablevision, CenturyLink, Suddenlink, and other MVPDs.¹¹ In addition, TWN has made its programming available through its website since August 2013.¹² TWN asserts that it has a strong online presence, with over 70,000 unique website hits per month, nearly a million followers on Facebook, 75,000 followers on Instagram, 41,700 followers on Twitter, and 12,400 followers on YouTube.¹³

³ As explained *supra*, note 2, the Bureau released a Memorandum Opinion and Order in 2017 dismissing TWN's complaint with respect to several allegations. This Order disposes of all of the remaining allegations in TWN's complaint.

⁴ *Comcast-NBCU Order*, 26 FCC Rcd at 4267, para. 73.

⁵ *Id.* at 4361, Appx. A, Sec. IV(B)(3).

⁶ *Id.* at 4363, Appx. A, Sec. IV(G)(1)(a).

⁷ Complaint at 8-9. TWN states that it is the largest African-American religious network in the world, reaching millions of viewers, including elderly and disabled viewers who are unable to leave their homes to attend services in person. *Id.* at 9, 25.

⁸ *Id.* at 8-9; Comcast Answer (Answer) at 6.

⁹ Answer at 6.

¹⁰ Complaint at 26.

¹¹ *Id.* at 9.

¹² *Id.* at 10.

¹³ *Id.* at 25.

4. Comcast is the nation's largest cable operator with more than 22 million video subscribers and serves customers in 40 states and Washington, D.C.¹⁴ Comcast is also a vertically integrated content provider, owning the NBC and Telemundo broadcast networks, various national cable networks, and regional sports and news networks.¹⁵

5. TWN and Comcast provide distinctly different versions of the events giving rise to TWN's complaint. TWN states that on November 11, 2016, Jennifer Gaiski, Senior Vice President, Content Acquisition, Comcast Cable Communications, notified TWN by letter of Comcast's intent to eliminate distribution of TWN on 456 Comcast systems, which reduced distribution on Comcast from approximately 12 million to approximately 5 million subscribers.¹⁶ According to TWN, the eliminated markets included key African American markets, such as Washington, D.C., Philadelphia, and Baltimore, as well as other major metropolitan areas such as Pittsburgh, Houston, Salt Lake City, San Francisco/Oakland, Denver, Boston, and Minneapolis/St. Paul.¹⁷ TWN asserts that Ms. Gaiski's letter did not provide any explanation for Comcast's decision to reduce distribution of TWN and came without any prior warning of Comcast's decision.¹⁸ TWN states that it was subsequently informed by Comcast that TWN would be replaced on these systems by the Impact Network (Impact), which also features African-American ministry programming.¹⁹

6. TWN asserts that following receipt of the November 11, 2016 letter, Kevin Adell, President and CEO of TWN, contacted Ms. Gaiski to find out why Comcast had reduced carriage of TWN and to explore a solution.²⁰ TWN maintains that instead of offering any tangible explanation for the reduction in distribution, Ms. Gaiski told Mr. Adell that Comcast was reducing distribution of TWN "[b]ecause we are Comcast, and we can."²¹

7. TWN states that on November 22, 2016, Mr. Adell and John Mattiello, TWN's Director of Marketing and Affiliate Relations, met with Ms. Gaiski and her team at Comcast's Philadelphia headquarters.²² According to TWN, when pressed for an explanation for Comcast's decision to reduce distribution of TWN, Ms. Gaiski said that TWN did not perform as well as it should, but would not explain how Comcast measured its performance or the specific markets where TWN supposedly did not adequately perform.²³ Additionally, TWN asserts that "instead of engaging with Mr. Adell during his attempts to negotiate a revocation of Ms. Gaiski's letter, Ms. Gaiski instead inquired about TWN's online distribution rights, an unrelated matter in which Comcast had not previously expressed interest."²⁴ Mr. Adell maintains that Ms. Gaiski "demanded exclusive control over TWN's digital rights."²⁵ Mr. Adell states that he rejected this request, explaining that TWN streams its content through TWN's website and

¹⁴ *Id.* at 11; Answer at 39.

¹⁵ Complaint at 11; Answer at 39.

¹⁶ Complaint at 13 and Exh. 9; Answer at 9.

¹⁷ Complaint at 13 and Exh. 9.

¹⁸ *Id.* at 14 and Exh. 9.

¹⁹ *Id.* at 13; Declaration of Kevin Adell, President and Chief Executive Officer, The Word Network (Adell Decl.), at para. 16.

²⁰ Adell Decl. at para. 25.

²¹ Complaint at 1-2; Adell Decl. at 25.

²² Complaint at 14; Adell Decl. at para. 26.

²³ Complaint at 15; Adell Decl. at para. 29.

²⁴ Complaint at 15.

²⁵ Adell Decl. at para. 32.

does not license its digital rights to any distributors.²⁶ Mr. Adell maintains that Comcast then informed TWN that its policy is to not carry a video programming vendor unless the vendor grants Comcast its digital rights.²⁷ Mr. Adell states that he reiterated that TWN would not part with its “exclusive worldwide rights,” as TWN uses them as part of its business model, and Comcast subsequently refused to negotiate any further.²⁸

8. TWN further states that after learning that Comcast intended to reduce distribution of TWN, Bishop Charles Ellis III, one of the more popular preachers featured on TWN, attempted to contact Ms. Gaiski, but Ms. Gaiski never responded to him.²⁹ Instead, TWN says, Antonio Williams, a director in Comcast’s government affairs department, returned his call.³⁰ TWN asserts that when asked why Comcast was replacing TWN with the Impact Network on 456 of its systems, Mr. Williams responded that TWN had not been a good partner for Comcast, that TWN’s programming was “mediocre,” and that Mr. Adell had not visited Comcast’s headquarters.³¹ According to TWN, Mr. Williams also stated that Comcast believed replacing TWN with Impact on these systems would give the African American community a broader selection of programming and greater variety of programming options.³² TWN states that a second call, which included Mr. Williams, Bishop Ellis, Reverend Jesse Jackson, Sr., and Bishop Paul Morton, occurred “prior to Christmas” 2016.³³ During this call, the ministers explained to Mr. Williams the harm to African American ministers that would result if Comcast reduced its distribution of TWN and Mr. Williams agreed to relay their concerns to his superiors at Comcast.³⁴ However, TWN states that none of the ministers ever heard back from Mr. Williams or Comcast.³⁵

9. Comcast provides a different version of events. Comcast asserts that in 2016, its Content Acquisition team, led by Ms. Gaiski, began a review of the religious networks carried on its systems, all of which are unaffiliated with Comcast, with a focus on their appeal among African American viewers.³⁶ The review included an examination of the networks, their program offerings, the level of consumer interest for their programming in particular regions, and the networks’ level of engagement with Comcast and the local communities where they are carried.³⁷ Comcast says that in September and October 2016, it reviewed the results of an audience survey of viewer preferences among African-American pay-TV subscribers that was conducted between June 21 and July 13, 2016.³⁸ According to Comcast, the survey showed that Comcast carries multiple religious networks that are popular among African American viewers and that other religious networks had greater reach and higher intensity viewership among

²⁶ Complaint at 15; Adell Decl. at para. 32.

²⁷ Complaint at 15; Adell Decl. at para. 35.

²⁸ Complaint at 16; Adell Decl. at para. 35.

²⁹ Complaint at 16; Declaration of Bishop Charles H. Ellis III (Ellis Decl.) at para. 20.

³⁰ Complaint at 16; Ellis Decl. at para. 21.

³¹ Complaint at 16; Ellis Decl. at para. 22.

³² Complaint at 16-7; Ellis Decl. at para. 22.

³³ Complaint at 17; Ellis Decl. at para. 24.

³⁴ Complaint at 17-8; Ellis Decl. at para. 25.

³⁵ Complaint at 18; Ellis Decl. at para. 25.

³⁶ Answer at 6-7. Comcast explains that due to intense competition from other MVPDs and online video services, it continuously evaluates the programming lineup for its subscribers within the constraints of each system’s bandwidth and strives to select programming that keeps them loyal customers. Gaiski Decl. at para. 8.

³⁷ Answer at 7.

³⁸ *Id.*

African American viewers than TWN.³⁹ Comcast's Content Acquisition team subsequently conducted additional research and analysis of programming available on the various religious networks.⁴⁰ Comcast states that this research showed that TWN's programming substantially overlapped with many of the other religious networks carried by Comcast, including Impact,⁴¹ and that there would be adequate substitutes for TWN viewers if TWN were no longer available on Comcast systems in certain markets.⁴² Comcast states that the research further showed that Impact offers a broader selection of programming, spanning a greater variety of program genres, than TWN, which almost exclusively airs ministry-focused programming.⁴³

10. Other factors weighing in favor of increasing distribution of Impact, Comcast says, were the fact that, unlike TWN, Impact is an African American owned and operated network, adding to the diversity of independent programming carried by Comcast, and the fact that Impact has sponsored concerts and religious events in local communities that enhance Comcast's carriage of Impact in those communities.⁴⁴ Comcast asserts that based on all of these factors, and after consultation with executives in the regions where it carried TWN, the Content Acquisition team decided to increase carriage of Impact by adding it to systems in Comcast's Northeast, Central, and West Divisions and reduce carriage of TWN by removing it from systems in Comcast's Northeast and West Divisions.⁴⁵ Comcast states that carriage of TWN continued in the Central Division, which includes TWN's home market in Detroit and had the necessary bandwidth.⁴⁶ As a result of these changes, Impact's carriage on Comcast's systems increased from approximately {REDACTED} million subscribers to approximately {REDACTED} million subscribers, while TWN's carriage decreased from approximately {REDACTED} million subscribers to approximately {REDACTED} million subscribers.⁴⁷

11. Comcast acknowledges that on November 11, 2016, Ms. Gaiski sent a letter, via fax, to Mr. Adell informing TWN of its decision to remove TWN from Comcast systems in the Northeast and West Divisions.⁴⁸ Comcast states that on November 14, 2016, Ms. Gaiski and Justin Smith, Senior Vice President, Content Acquisitions, Comcast, spoke with Mr. Adell by phone and explained the reasons for Comcast's decision to reduce distribution of TWN.⁴⁹ Comcast states that on November 22, 2016, Ms. Gaiski and her team met with Mr. Adell and Mr. Mattiello at Comcast's Philadelphia headquarters and again explained the reasons for its decision to reduce TWN's carriage, including providing additional content and variety to its customers consistent with different systems' needs, as well as bandwidth

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* Comcast notes that at the time of this analysis, Impact was carried to approximately {REDACTED} million subscribers in the Heartland Region within Comcast's Central Division. *Id.*

⁴² *Id.* Comcast states that its research showed that at least 25 of the ministers that appear on TWN also appear on other networks carried by Comcast and many of these ministers are also available on local religious broadcast stations that Comcast carries in nearly every market. Gaiski Decl. at 11.

⁴³ Answer at 7.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*

⁴⁶ *Id.*; Gaiski Decl. at para. 15.

⁴⁷ Answer at 8.

⁴⁸ *Id.* at 9; Gaiski Decl. at para. 16. *See also* Complaint at Exh. 9.

⁴⁹ Gaiski Decl. at para. 17; Declaration of Justin Smith, Senior Vice President, Content Acquisition, Comcast Cable Communications (Smith Decl.), at para. 5.

constraints.⁵⁰ Comcast states that Ms. Gaiski agreed to consider TWN's request to maintain carriage on certain of the systems at issue and indicated that TWN was free to contact those systems as well.⁵¹ Comcast, in three sworn declarations, denies that Ms. Gaiski ever told TWN that the reason for the reduction in distribution of TWN was "[b]ecause we are Comcast, and we can."⁵² Comcast also denies, in three sworn declarations, that Ms. Gaiski demanded or sought any digital rights, let alone exclusive rights, to TWN's programming.⁵³ Comcast asserts that it would not have made sense to seek or demand such rights as Comcast was interested in reducing distribution of TWN, not obtaining additional distribution rights.⁵⁴

12. Comcast states that, following the November 22 meeting, the Content Acquisition team began the process of identifying markets where it was willing to consider continued distribution of TWN, if supported by feedback from the local systems.⁵⁵ On November 30, 2016, Ms. Gaiski and Mr. Smith participated in a phone call with Mr. Adell and Mr. Mattiello.⁵⁶ According to Comcast, Mr. Adell informed Comcast during this call that the broadcast television station that he owns, WADL, Detroit, Michigan, would not renew its deal with NBCUniversal to carry certain NBCUniversal programming, that he was running ads against Comcast on his Detroit radio station, WFDF, and that he was planning a protest outside of Comcast's headquarters in Philadelphia for December 2, 2016.⁵⁷ Comcast says that Ms. Gaiski and Mr. Smith reiterated that Comcast was continuing internal discussions and reaching out to local systems regarding whether to maintain carriage of TWN in additional markets, but had not yet come to any final determination.⁵⁸

13. Comcast asserts that TWN subsequently launched a public relations campaign that encouraged its viewers to complain directly to Ms. Gaiski and Mr. Smith and organized protests outside of Comcast's headquarters in December 2016 and January 2017.⁵⁹ Additionally, Comcast asserts that in early January 2017, TWN published a letter on its website that purported to be from Reverend Al Sharpton accusing Comcast of violating its Memorandum of Understanding with African American

⁵⁰ Answer at 9; Gaiski Decl. at para. 20. In addition to Ms. Gaiski, the meeting attendees for Comcast were Justin Smith, Sarah Gitchell (Senior Vice President, Deputy General Counsel and Chief Counsel, Content Acquisitions), Keesha Boyd (Executive Director, Multicultural Services), Bret Perkins (Vice President, External and Governmental Affairs), Antonio Williams (Director of Governmental and External Affairs), and Javier Garcia (Senior Vice President and General Manager, Multicultural Services). Gaiski Decl. at para. 18.

⁵¹ Answer at 9; Gaiski Decl. at para. 22; Declaration of Keesha Boyd, Executive Director, Multicultural Services (Boyd Decl.), at para. 6; Smith Decl. at 5.

⁵² Answer at 9; Gaiski Decl. at para. 23; Smith Decl. at para. 7; Boyd Decl. at para. 9. Ms. Gaiski and Mr. Smith, both of whom participated in the November 14 phone call and the November 22 meeting, deny that Ms. Gaiski made this statement during either the phone call or the meeting. Gaiski Decl. at para. 23; Smith Decl. at para. 7. Ms. Boyd, who was present during the November 22 meeting, states that no such statement was made during the meeting. Boyd Decl. at para. 9.

⁵³ Answer at 9; Gaiski Decl. at para. 24; Smith Decl. at para. 6; Boyd Decl. at para. 8.

⁵⁴ Gaiski Decl. at para. 24

⁵⁵ Answer at 9.

⁵⁶ *Id.* at 10; Gaiski Decl. at para. 27; Smith Decl. at para. 8.

⁵⁷ Answer at 10; Gaiski Decl. at para. 27; Smith Decl. at para. 8.

⁵⁸ Answer at 10; Gaiski Decl. at para. 28; Smith Decl. at para. 8.

⁵⁹ Answer at 10; Gaiski Decl. at para. 29.

leadership organizations submitted in the Comcast-NBCU merger proceeding.⁶⁰ Comcast states that on January 11, 2017, Reverend Sharpton sent Mr. Adell a letter advising that Mr. Adell had “misinformed” him regarding the facts and had “altered [the] letter without [his] consent.”⁶¹ Comcast notes that Reverend Sharpton’s letter further stated that Comcast had not made any changes that violated the MOU or undermined its commitment to the African American community and directed Mr. Adell to cease such misrepresentation.⁶²

14. Comcast states that “[g]iven the non-productive and hostile nature of Word’s conduct” and “the lack of any contrary feedback from the local systems,” it proceeded with its planned reduction in carriage for TWN.⁶³ On January 12, 2017, Comcast discontinued carriage of TWN on the 456 systems listed in Ms. Gaiski’s November 11 letter and replaced TWN on those systems with the Impact Network.⁶⁴ Comcast continued to carry TWN in its Central Division, without acquiring exclusive (or any) digital rights as a condition of such carriage. Comcast states that following the reduction in TWN’s carriage, it received fewer than 50 complaints from the approximately {REDACTED} million customers who were now receiving Impact instead of TWN.⁶⁵

15. On February 6, 2017, Mr. Adell provided written notice to Comcast of TWN’s intent to file a complaint pursuant to Section 76.1302(b) of the Commission’s rules.⁶⁶ This pre-filing notice alleged that Comcast’s decision to reduce carriage of TWN constituted unlawful discrimination in violation of the program carriage rules and the non-discrimination condition in the *Comcast-NBCU Order* but made no mention of Comcast’s alleged demand for digital rights.⁶⁷ Comcast responded to this notice on February 16, 2017.⁶⁸ On May 19, 2017, TWN provided a supplemental notice to Comcast of TWN’s intent to file a complaint which alleged for the first time that Comcast had demanded exclusive digital

⁶⁰ Answer at 11; Gaiski Decl. at para. 30. See *Comcast-NBCU Order*, 26 FCC Rcd at 4492, App. G, Memorandum of Understanding Between Comcast Corporation, NBC Universal and the African American Leadership Organizations (MOU). The stated purpose of the MOU is “to enhance the policies and programs by which African Americans may realize greater participation in the five focus areas [(corporate governance, employment/workforce recruitment and retention, procurement, programming, and philanthropy and community investment)] and identify and pursue actions by which the National African American Leadership Organizations can support the growth of Comcast and NBCU’s business within the African American consumer market.” *Id.* at 4493.

⁶¹ Answer at 11; Gaiski Decl. at para. 30.

⁶² Answer at 11; Gaiski Decl. at para. 30.

⁶³ Answer at 11.

⁶⁴ Complaint at 18; Answer at 8.

⁶⁵ Answer at 11; Gaiski Decl. at para. 31.

⁶⁶ Complaint at 8 and Exh. 5; Answer at 12. A pre-filing notice is required for complaints filed under the program carriage rules but is not required for complaints filed pursuant to the exclusivity and unfair practices conditions of the *Comcast-NBCU Order*. See 47 CFR § 76.1302(b) (“Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in §76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.”).

⁶⁷ Complaint at Exh. 5.

⁶⁸ *Id.* at 8 and Exh. 6; Answer at 12.

rights to TWN's programming.⁶⁹ Comcast responded to this notice on May 26, 2017.⁷⁰ On June 8, 2017, TWN filed a complaint against Comcast with the Commission which alleged, among other things, violations of the *Comcast-NBCU Order's* exclusivity and unfair practices conditions.

III. DISCUSSION

A. Alleged Violation of Exclusivity Condition

16. We conclude that TWN has failed to establish a *prima facie* case of a violation of the exclusivity condition set forth in the *Comcast-NBCU Order*.⁷¹ Section IV(B)(3) of the exclusivity condition prohibits Comcast from “enter[ing] into or enforc[ing] any agreement or arrangement for carriage on Comcast’s MVPD system that forbids, limits, or creates incentives to limit a broadcast network or cable programmer’s provision of its Video Programming to one or more OVDs,” unless one of three limited exceptions applies.⁷² A demand by Comcast for non-exclusive digital rights would not violate the exclusivity condition.

17. A claim alleging that Comcast violated the exclusivity condition of the *Comcast-NBCU Order* is analogous to a claim alleging that an MVPD violated the exclusivity prohibition of the Commission’s program carriage rules.⁷³ Under the program carriage rules, a complaint alleging a violation of the exclusivity prohibition must be supported by documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that “supports the claim” that an MVPD coerced a programmer to provide exclusive rights.⁷⁴ The Commission has explained that this threshold requirement “ensure[s] that only legitimate complaints proceed to further evidentiary proceedings.”⁷⁵ Similarly, in seeking to establish a *prima facie* case of a violation of the exclusivity condition of the *Comcast-NBCU Order*, we would expect a complainant to provide documentary evidence or testimonial evidence (supported by an affidavit or declaration under penalty of perjury) that “supports the claim” that Comcast either demanded exclusivity or “enter[ed] into or enforc[ed]” an exclusive

⁶⁹ Complaint at 8 and Exh. 7; Answer at 12.

⁷⁰ Complaint at 8 and Exh. 8; Answer at 12.

⁷¹ The Commission has made clear that “the Media Bureau’s determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only.” *Revision of the Commission’s Program Carriage Rules*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11506, para. 17 (2011) (*2011 Program Carriage Order*).

⁷² *Comcast-NBCU Order*, 26 FCC Rcd at 4361, Appx. A, Sec. IV(B)(3). Under the exceptions to the exclusivity condition, Comcast is not prohibited from entering into and enforcing an agreement or arrangement (1) “under which a C-NBCU Programmer discourages or prohibits a broadcast network or cable programmer from making Video Programming, for which a C-NBCU programmer has agreed to pay, available to consumers for free over the Internet within the first 30 days after a C-NBCU Programmer first distributes the Video Programming to consumers”; (2) “under which the broadcast network or cable programmer provides Video Programming exclusively to a C-NBCU Programmer, and to no other MVPD or OVD, for a period of time of not greater than 14 days”; or (3) “which requires that a C-NBCU Programmer is treated in material parity with other similarly situated MVPDs with respect to price and non-price terms, except to the extent application of other MVPDs’ non-price terms would frustrate the purpose of [the *Comcast-NBCU Order*].” *Id.* TWN asserts that none of the exceptions to the exclusivity condition are present because Comcast did not propose to pay for TWN’s digital rights, propose an exclusivity arrangement limited to 14 days, or request that Comcast be treated in material parity with a similarly situated MVPD. Complaint at 41.

⁷³ 47 CFR § 76.1301(b).

⁷⁴ *Id.* § 76.1302(d)(3)(ii).

⁷⁵ *2011 Program Carriage Order*, 26 FCC Rcd at 11502, para. 10.

arrangement. As explained below, TWN has failed to do so.

18. To support its claim that Comcast demanded exclusive digital rights in violation of the exclusivity condition, TWN provides a Declaration under penalty of perjury from Mr. Adell. This Declaration, however, not only fails to support the claim that Comcast demanded exclusive digital rights, it undermines the claim. In Mr. Adell's Declaration, he states that "Ms. Gaiski also demanded exclusive control over TWN's digital rights at this meeting."⁷⁶ The phrase "exclusive control" is not defined in the complaint or in Mr. Adell's Declaration. Mr. Adell's Declaration clarifies the meaning of the phrase when he subsequently states that "Comcast terminated negotiations and informed me that its policy is to not carry a network unless it grants Comcast its digital rights."⁷⁷ There is no mention in this statement of exclusive digital rights. In addition, Comcast's alleged statement that "its policy is to not carry a network unless it grants Comcast its digital rights" makes sense only if the reference to "digital rights" means non-exclusive rights. This is because there is no evidence that Comcast has exclusive digital rights to any of the networks it carries. Indeed, Comcast has committed to refrain from demanding exclusive digital rights from programmers.⁷⁸ A demand by Comcast for non-exclusive digital rights would not violate the exclusivity condition.⁷⁹ Mr. Adell continues with "I reiterated that TWN would not part with its exclusive worldwide rights, as TWN uses them as part of its business model. In response, Comcast refused to negotiate any further, making it obvious that negotiations would not proceed until TWN agreed to grant Comcast its online digital rights."⁸⁰ This statement reflects TWN's concern that any demand for its digital rights, including on a non-exclusive basis, would preclude TWN from keeping exclusive digital

⁷⁶ Adell Decl. at para. 32.

⁷⁷ *Id.* at para. 35.

⁷⁸ See *Comcast/NBCU Order*, 26 FCC Rcd at 4266, para. 69 (citing Statement of Brian L. Roberts, Chairman and Chief Executive Officer, Hearing on An Examination of the Proposed Combination of Comcast and NBC Universal before the House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Serial No. 111-94 (Feb. 4, 2010), at 106 (responding to question from Rep. Peter Welch) ("Mr. WELCH. . . . Are you going to be asking, you Comcast, asking independent programmers to sign exclusivity deals with you or with your TV Everywhere partners? Mr. ROBERTS. Absolutely not.") ("Roberts Statement"). See also Roberts Statement at 117 (written response to questions from Rep. Waxman) ("Comcast does not ask its programming suppliers (whether for cable carriage or for distribution on VOD or Online) for exclusive rights to carry their programming. Of course, the industry commonly utilizes timing 'windows' for content, like advertising-supported, subscription, and pay-per-view windows, that govern when and how different types of content are available to consumers. Within this context, programmers who sell to Comcast remain free to sell to anyone else they want, on any distribution channel."). We further note that MVPDs such as Comcast make video programming available to their subscribers online through their TV Everywhere offerings. *Annual Assessment of the Statues of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 591, para. 56 (2017) (*Eighteenth Annual Competition Report*). The Commission noted in approving the Comcast-NBCU merger that "the TV Everywhere principles, which Comcast helped develop and espouses, provide that 'TV Everywhere is open and non-exclusive; cable, satellite or telco video distributors can enter into similar arrangements with other programmers.'" *Comcast/NBCU Order*, 26 FCC Rcd at 4267 n.158.

⁷⁹ We note that Comcast denies that it demanded either exclusive or non-exclusive digital rights from TWN. See *supra* para. 11.

⁸⁰ Adell Decl. at para. 35.

rights to itself.⁸¹ This statement does not support a claim that Comcast demanded exclusive digital rights.

19. Even beyond Mr. Adell's Declaration,⁸² the allegations in the text of TWN's complaint are vague and inconsistent as to whether Comcast demanded exclusive digital rights or non-exclusive digital rights. As an initial matter, we find it telling that, as noted above, TWN made no mention of a demand by Comcast for digital rights, much less exclusive digital rights, in its February 6, 2017 pre-filing notice to Comcast (i.e., the notice it was required to provide to Comcast prior to filing the complaint with the Commission).⁸³ TWN raised its allegation that Comcast had demanded exclusive digital rights for the first time more than three months later, in its May 19, 2017 supplemental notice to Comcast of its intent to file a complaint.⁸⁴ In the complaint, TWN alleges that "Comcast violated [the exclusivity] provision when it demanded, during the November 22 meeting, that TWN relinquish certain digital rights as a condition of carriage on Comcast's linear system."⁸⁵ Notably, this allegation makes no mention of exclusive digital rights. TWN references a demand by Comcast for "exclusive digital rights" only when making allegations, and not always then,⁸⁶ but never when describing the facts underlying the complaint. For example, in describing the November 22 meeting in the Complaint's Statement of Facts, TWN makes no reference to a demand by Comcast for exclusive digital rights:

Instead of engaging with Mr. Adell during his attempts to negotiate a revocation of Ms. Gaiski's letter, Ms. Gaiski instead inquired about TWN's online distribution rights, an unrelated matter in which Comcast had not previously expressed interest. Mr. Adell responded that TWN streams its content through TWN's website and does not license it to any distributor. Comcast informed TWN that its policy is to not carry a video programming vendor unless the video programming vendor grants Comcast its digital rights. TWN reiterated that it would not part with its exclusive worldwide rights, as TWN uses them as part of its business model. In response, Comcast refused to negotiate

⁸¹ The Commission has explained that it is commonplace for MVPDs to obtain digital rights to programming for their own online platforms. *See Eighteenth Annual Competition Report*, 32 FCC Rcd at 591, para. 56 ("MVPDs have responded to the perceived competition from OVDs by negotiating for online distribution rights for their traditional programming services" and "use their TV Everywhere offerings to differentiate their products."). TWN, however, takes a different approach in that it retains exclusive digital rights to its programming and has not licensed it to any other distributor. Adell Decl. at 32.

⁸² While certain statements in the text of the complaint reference a demand by Comcast for "exclusive digital rights," these statements are supported only by a verification, not by an affidavit or declaration under penalty of perjury, and thus fail to provide support for the claim that Comcast demanded exclusive digital rights. *See* Complaint, Verification of Kevin Adell. *See also supra* para. 17.

⁸³ Complaint at Exh. 5.

⁸⁴ *Id.* at Exh. 7.

⁸⁵ *Id.* at 41.

⁸⁶ *Compare* Complaint at 6-7 ("Giving *exclusive* rights as Comcast insisted would damage, if not entirely foreclose, TWN's online presence and make it more difficult to maintain and expand video programming with other MVPDs.... Granting Comcast *exclusive* digital rights, for example, would entirely prohibit TWN from continuing its thriving digital distribution service to consumers throughout the world via its website.") (emphasis added); at 40 ("Comcast informed TWN that its policy is to not carry a video programming vendor unless the video programming vendor grants Comcast its digital rights, and it refused to negotiate with TWN for the reversal of its decision to slash TWN's distribution unless TWN granted Comcast *exclusive* digital rights. TWN reiterated that it would not part with its exclusive world-wide digital rights, as TWN uses them as part of its business model. In response, Comcast refused to negotiate any further, making it obvious that negotiations would not proceed until TWN agreed to grant Comcast *exclusive* online digital rights.") (emphasis added), *with* Complaint at 41 ("Comcast's refusal to negotiate with TWN for expanded linear distribution unless TWN first agreed to relinquish *certain of its digital rights* constitutes a unilateral arrangement for carriage on Comcast's MVPD system.") (emphasis added).

any further, making it obvious that negotiations would not proceed until TWN agreed to grant Comcast its online digital rights.⁸⁷

Indeed, TWN does not even allege here that Comcast *demand*ed digital rights; rather, it states that Ms. Gaiski merely *inquired about* TWN's online distribution rights. This description of the meeting also appears to reflect TWN's concern that it did not want to part with its exclusive digital rights, not that Comcast demanded exclusive digital rights.⁸⁸ Additionally, in its request for relief to the Media Bureau, TWN states that "the Media Bureau should find that Comcast unlawfully demanded that TWN relinquish its digital rights as a condition of carriage in violation of Condition IV(B)(3) ... of the *Comcast-NBCU Order*."⁸⁹ Thus, TWN does not ask the Bureau to find that Comcast demanded exclusive digital rights in violation of the exclusivity condition and, as discussed above, a demand for non-exclusive digital rights would not violate the exclusivity condition.

20. TWN's failure to support its claim that Comcast demanded exclusive digital rights is not surprising given the restrictions imposed on Comcast by the exclusivity condition. Because the exclusivity condition prohibits Comcast from "enter[ing] into or enforc[ing]" an agreement for exclusive digital rights, any successful demand by Comcast for exclusive digital rights from a programmer would violate the exclusivity condition when Comcast "enter[s] into" an agreement reflecting those rights or when it attempts to "enforce" those rights, subjecting Comcast to possible forfeitures and other remedial action.⁹⁰ To be sure, if a programmer acquiesces to Comcast's demand for exclusive digital rights in order to obtain carriage of its network, the programmer might not be expected to file a complaint with the Commission. In that case, however, a complaint challenging the exclusive arrangement might nonetheless be filed by an aggrieved distributor (MVPD/OVD) that cannot obtain access to the digital rights. Indeed, the justification for the exclusivity condition in the *Comcast-NBCU Order* focuses on the need to protect competing distributors based on the view that competing distributors might be harmed if Comcast were able to enter exclusivity arrangements for desirable third party programming thereby denying that programming to other distributors.⁹¹ Furthermore, an exclusive arrangement with TWN would be easily discoverable by other OVDs and MVPDs if, for example, an OVD or MVPD became aware that Comcast was distributing TWN's programming online and the competing OVD or MVPD sought similar rights and was rebuffed.

21. We decline TWN's suggestion that the Bureau designate this case for a hearing on the factual disputes.⁹² Consistent with the Commission's established policy of "ensuring that only legitimate complaints proceed to a hearing,"⁹³ and given the time and expense of a hearing, we decline to subject the parties to a hearing in light of TWN's failure to establish a *prima facie* case. Accordingly, we dismiss the complaint with respect to this allegation.

⁸⁷ *Id.* at 15-16 (footnotes omitted). TWN's subsequent description of the November 22 meeting similarly did not allege that Comcast demanded *exclusive* digital rights. *Id.* at 39-40 ("Instead of engaging with Mr. Adell during his attempts to negotiate a revocation of Ms. Gaiski's letter, Ms. Gaiski asked about TWN's online distribution rights, an unrelated matter in which Comcast had not previously expressed interest. Mr. Adell responded that TWN streams its content through TWN's website and has not licensed it, or provided any rights to, any other distributor.").

⁸⁸ *See supra* para. 18.

⁸⁹ Complaint at 46.

⁹⁰ *See Comcast-NBCU Order*, 26 FCC Rcd at 4381, Appx. A, Sec. XVIII ("Any violation of these Conditions shall be a violation of the Order.").

⁹¹ *Id.* at 4267, para. 73.

⁹² *See Reply* at 35.

⁹³ *2011 Program Carriage Order*, 26 FCC Rcd at 11502, para. 10.

B. Alleged Violation of Unfair Practices Condition

22. We also conclude that TWN has failed to establish a *prima facie* case of a violation of the unfair practices condition set forth in the *Comcast-NBCU Order*.⁹⁴ Section IV(G)(1)(a) of the unfair practices condition prohibits Comcast from “engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any MVPD or OVD from providing Video Programming online to subscribers or consumers.”⁹⁵ TWN contends that distribution by Comcast is necessary to a programming network’s viability and that by refusing to negotiate for broad distribution unless TWN gave Comcast its digital rights, Comcast unfairly restricted TWN from access to Comcast subscribers.⁹⁶ TWN further asserts that Comcast’s refusal to negotiate for carriage unless TWN grants Comcast digital rights is an unfair practice that limits TWN’s exclusive digital rights to its programming.⁹⁷ TWN states that if Comcast usurps some of TWN’s exclusive video content, TWN’s ability to license those rights to other OVDs is diminished.⁹⁸

23. In order to establish a violation of the unfair practices condition, a complainant must demonstrate that the “purpose or effect” of the conduct at issue is to “hinder significantly or prevent any MVPD or OVD from providing Video Programming online to subscribers or consumers.”⁹⁹ The prohibition on unfair practices set forth in Section 628(b) of the Communications Act, as amended (Act), contains language that is substantially similar to the unfair practices condition in the *Comcast-NBCU Order*.¹⁰⁰ In adopting rules to implement Section 628(b), the Commission stated that “the complainant must show that its ability to distribute programming to customers has been hampered in some fashion” and asserted that its “analysis of the hindrance in the context of an alleged unfair practice will focus on whether the purpose or effect of the practice was to hinder or harm the complainant relative to its competitors.”¹⁰¹ Because the language in Section 628(b) of the Act and in the unfair practices condition is substantially similar, we apply this same analysis to complaints brought under the unfair practices condition of the *Comcast-NBCU Order*.

24. TWN in its request for relief states that “the Media Bureau should find that Comcast unlawfully demanded that TWN relinquish its digital rights as a condition of carriage in violation of ...

⁹⁴ Complaint at 42.

⁹⁵ *Comcast-NBCU Order*, 26 FCC Rcd at 4363, Appx. A, Sec. IV(G)(1)(a).

⁹⁶ Complaint at 42.

⁹⁷ *Id.*

⁹⁸ *Id.* at 42-43.

⁹⁹ *Comcast-NBCU Order*, 26 FCC Rcd at 4363, Appx. A, Sec. IV(G)(1)(a).

¹⁰⁰ 47 U.S.C. § 548(b) (“It shall be unlawful for a cable operator, a satellite cable programming vendor in which the cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”).

¹⁰¹ *Implementation of Sections 12 and 18 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3374, para. 41 & n.26. See also *AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 13206, 13242, para. 45 (MB 2011) (“[W]e believe this precedent establishes that the salient issue in assessing ‘significant hindrance’ is whether an MVPD has been hindered relative to its competitors and whether the hindrance is substantial enough to eliminate the MVPD as a competitive choice for a meaningful number of customers.”).

Condition IV(G)(1)(a) of the *Comcast-NBCU Order*.¹⁰² Thus, TWN does not even request that the Bureau find that Comcast demanded exclusive digital rights to TWN's programming in order to find a violation of the unfair practices condition. Even if the complaint could be read to make such a request, however, as we explain above, TWN has not established a *prima facie* case that Comcast demanded exclusive digital rights to TWN's programming.¹⁰³ Accordingly, we need not and do not address whether a demand for exclusive digital rights violates the unfair practices condition.

25. In addition, even assuming that Comcast raised the issue of non-exclusive digital rights to TWN's programming, we conclude that TWN has failed to establish a *prima facie* case that a demand for non-exclusive digital rights has the purpose or effect of significantly hindering or preventing TWN from providing Video Programming online to subscribers or consumers in violation of the unfair practices condition.¹⁰⁴ As an initial matter, providing Comcast with non-exclusive digital rights to TWN's programming does not hinder or prevent TWN from continuing to provide Video Programming online to its subscribers or consumers. Nor does TWN offer any evidence that providing Comcast with non-exclusive digital rights would hinder or harm TWN relative to its competitors. For example, TWN does not assert that its competitors have retained the exclusive right to distribute their programming or demonstrate that TWN would be harmed vis-à-vis these competitors if it did not retain exclusive rights to distribute its programming. Arrangements involving non-exclusive digital rights are common in the marketplace.¹⁰⁵ For these reasons, we conclude the TWN has failed to establish a *prima facie* case that Comcast violated the unfair practices condition of the *Comcast-NBCU Order*. Therefore, we dismiss this aspect of its complaint.

IV. ORDERING CLAUSE

26. 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), and the exclusivity and unfair

¹⁰² Complaint at 46.

¹⁰³ See *supra* para. 18.

¹⁰⁴ *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*, First Report and Order, 8 FCC Rcd 3359, 3363 para. 12 (1993) (a complaint alleging a violation of the unfair practices provision of Section 628(b) "will not go forward unless the complainant makes a threshold showing of harm").

¹⁰⁵ See *supra* note 78.

practices conditions set forth in the *Comcast-NBCU Order*, the above-captioned complaint is **DISMISSED** to the extent indicated herein. This action is taken pursuant to the authority delegated to the Media Bureau in Section 0.283 of the Commission's rules, 47 CFR § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief
Media Bureau