

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

In the Matter of	)	
	)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	
	)	CSR-8972-P
v.	)	
	)	
Comcast Cable Communications, LLC and	)	
Comcast Corporation,	)	
Defendants	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 1, 2019**

**Released: July 2, 2019**

By the Chief, Media Bureau

**I. INTRODUCTION**

1. By this Memorandum Opinion and Order, we dismiss in part and deny in part the December 3, 2018 program carriage complaint (Second Complaint) filed by beIN Sports, LLC (beIN Sports)<sup>1</sup> against Comcast Corporation and Comcast Cable Communications, LLC (collectively, Comcast) in the above-captioned proceeding.

2. beIN Sports, a video programming vendor (VPV), alleges that Comcast, a vertically integrated multichannel video programming distributor (MVPD), discriminated “on the basis of affiliation or nonaffiliation” in the selection, terms, and conditions of carriage of two beIN Sports networks, beIN en Español (beIN-E) and beIN, in violation of section 616 of the Communications Act of 1934, as amended (the Act),<sup>2</sup> section 76.1301(c) of the Commission’s rules,<sup>3</sup> the Commission’s order approving Comcast’s acquisition of NBCUniversal (NBCU), and the Comcast-NBCU conditions.<sup>4</sup>

3. After reviewing the Second Complaint, we make the following findings. First, we find that beIN Sports failed to make a *prima facie* case of discrimination with regard to beIN-E because we conclude that beIN-E and Comcast-affiliated VPV Universo are not “similarly situated.” Second, we find that beIN Sports established a *prima facie* case of discrimination for beIN. Upon examining the merits of the case, however, we conclude that, although beIN is “similarly situated” to Comcast-affiliated VPV NBC Sports Network (NBCSN) and treated differently than NBCSN, Comcast did not discriminate on the basis of affiliation or non-affiliation. Based on these findings, there is, by definition, no violation of the Comcast-NBCU conditions. Accordingly, we dismiss beIN Sports’s Second Complaint with prejudice as to beIN-E and deny the Second Complaint as to beIN.

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<sup>1</sup> Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P (filed Dec. 13, 2018) (Second Complaint).

<sup>2</sup> 47 U.S.C. § 536(a)(3).

<sup>3</sup> 47 CFR § 76.1301(c).

<sup>4</sup> *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4287, 4358, para. 121, Appx. A, Sec. III (1) (2011) (*Comcast-NBCU Order*).

## II. BACKGROUND

4. *Commission Program Carriage and Pleading Rules.* Section 616 of the Act<sup>5</sup> directs the Commission to establish rules governing program carriage agreements and related practices between cable operators or other MVPDs and VPVs.<sup>6</sup> Among other provisions, the Act requires that the program carriage rules

prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated [VPV] to compete fairly by discriminating in video programming distribution on the basis of affiliation or non[-]affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.<sup>7</sup>

Section 76.1301(c) of the Commission's rules contains language essentially identical to section 616.<sup>8</sup> In addition, section 76.1302 of the Commission's rules establishes procedures for the review of program carriage complaints and sets forth the contents required therein.<sup>9</sup> A review of program carriage complaints is a two-step process: (1) an initial *prima facie* determination by the Media Bureau (Bureau) and (2) if necessary, a decision on the merits by an adjudicator, *i.e.*, either the Bureau or an Administrative Law Judge (ALJ).<sup>10</sup>

5. A complainant VPV carries the burden of proof to establish a *prima facie* case of discrimination in violation of section 76.1301 based on the evidence presented in its program carriage complaint.<sup>11</sup> Thus, in evaluating whether a complainant has established a *prima facie* case, the Bureau examines only the evidence presented in the complaint and does not consider any subsequent evidence or responsive filings. In order to establish a *prima facie* case of discrimination based on circumstantial evidence,<sup>12</sup> of the sort alleged here, a complainant must provide evidence that: (1) the complainant is a VPV as defined in section 616(b) of the Act and section 76.1300(e) of the Commission's rules;<sup>13</sup> (2) the defendant is an MVPD as defined in section 602(13) of the Act and section 76.1300(d) of the Commission's rules;<sup>14</sup> (3) the complainant is similarly situated to a VPV affiliated with the defendant, as

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<sup>5</sup> 47 U.S.C. § 536.

<sup>6</sup> *See id.* § 536(a).

<sup>7</sup> *See id.* § 536(a)(3).

<sup>8</sup> 47 CFR § 76.1301(c).

<sup>9</sup> *See generally id.* § 76.1302; *id.* § 76.1302(c).

<sup>10</sup> *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, First Report and Order, 8 FCC Rcd 3359, 3365, para. 17 (1993) (*1993 Program Carriage First R&O*); *see also Revision of the Commission's Program Carriage Rules*, MB Docket No. 07-42, Second Report and Order, 26 FCC Rcd 11494, 11504, para. 20, n.74 (2011) (*2011 Program Carriage Order*) (“[a] potential third step applies to the extent a party appeals the decision of the Bureau or an ALJ to the Commission” (citing 47 CFR §§ 1.115, 76.10(c)(1) (addressing Applications for Review of actions taken on delegated authority)); 47 CFR §§ 1.276, 76.10(c)(2) (addressing appeals of initial decisions of an ALJ)).

<sup>11</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642, 2654, paras. 23-24 (1993) (*1993 Program Carriage Second R&O*).

<sup>12</sup> Based on our reading of the Second Complaint, beIN Sports seeks to prove its discrimination claim through circumstantial rather than direct evidence. *2011 Program Carriage Order*, 26 FCC Rcd at 11504, paras. 14-15 (2011).

<sup>13</sup> 47 U.S.C. § 536(b); 47 CFR § 76.1302(d)(1); *id.* § 76.1300(e).

<sup>14</sup> 47 U.S.C. § 522(13); 47 CFR § 76.1302(d)(2); *id.* § 76.1300(d).

indicated by a combination of factors, including genre, ratings, license fee, target audience, target advertisers, target programming, and other factors;<sup>15</sup> (4) the defendant has treated the complainant differently from its similarly situated, affiliated VPV with respect to the selection, terms, or conditions for carriage;<sup>16</sup> and (5) the defendant's discriminatory conduct has the effect of unreasonably restraining the ability of the complainant to compete fairly.<sup>17</sup> With regard to the third factor, a complainant must provide evidence that the defendant is in fact "affiliated" with the similarly situated VPV at issue, i.e., that the defendant has an attributable interest in the similarly situated, affiliated VPV.<sup>18</sup> In its case-by-case assessment of whether a complaint contains sufficient evidence at the *prima facie* stage to establish that the effect of a defendant MVPD's conduct is to restrain unreasonably the ability of the complainant VPV to compete fairly under factor five, the Bureau considers "the impact of the defendant MVPD's adverse carriage action on the [complainant VPV]'s subscribership, licensee fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale."<sup>19</sup>

6. If the Bureau finds that a complainant VPV has not made a *prima facie* showing of a violation of the program carriage rules, the Bureau will dismiss the complaint.<sup>20</sup> If, however, the Bureau finds that the VPV has made a *prima facie* showing, the complaint may proceed to a ruling on the merits.<sup>21</sup> Then, the Bureau will determine whether the MVPD has discriminated against an unaffiliated VPV in the manner described in section 616 of the Act and, in so doing, will assess whether it can make a decision on the merits based on the complaint, answer, and reply or "whether further investigation is required."<sup>22</sup> If further investigation is required, staff has the discretion to require the submission of further information or, where appropriate, to allow discovery and/or to designate the complaint for hearing before an ALJ.<sup>23</sup>

7. Section 616 of the Act prohibits discrimination only "on the basis of affiliation or nonaffiliation."<sup>24</sup> There is no violation of the Act or the Commission's rules if an MVPD treats a non-affiliated VPV differently based on a "reasonable business purpose[,] obviously excluding any purpose to

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<sup>15</sup> 47 CFR § 76.1302(d)(3)(iii)(B)(2)(i).

<sup>16</sup> *Id.* § 76.1302(d)(3)(iii)(B)(2)(ii).

<sup>17</sup> *Id.* § 76.1302(d)(3)(iii)(A).

<sup>18</sup> See *1993 Program Carriage Second R&O*, 9 FCC Rcd at 2654, para. 29; 47 CFR § 76.1300(b).

<sup>19</sup> *2011 Program Carriage Order*, 26 FCC Rcd at 11506, para. 15, n.60 (citing *Tennis Channel, Inc., Complainant, v. Comcast Cable Communications, LLC, Defendant*, MB Docket No. 10-204, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149, 14161-62, paras. 20-21 (MB 2010); *Herring Broadcasting, Inc., d/b/a/ WealthTV, Complainant, et al., v. Cox Communications, Inc., Defendant, et al.*, DA 08-2269, Hearing Designation Order, 23 FCC Rcd 14787, 14798, 14802, 14807-08, 14812-13, 14823-25, 14836, paras. 19, 29-31, 41-42, 53-54, 77-78, 110 (MB 2008) (*WealthTV*); *TCR Sports Broadcasting, L.L.P., d/b/a Mid-Atlantic Sports Network, Complainant, v. Comcast Corporation, Defendant*, MB Docket No. 06-148, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8993-94, para. 11 (2006)).

<sup>20</sup> See 47 CFR § 76.1302(g)(4).

<sup>21</sup> See *id.* § 76.1302(g)(3).

<sup>22</sup> See *id.* § 76.1302(i); *1993 Program Carriage First R&O*, 8 FCC Rcd at 3365, para. 17.

<sup>23</sup> See *id.* The Bureau will refer a program carriage proceeding or discrete issues arising in the proceeding for an adjudicatory hearing before an ALJ if the Bureau determines that the complainant has made a *prima facie* showing but the disposition of the complaint or discrete issues raised in the complaint will require resolution of factual disputes in an adjudicatory hearing or extensive discovery. *2011 Program Carriage Order*, 26 FCC Rcd at 11499, para. 6, n.26 (citing *1993 Program Carriage Second R&O*, 9 FCC Rcd at 2652, 2656, paras. 24, 34); see, e.g., *WealthTV*, 23 FCC Rcd at 14828-29, para. 89 (finding that the NFL had presented sufficient evidence to make a *prima facie* showing that Comcast indirectly and improperly demanded a financial interest in the NFL's

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illegitimately hobble competition” from the non-affiliated VPV.<sup>25</sup> As the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) has found, differential treatment of a non-affiliated VPV is not discriminatory if a defendant MVPD will receive no commercial benefit from carriage of the complainant VPV’s programming.<sup>26</sup>

8. *Comcast-NBCU Order*. When the Commission approved Comcast’s acquisition of NBC Universal on January 20, 2011, it imposed certain conditions addressing carriage of unaffiliated video programming. Among other conditions, the *Comcast-NBCU Order* prohibited Comcast from discriminating against unaffiliated VPVs based on affiliation or non-affiliation in the selection, price, terms, or conditions of carriage.<sup>27</sup> Under the Comcast-NBCU conditions, a complainant VPV was required to prove all the elements of a *prima facie* case of discrimination established under the Commission’s rules pursuant to section 616 of the Act except the fifth element—i.e., that the complainant was unreasonably restrained from competing fairly.<sup>28</sup> The merits analysis would otherwise proceed as in any program carriage proceeding. The Comcast-NBCU conditions were to remain in effect for seven years following the date of the *Comcast-NBCU Order* and thus expired on January 20, 2018.<sup>29</sup>

9. *The Parties*. beIN Sports was incorporated in May 2012.<sup>30</sup> It is the owner of sports programming networks beIN-E and beIN, which are not affiliated with any MVPD. According to beIN Sports, it “primarily distributes top-flight European soccer, including games of the Spanish La Liga, French Ligue 1, as well as FIFA World Cup Qualifiers”<sup>31</sup> via its networks. In addition, beIN Sports programming “includes sports-related news and original programming, motor sports, college sports, rugby, track and field, combat sports, Conference USA football matches, and multiple boxing promotions.”<sup>32</sup> The programming of beIN and beIN-E is substantially similar except that beIN-E broadcasts entirely in Spanish.

10. Comcast is a cable operator, with 22.4 million video subscribers across the United States.<sup>33</sup> Comcast is also a vertically integrated video programming content provider, owning various broadcast and national cable networks, including Universo and NBCSN.<sup>34</sup> The Second Complaint describes Universo as “consist[ing] mostly of sports, scripted and reality series, and music

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programming in exchange for carriage and that the pleadings and documentation presented several factual disputes as to whether Comcast’s retiering of the NFL Network was the result of Comcast’s failure to obtain a financial interest in the NFL’s programming).

<sup>24</sup> 47 U.S.C. § 536(a)(3) (emphasis added).

<sup>25</sup> See *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) (citing *TCR Sports Broad. Holding, L.L.P. d/b/a/ Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099, 18115, para. 22 (2010), *pet. denied*, 679 F.3d 269 (4th Cir. 2012) (*TCR Sports*)) (*Tennis Channel Decision*).

<sup>26</sup> See *id.* at 987.

<sup>27</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4287, 4358, para. 121, Appx. A, Sec. III (1).

<sup>28</sup> See *id.* at 4287, 4358-59, para. 121, Appx. A, Sec. III (1, 4)

<sup>29</sup> *Id.* at 4381, Appx. A § XX (stating that “[e]xcept as expressly stated, these Conditions shall remain in effect for seven years following the date of [the *Comcast-NBCU Order*]”).

<sup>30</sup> Second Complaint at 9, para. 20.

<sup>31</sup> *Id.* at 9, para. 17.

<sup>32</sup> *Id.* at 9, para. 18.

<sup>33</sup> *Id.* at 10-11, para. 24.

<sup>34</sup> *Id.* at 10-11, para. 24.

programming.”<sup>35</sup> It characterizes NBCSN as “a national sports cable network that carries basketball, professional and college American football, soccer, hockey, motor sports, and golf among many other sports events,” with marquee events including the Summer and Winter Olympics, soccer’s English Premier League, PGA, NFL, NBA, NHL, IAAF World Championships, and the Six Nations Championship.<sup>36</sup>

11. *Past Carriage and Negotiations.* beIN Sports was initially granted carriage on Comcast’s systems from August 2012 to [REDACTED].<sup>37</sup> The initial carriage agreement between the parties gave Comcast [REDACTED].<sup>38</sup> The agreement also specified that beIN-E was to be carried on Comcast’s XFINITY Latino Package (Latino Tier) for \$9.99 a month and that beIN and beIN-E were to be carried on Comcast’s Sports and Entertainment Package (SEP Tier) for \$4.99 a month, with each tier price to be paid in addition to the price of a basic cable subscription.<sup>39</sup> According to beIN Sports, the two networks reached [REDACTED].<sup>40</sup> Comcast carries its affiliated networks on more highly penetrated tiers, with Universo on Comcast’s Preferred Tier or, in some areas, on the Starter Tier and NBCSN carried on Comcast’s Starter Tier.<sup>41</sup>

12. On April 11, 2017, beIN Sports submitted a renewal proposal to Comcast [REDACTED].<sup>42</sup> On December 13, 2017, Comcast responded with a counteroffer that, among other terms, proposed [REDACTED].<sup>43</sup> On February 2, 2018, beIN Sports responded with a counterproposal.<sup>44</sup> On March 7, 2018, beIN Sports modified its counterproposal at Comcast’s invitation.<sup>45</sup> Comcast responded with a further proposal on July 28, 2018.<sup>46</sup> [REDACTED].<sup>47</sup> On July 31, 2018, the parties’ existing carriage agreement expired.<sup>48</sup> On August 1, 2018, Comcast ceased to carry beIN Sports networks<sup>49</sup> and advised subscribers of viewing alternatives.<sup>50</sup>

13. *Procedural History.* On March 15, 2018, beIN Sports filed with the Commission a program carriage complaint against Comcast, alleging that Comcast discriminated against beIN Sports in the selection, terms, and conditions for carriage of beIN-E and beIN (First Complaint).<sup>51</sup> Specifically,

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<sup>35</sup> Second Complaint at 11-12, para. 26 (internal quotations omitted).

<sup>36</sup> *Id.* at 11, para. 25.

<sup>37</sup> *Id.* at 19, para. 43.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 21-22, para. 46; *see id.* at Exh. 6 (Comcast’s Dec. 13, 2017 Offer)

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 22, para. 47; *see* Exh. 5 (beIN Sports’s Proposal).

<sup>43</sup> *Id.* at 24, para. 49; Exh. 6 (Comcast’s Dec. 13, 2017 Offer).

<sup>44</sup> *Id.* at 24-25, para. 50.

<sup>45</sup> *Id.* at 26, para. 52.

<sup>46</sup> *Id.* at 26-27, para. 53; Exh. 3 (beIN Sports’s Pre-Filing Notice to Comcast).

<sup>47</sup> *Id.* at 26-27, para. 53; Answer of Comcast Cable Communications, LLC and Comcast Corporation to Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P at 21-22, para. 23 (filed Feb. 11, 2019) (Answer). *See also* Reply of beIN Sports, LLC, to Answer of Comcast Cable Communications, LLC and Comcast Corporation to Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P, at 83-85, paras. 135-138 (filed May 6, 2019) (Reply).

<sup>48</sup> Second Complaint at Exh. 3 (beIN Sports’s Pre-Filing Notice to Comcast).

<sup>49</sup> *Id.* at Exh. 5 (beIN Sports’s Proposal).

beIN Sports alleged that Comcast violated section 616(a)(3) of the Act, section 76.1301(c) of the Commission's rules, the Commission's order approving Comcast's acquisition of NBCUniversal, and the Comcast-NBCU conditions.<sup>52</sup> On May 14, 2018, Comcast filed its answer to the First Complaint.<sup>53</sup> On June 4, 2018, beIN Sports filed its reply.<sup>54</sup> On August 2, 2018, the Bureau issued an order finding that beIN Sports had failed to establish a *prima facie* case of program carriage discrimination in the First Complaint and dismissed it without prejudice.<sup>55</sup> Specifically, the Bureau found that beIN Sports "failed to provide evidence sufficient to support its claim that the programming [beIN-E and beIN] would provide under the renewal agreement is similarly situated to the video programming provided by [Universo and NBCSN]" due to the "significant uncertainty about what programming would be provided by beIN Sports in a renewal agreement."<sup>56</sup> The Bureau particularly focused on [REDACTED].<sup>57</sup>

14. On October 10, 2018, beIN Sports submitted a new proposal to Comcast and [REDACTED].<sup>58</sup> However, [REDACTED], on December 3, 2018, beIN Sports [REDACTED] notified Comcast that it would file another program carriage complaint with the Commission.<sup>59</sup>

15. On December 13, 2018, beIN Sports filed its Second Complaint against Comcast,<sup>60</sup> alleging the same violations laid out in the First Complaint with additional information that beIN Sports claims addresses the deficiencies identified by the Bureau when it dismissed the First Complaint.<sup>61</sup> On February 11, 2019, Comcast filed its Answer to the Second Complaint.<sup>62</sup> On May 6, 2019, beIN Sports filed its Reply to Comcast's Answer to the Second Complaint.<sup>63</sup>

16. On February 5, 2019, beIN Sports filed its Third Complaint against Comcast, repeating some of the claims of the Second Complaint and including an additional allegation of unreasonable refusal to deal.<sup>64</sup> On February 15, 2019, Comcast filed a motion to strike the Third Complaint,<sup>65</sup> and beIN Sports filed an opposition to that motion on February 22, 2019.<sup>66</sup> On March 29, 2019, the Bureau dismissed the Third Complaint with prejudice, finding that, in filing the Third Complaint, beIN Sports failed to comply with the procedural requirements of the Commission's rules governing program carriage

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<sup>50</sup> *Id.* at 5, para. 3.

<sup>51</sup> Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-90, File No. CSR-8954-P (filed Mar. 15, 2018) (First Complaint).

<sup>52</sup> *See id.* at 1-2, paras. 1-2.

<sup>53</sup> Answer of Comcast Cable Communications, LLC and Comcast Corporation to Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-90, File No. CSR-8954-P (filed May 14, 2018) (beIN I Answer).

<sup>54</sup> Reply of beIN Sports, LLC, to Answer of Comcast Cable Communications, LLC and Comcast Corporation to Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-90, File No. CSR-8954-P (filed June 4, 2018) (beIN I Reply).

<sup>55</sup> *beIN Sports, LLC*, 33 FCC Rcd 7476, 7481, paras. 17-18 (MB 2018) (*beIN I MO&O*).

<sup>56</sup> *Id.* at 7480, paras. 13-14.

<sup>57</sup> *Id.* at 7480, para. 13, n.51.

<sup>58</sup> Second Complaint at 27, para. 56.

<sup>59</sup> *Id.* at 13-14, 27-28, paras. 31, 56-57.

<sup>60</sup> *See generally id.*

<sup>61</sup> *Id.* at 5-6, paras. 7, 9-10 (citing *beIN I MO&O*, 33 FCC Rcd at 7480, para. 13).

<sup>62</sup> *See generally* Answer.

<sup>63</sup> *See generally* Reply.

<sup>64</sup> Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB

(continued....)

complaints by submitting an additional pleading absent a request from the Bureau and failing to satisfy its obligation to present “extraordinary circumstances” that could permit the Bureau’s acceptance of an otherwise prohibited pleading.<sup>67</sup> On April 29, 2019, beIN Sports filed an application for review of the *Third Complaint Dismissal Order*.<sup>68</sup> On May 14, 2019, Comcast filed an opposition to beIN Sports’s Application for Review.<sup>69</sup> On May 24, 2019, beIN Sports filed its reply to Comcast’s opposition.<sup>70</sup> The Application for Review of the *Third Complaint Dismissal Order* remains pending before the Commission.

### III. DISCUSSION

17. As set forth below, we dismiss beIN Sports’s Second Complaint with prejudice as to beIN-E and deny the Second Complaint as to beIN. First, we conclude that beIN Sports did not demonstrate that beIN-E is “similarly situated” to Comcast-affiliated VPV Universo. Therefore, beIN Sports did not make a *prima facie* case of program carriage discrimination with respect to beIN-E. Next, we conclude that beIN Sports has established a *prima facie* case under the program carriage rules with respect to beIN. After reviewing the pleadings on the merits, however, we conclude that Comcast has demonstrated that its differential treatment of beIN arises from non-discriminatory, legitimate business reasons rather than discrimination on the basis of affiliation or non-affiliation. Finally, because we have found that beIN Sports did not establish a *prima facie* case of discrimination as to beIN-E and that Comcast did not discriminate on the basis of affiliation or non-affiliation with respect to beIN, there is, by definition, no violation of the Comcast-NBCU conditions.<sup>71</sup>

#### A. *Prima Facie* Determination

18. As an initial matter, we find that beIN Sports has satisfied the first two elements of a *prima facie* case of program carriage discrimination against Comcast with respect to both beIN-E and beIN.<sup>72</sup> Specifically, beIN Sports has provided sufficient evidence to establish that: (1) both beIN and

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Docket No. 18-384, File No. CSR-8972-P (filed Feb. 5, 2019) (Third Complaint) at 1, para. 1.

<sup>65</sup> Comcast Cable Communications, LLC and Comcast Corporation Motion to Strike, MB Docket No. 18-384, File No. CSR-8972-P (filed Feb. 15, 2019).

<sup>66</sup> beIN Sports, LLC Opposition to Motion to Strike, MB Docket No. 18-384, File No. CSR-8972-P (filed Feb. 22, 2019).

<sup>67</sup> *beIN Sports, LLC, Complainant, v. Comcast Cable Communications, LLC and Comcast Corporation*, MB Docket No. 18-384, Order, DA 19-234, para. 1 (MB 2019) (*Third Complaint Dismissal Order*).

<sup>68</sup> Application of beIN Sports, LLC, for Review of Dismissal of Third Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC, and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P (filed Apr. 29, 2019).

<sup>69</sup> Opposition of Comcast to Application of beIN Sports, LLC, for Review of Dismissal of Third Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC, and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P (filed May 14, 2019).

<sup>70</sup> Reply of beIN Sports, LLC, to Opposition of Comcast Cable Communications, LLC and Comcast Corporation to Application of beIN Sports, LLC, for Review of Dismissal of Third Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P (filed May 24, 2019).

<sup>71</sup> See *supra* para. 8. Because we find that beIN Sports did not establish a *prima facie* case of discrimination as to beIN-E and that Comcast did not discriminate on the basis of affiliation or non-affiliation with respect to beIN, we need not address Comcast’s arguments as to collateral estoppel or untimeliness of the Second Complaint. See Answer at 8-12, 48-49, paras. 9-13, 60.

<sup>72</sup> See *supra* para. 5 (setting forth the elements of a *prima facie* case of program carriage discrimination based on circumstantial evidence).

beIN-E are VPVs and (2) Comcast is an MVPD as defined by the Act and the Commission's rules and has an attributable interest in NBCSN and Universo, as defined in section 76.1300(b) of the Commission's rules.<sup>73</sup> The remainder of our *prima facie* analysis is set forth below.

### 1. beIN-E and Universo

19. On the third element of a *prima facie* case of program carriage discrimination with respect to beIN-E, we conclude that beIN Sports has failed to provide sufficient evidence that beIN-E and Universo are similarly situated. Notably, beIN-E and Universo are not, overall, of the same programming genre, a key factor in determining whether networks are similarly situated.<sup>74</sup> While sports programming is only one of several categories of programming that Universo offers, sports programming dominates beIN-E's line-up.<sup>75</sup> [REDACTED].<sup>76</sup> Thus, we find that the evidence put forth by beIN Sports in its complaint indicates that beIN-E is fundamentally a sports network, while Universo is an entertainment network that includes a small proportion of sports programming.

20. While beIN Sports highlights the similar ethnic backgrounds of the networks' target audiences,<sup>77</sup> this similarity likely stems from the fact that both beIN-E and Universo are Spanish-language networks rather than any similarity in the types of content they provide. beIN Sports also provides evidence that the two networks share some advertisers, but this evidence standing alone is insufficient.<sup>78</sup> Overall, we find that beIN Sports has failed to provide sufficient evidence to establish that the two networks are similarly situated.<sup>79</sup>

21. Because we find that beIN Sports has failed to provide sufficient evidence that beIN-E and Universo are similarly situated, we do not need to reach the additional elements of a *prima facie* case with respect to these VPVs. We note, however, that, in the alternative, even if beIN Sports had met its burden of establishing a *prima facie* case, we would nonetheless deny the Second Complaint as to beIN-E on the merits for the same reasons we deny the Second Complaint as to beIN, i.e., that the same legitimate, non-discriminatory business reasons apply to Comcast's decision not to carry beIN-E as apply to its decision not to carry beIN.<sup>80</sup>

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<sup>73</sup> See *supra* para. 9 (describing beIN Sports and its programming); para. 10 (describing Comcast and its programming); 47 CFR § 76.1300(b); Second Complaint at 10-11, para. 24.

<sup>74</sup> Second Complaint at 32-58, paras. 67-113.

<sup>75</sup> See *supra* para. 10 (noting that Universo's programming consists "mostly of sports, *scripted and reality series, and music programming*" (emphasis added)).

<sup>76</sup> See Second Complaint at 43, para. 84 & at Exh. 8 (Decl. of Antonio Briceño) at 8 (chart demonstrating that [REDACTED]). Moreover, although the Second Complaint shows that Universo has increased its soccer programming over time, soccer games remain a very small part of Universo's lineup; only [REDACTED] of Universo's total minutes of programming are live soccer programming, which is significantly less than the [REDACTED] of beIN-E's total minutes of programming that consist of soccer. See *id.*

<sup>77</sup> [REDACTED] of households viewing beIN-E and [REDACTED] of households viewing Universo are "led by some identifying as Hispanic." See *id.* at Exh. 8 (Decl. of Antonio Briceño) at 9, para. 24.

<sup>78</sup> *Id.* at Exh. 8 (Decl. of Antonio Briceño) at 14-17, paras. 36-41. See *2011 Program Carriage Order*, 26 FCC Rcd at 11506, para. 14 ("[I]t is unlikely that programming would be considered 'similarly situated' if only one of these factors is found to be similar.").

<sup>79</sup> See 47 CFR § 76.1302(d)(3)(iii)(B)(2)(i); see also *supra* para. 5 (stating that a "combination of factors, including genre, ratings, license fee, target audience, target advertisers, target programming, and other factors" are considered in determining whether a complainant is similarly situated to a VPV affiliated with the defendant).

<sup>80</sup> See *infra* paras. 26-29 (finding Comcast did not engage in discrimination on the basis of affiliation or non-affiliation in light of Comcast's legitimate and non-discriminatory business reasons for declining to carry the beIN Sports networks under beIN Sports's proposed terms).



**B. beIN and NBCSN**

22. *beIN and NBCSN Are Similarly Situated.* We find that beIN Sports has provided sufficient evidence in the Second Complaint that beIN and NBCSN are similarly situated on the basis of factors including genre, target programming, and target audience.<sup>81</sup> Most importantly, the networks share key similarities in genre and target programming. Both beIN and NBCSN are sports networks that televise, among other sports programming, matches featuring popular soccer leagues.<sup>82</sup> Specifically, the sports programming of beIN and NBCSN represents, respectively, [REDACTED].<sup>83</sup> Furthermore, upon the expiration of its program carriage agreement with beIN Sports, Comcast listed its own affiliated networks among the substitutes it suggested to subscribers interested in viewing soccer.<sup>84</sup> As beIN Sports notes, both networks' actual audiences also are similar in several respects. [REDACTED].<sup>85</sup>

23. *Comcast Has Treated beIN Differently than NBCSN.* We also find that beIN Sports has provided sufficient evidence that Comcast treated beIN differently than NBCSN. Specifically, [REDACTED].<sup>86</sup> Such placement on a higher-priced tier would naturally limit beIN to a smaller subscriber base.<sup>87</sup> beIN Sports also alleges that Comcast pays a higher fee to NBCSN than to beIN based on subscriber numbers.<sup>88</sup> In addition, beIN Sports cites as examples of discriminatory treatment: [REDACTED].<sup>89</sup>

24. *Comcast's Differential Treatment of beIN Has the Effect of Unreasonably Restraining beIN from Competing Fairly.* Finally, we find that beIN Sports has provided sufficient evidence that Comcast's differential treatment of beIN has the effect of unreasonably restraining beIN from competing fairly. beIN Sports alleges that Comcast's "discriminatory offer" has placed it in an "untenable" position due to the Most Favored Nation (MFN) obligations imposed by other MVPDs in the event that it accepted Comcast's offer, on the one hand, and the total loss of access to any Comcast packages, on the other hand.<sup>90</sup> Specifically, beIN Sports notes the following harms: [REDACTED].<sup>91</sup>

25. For these reasons, we conclude that beIN Sports has established a *prima facie* case of program carriage discrimination with respect to beIN and NBCSN.

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<sup>81</sup> See *supra* note 80 (listing factors we consider in determining whether a complainant is similarly situated to a VPV affiliated with the defendant).

<sup>82</sup> Second Complaint at 32, para. 68 (stating that the Bureau found "that two sports programs could be similarly situated, even though one is focused on golf and the other on American football") (citing *WealthTV*, 23 FCC Rcd at 14822-23, para. 75)).

<sup>83</sup> See *id.* at 43, para. 84 & at Exh. 8 at 8.

<sup>84</sup> *Id.* at 3, para. 4.

<sup>85</sup> *Id.* at 44, para. 86. beIN Sports also asserts that beIN and NBCSN share [REDACTED] advertisers in common. See *id.* at 56-57, para. 109.

<sup>86</sup> *Id.* at 59, para. 116.

<sup>87</sup> *Id.* at 59, para. 115. beIN Sports asserts that Comcast afforded beIN [REDACTED]. *Id.* at 21-22, para. 46 & Exh. 8 (Decl. of Antonio Briceño) at 8, para. 10.

<sup>88</sup> beIN Sports states that, [REDACTED]. *Id.* at 62-63, para. 124.

<sup>89</sup> *Id.* at 61-62, paras. 118, 121, & 122.

<sup>90</sup> *Id.* at 63, para. 126.

<sup>91</sup> *Id.* at 63-65, para. 126.

### C. Decision on the Merits

26. Having determined that beIN Sports has made a *prima facie* showing of a violation of the program carriage rules with respect to beIN and NBCSN, we next address the merits of beIN Sports's case. We conclude that the evidence provided in the written record, i.e., the Second Complaint, Answer, and Reply, is sufficient to proceed to a ruling on the merits without further investigation.<sup>92</sup> At the same time, we find that the record fails to show that Comcast discriminated against beIN on the basis of affiliation or non-affiliation.<sup>93</sup> Specifically, we find that Comcast has treated beIN differently than NBCSN not based on its lack of affiliation with Comcast, but rather based on non-discriminatory, legitimate business reasons—in this case, “a straight up financial analysis.”<sup>94</sup> We make this finding for two reasons: (1) there is no evidence that Comcast would benefit commercially from beIN's carriage;<sup>95</sup> and (2) Comcast has provided sufficient evidence to establish that it not only would derive no commercial benefit from beIN's carriage, but also could, in fact, suffer commercial harm from continued carriage of beIN.<sup>96</sup>

27. As the D.C. Circuit noted in the *Tennis Channel Decision*, a proposed increase in licensing fees is “itself a clear negative” in an MVPD's process of “deciding whether to carry a network and at what cost.”<sup>97</sup> As previously noted, beIN Sports's April 11, 2017 proposal<sup>98</sup> included [REDACTED] of [REDACTED],<sup>99</sup> which represents [REDACTED].<sup>100</sup> Even beIN Sports's February 2, 2018 counterproposal<sup>101</sup> [REDACTED] from the rate paid under the prior agreement.<sup>102</sup> As in the *Tennis Channel Decision*, where there was no affirmative evidence of the commercial benefits to Comcast of carrying Tennis Channel's programming, the record here does not persuade us that there are “corresponding benefits that would accrue to Comcast by accepting” beIN Sports' proposed terms or a “reason [for Comcast] to expect a net benefit”<sup>103</sup> from continuing to carry beIN Sports channels.<sup>104</sup> As Comcast notes, after dropping beIN-E and beIN, it lost approximately [REDACTED] of the approximately [REDACTED] million customers authorized to view the beIN Sports networks,

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<sup>92</sup> *1993 Program Carriage First R&O*, 8 FCC Rcd at 3389, para. 75 (“[W]e seek to dispose of as many complaint cases as possible on the basis of a complaint, answer and reply. Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint.”). beIN Sports asserts “that this complaint supplies the Bureau with ample information to allow the Bureau to not only make a *prima facie* determination but also to decide the case on the merits without discovery, and without need to refer the complaint to an administrative law judge.” Second Complaint at 9, para. 15. Similarly, Comcast argues that if the Second Complaint is decided on the merits, it can be done so based on the pleadings and that “no further pleadings are necessary.” See Answer at 40, para. 46. We agree and proceed to a decision on the merits as mentioned above.

<sup>93</sup> In previous orders, the Commission reserved decision on whether the burden shifts to the MVPD to prove that it acted on legitimate and non-discriminatory business reasons or, instead, the ultimate burden of proof (and thus the obligation to disprove any proffered business justification) remains on the complainant at all times. See *Game Show Network LLC v. Cablevision Systems Corp.*, 32 FCC Rcd 6160, 6180, n.163 (2017) (*Game Show Network MO&O*); *TCR Sports*, 25 FCC Rcd at 18105, para. 11. We again need not resolve that issue here because we find that the evidence supports Comcast's asserted business justifications no matter who bears the ultimate burden of proof.

<sup>94</sup> See *Tennis Channel Decision*, 717 F.3d at 987 (“Comcast also argued that the Commission could not lawfully find discrimination because Tennis offered no evidence that its rejected proposal would have afforded Comcast *any* benefit. If this is correct, as we conclude below, the Commission has nothing to refute Comcast's contention that its rejection of Tennis's proposal was simply ‘a straight up financial analysis,’ as one of its executives put it.”) (finding that non-discriminatory, legitimate business reasons may be used to justify disparate treatment of an unaffiliated programmer).

<sup>95</sup> See *supra* para. 7, notes 24-26 (stating that there is no violation of the Act or the Commission's rules if an MVPD treats a non-affiliated VPV differently based on a reasonable business purpose, such as if a defendant MVPD will receive no commercial benefit from carriage of the complainant VPV's programming).

<sup>96</sup> See *infra* para. 27 (noting that Comcast would save approximately [REDACTED] by declining to carry the beIN

(continued....)

accounting for about a [REDACTED] annual loss in margin.<sup>105</sup> Compared to the approximately [REDACTED] annual cost of carriage under the expired terms and the [REDACTED] annual cost of carriage under beIN Sports's proposed terms, this represents a savings of approximately [REDACTED] and [REDACTED], respectively. These numbers support Comcast's contention that it had already been overpaying for carriage of the beIN Sports networks under the expired terms of the program carriage agreement and that beIN Sports's proposal would be even more adverse to Comcast's business interest.<sup>106</sup> In light of the "clear negative" of an increased licensing fee,<sup>107</sup> the failure to demonstrate any "reason to expect a net benefit"<sup>108</sup> from Comcast's continued carriage of beIN on any of the terms proposed by beIN Sports persuades us that Comcast "made a decision based on its business interests regarding carriage."<sup>109</sup>

28. We are not persuaded by beIN Sports's assertion that because it offered carriage [REDACTED].<sup>110</sup> beIN Sports's reasoning is based on the dubious assumption that Comcast would make a business decision to give a VPV that appeals to a niche audience carriage on its most-subscribed tier.<sup>111</sup> Moreover, although the [REDACTED] might have allowed Comcast to [REDACTED]. [REDACTED]. [REDACTED].<sup>112</sup> Based on the data Comcast submitted—[REDACTED]— it was more than reasonable for Comcast to conclude that it would not receive a net commercial benefit from

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Sports networks, given the [REDACTED] annual cost of carriage under the expired beIN Sports carriage terms and only [REDACTED] annual loss in margin from customer loss after dropping the beIN Sports networks).

<sup>97</sup> *Tennis Channel Decision*, 717 F.3d at 985.

<sup>98</sup> Second Complaint at 22, para. 17.

<sup>99</sup> *Id.* at Exh. 5; Answer at 5, para. 12.

<sup>100</sup> Answer at 5, para. 12.

<sup>101</sup> Second Complaint at 24-25, para. 50.

<sup>102</sup> *Id.* at Exh. 7 (beIN Sports's Counterproposal).

<sup>103</sup> *Tennis Channel Decision*, 717 F.3d at 985-86.

<sup>104</sup> See Answer at Exh. 1 (Decl. of Andrew Brayford).

<sup>105</sup> beIN Sports disputes Comcast's data as a proper measure; however, it fails to quantify the ways in which it

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carriage of the beIN Sports networks under the terms beIN Sports proposed.<sup>113</sup>

29. In light of Comcast's legitimate and non-discriminatory reasons for declining to carry the beIN Sports networks pursuant to beIN Sports's proposed terms, we conclude that Comcast has not engaged in discriminatory conduct on the basis of affiliation or non-affiliation and, therefore, did not violate the Commission's program carriage rules.

#### IV. CONCLUSION

30. For the foregoing reasons, we find that beIN Sports did not make a *prima facie* case of program carriage discrimination with respect to beIN-E and did make a *prima facie* case of program carriage discrimination with respect to beIN. However, we also find that Comcast has demonstrated that its differential treatment of beIN arises from non-discriminatory, legitimate business reasons rather than discrimination on the basis of affiliation or non-affiliation in violation of section 616(a)(3) of the Act and section 76.1301(c) of the Commission's rules.

#### V. ORDERING CLAUSES

31. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i), 4(j), and 616 of the Communications Act as amended, 47 U.S.C. §§ 154(i), 154(j) and 536, and section 76.1302(g) of the Commission's rules, 47 CFR § 76.1302(g), that the above-captioned program carriage complaint is dismissed with prejudice and denied.

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disputes Comcast's data. *See* Reply at 11-12, paras. 12-14; *see id.* at Exh. 5 (Decl. of Hal Singer) at 5-18, paras. 14-28. Specifically, beIN Sports argues that Comcast's analysis only considers customers who dropped Comcast or Comcast video and disregards customers who dropped only the SEP or Latino tiers. *See id.* Given that beIN Sports's offer was conditioned on placement on tiers that [REDACTED], we believe Comcast's data is the more appropriate measure. *See supra* para. 12, note 42.

<sup>106</sup> *See* Answer at Exh. 1 (Decl. of Andrew Brayford).

<sup>107</sup> *See id.*

<sup>108</sup> *Tennis Channel Decision*, 717 F.3d at 985.

<sup>109</sup> *See Game Show Network MO&O*, 32 FCC Rcd at 6191 (statement of Comm'r Michael O'Rielly). In the *Game Show Network MO&O*, the Commission found that Cablevision's asserted business reasons for retiering Game Show Network were legitimate and non-discriminatory. *See id.* at 6179-86, paras. 63-82. In this regard, we find that we need not address beIN Sports's discriminatory intent arguments (e.g., lack of HD carriage and refusal to authenticate beIN Sports's app) because Comcast has demonstrated that its treatment of beIN arises from a legitimate business decision.

<sup>110</sup> Reply at 61-75, para. 98-118.

<sup>111</sup> Answer at Exh. 3 at 15-17.

<sup>112</sup> *See id.* at 44, para. 51 ("As Chairman Pai explained in his dissent from the *Tennis Channel Order*, while paying higher license fees and expanding distribution may suit a network's business objectives, Comcast is not obligated to be the first mover and provide the network with the revenue and publicity that it needs in order to become attractive to other MVPDs. . . . Comcast's obligation under our rules is to provide unaffiliated networks with nondiscriminatory – not preferential – treatment.") (emphasis original, internal quotations omitted).

<sup>113</sup> The DC Circuit's discussion of potential affirmative evidence that could have demonstrated net commercial benefits for Comcast of broader distribution of Tennis Channel is instructive: "A rather obvious type of proof would have been expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis more broadly or that Y number would leave Comcast in the absence of broader carriage, or a combination of the

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32. This action is taken pursuant to authority delegated by sections 0.283 and 76.1302(g) of the Commission's rules.<sup>114</sup>

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Michelle M. Carey  
Chief, Media Bureau

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two, such that Comcast would recoup the proposed increment in cost.” *Tennis Channel Decision*, 717 F.3d at 986. As in the case of *Tennis Channel*, “[n]ot only does the record lack affirmative evidence along these lines, there is evidence that no such benefits exist.” *See id.*

<sup>114</sup> 47 CFR §§ 0.283; 76.1302(g).