

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

In the Matter of	)	
	)	
Comcast Corporation	)	
	)	File No. CSR-7108
Petition for Declaratory Ruling that The America	)	
Channel is not a Regional Sports Network	)	

**ORDER**

**Adopted: September 25, 2007**

**Released: September 25, 2007**

By the Commission: Chairman Martin, Commissioners Copps and Tate issuing separate statements at a later date; Commissioner McDowell approving in part, concurring in part and issuing a statement at a later date.

**I. INTRODUCTION**

1. On January 24, 2007, Comcast Corporation ("Comcast") filed a Petition for Declaratory Ruling ("Petition") with the Commission seeking a declaration that The America Channel ("TAC") is not a Regional Sports Network ("RSN") as that term is defined in the *Adelphia Order*.<sup>1</sup> In its Response to Comcast's Petition, filed February 27, 2007, TAC requests that the Commission find that TAC does meet the definition of RSN and direct Comcast to participate in arbitration to resolve TAC's program carriage dispute with Comcast.<sup>2</sup> In this Order, we deny Comcast's Petition and declare that TAC is an RSN as that term is defined in the *Adelphia Order*. We conclude that TAC may seek arbitration to resolve its current program carriage dispute with Comcast and that Comcast must submit to arbitration pursuant to the program carriage condition adopted in the *Adelphia Order*. We also suspend the application of the program carriage condition to any additional disputes and note that we intend to adopt

<sup>1</sup> *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., et al.*, Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203, 8287 at ¶ 190 (rel. July 21, 2006) ("*Adelphia Order*").

<sup>2</sup> The Petition was put on public notice on February 7, 2007. Responsive pleadings were due by February 27, 2007. 47 C.F.R. § 76.7. In addition to TAC's filing, the Commission received comments from The Africa Channel on February 26, 2007 (expressing concern that TAC would "jump ahead" of more established networks in the distribution queue) and from Altitude on February 27, 2007 (claiming TAC qualifies neither as a regional nor sports network). Comcast filed its Reply on March 9, 2007. On March 9, 2007, the Commission received comments from BlueHighwaysTV (stating that TAC should not be allowed to jump to the head of the distribution line). The Commission also received comments on March 9, 2007 from Time Warner Cable (claiming TAC is not a *bona fide* RSN unless it offers separately marketed and branded regional programming networks that offer distinct feeds and content to discrete and limited geographic areas.) TWC Comments at 2. On March 23, 2007, DIRECTV, Inc. filed comments supporting Comcast's argument that TAC is not an RSN and on March 29, 2007, Oxygen Media, LLC, filed comments supporting Comcast and generally opposing any preferential carriage status for any networks. The Commission has continued to receive comments, mostly *ex parte*, from the parties and commenters and from the NorthEast Conference (August 7, 2007); Broadband Service Provider's Association (July 27, 2007); Media Access Project, et al. (July 19, 2007 and others); and RCN (July 12, 2007).

shortly an expedited carriage process at the Commission that will provide a timely and predictable program carriage dispute resolution process for all unaffiliated programmers, including RSNs.<sup>3</sup>

## II. BACKGROUND

2. Comcast is a multichannel video programming distributor ("MVPD") that serves communities throughout the United States and owns or is affiliated with numerous RSNs.<sup>4</sup> TAC is an independent video programming network, not affiliated with any MVPD, that has acquired rights to video broadcast college athletic conference events.<sup>5</sup>

3. In the *Adelphia Order*, the Commission approved multiple license transfer applications subject to conditions designed to ensure that the transactions served the public interest, convenience, and necessity pursuant to sections 214 and 310(d) of the Communications Act.<sup>6</sup> One of the conditions established a commercial arbitration process that may be used as an alternative to the Commission's program carriage complaint procedures ("program carriage condition"). Pursuant to that condition, an RSN that is unaffiliated with any MVPD and that has been denied carriage by Comcast or Time Warner may submit its carriage claim to arbitration.<sup>7</sup> The Commission adopted the condition to address concerns that Comcast and Time Warner's increased reach within regional markets, resulting from the Adelphia transactions, provided an increased incentive and ability to deny carriage to rival unaffiliated RSNs.<sup>8</sup>

4. The *Adelphia Order* states that its program carriage condition is based on commercial arbitration procedures such as those imposed in the *News Corp.-Hughes Order*, which set forth arbitration conditions for MVPDs seeking access to affiliated RSNs.<sup>9</sup> The arbitration is to be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules of the

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<sup>3</sup> See ¶ 24, *infra*, and n.68.

<sup>4</sup> Comcast's affiliated RSNs include: Comcast SportsNet Philadelphia; Comcast SportsNet Mid-Atlantic; Comcast/Charter Sports Southeast; Comcast SportsNet Chicago; Comcast SportsNet West and Comcast Local Detroit. Comcast also holds an ownership interest in Fox Sports Channel New England and SportsNet New York. See *Adelphia Order*, 21 FCC Rcd at 8209, n. 32. In addition, in 2006, Comcast launched a new sports network, "the mtn.," featuring athletics of the nine Mountain West Conference schools. Comcast owns 50% of the network, and Comcast SportsNet manages it. Comcast claims that it is the first network dedicated to a college athletic conference and will provide fans a comprehensive array of news, features, and analysis about their favorite teams and players. See <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-comcastcablenetworks>.

<sup>5</sup> Response at 5.

<sup>6</sup> See 47 U.S.C. §§ 214, 310(d).

<sup>7</sup> *Adelphia Order*, 21 FCC Rcd at 8287, ¶¶ 190-191 and Appendices B and C. The Commission's program carriage rules prohibit a cable operator or other MVPD from requiring "a financial interest in any program service as a condition for carriage" of such service, from coercing a programmer to grant "exclusive" carriage rights, and from engaging in conduct that unreasonably restrains "the ability of an unaffiliated programming vendor to compete fairly" by discriminating against such vendor "on the basis of affiliation or nonaffiliation." 47 C.F.R. § 76.1301(a)-(c). A programmer may file a program carriage complaint with the Commission. 47 C.F.R. §§ 76.1300-1302. See also, 47 U.S.C. § 536.

<sup>8</sup> *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189.

<sup>9</sup> Appendix B is worded to resolve program access complaints, but the procedures generally apply in the context of program carriage complaints. *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 190 and Appendix B (referencing *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473 (2004) ("*News Corp.-Hughes Order*").

American Arbitration Association (“AAA”).<sup>10</sup> An unaffiliated RSN that has been denied carriage by Comcast may submit its carriage claim to arbitration within 30 days after the denial of carriage in lieu of filing a complaint with the Commission.<sup>11</sup> The arbitrator shall issue his decision within 45 days from the date that the arbitrator is appointed.<sup>12</sup> Further, the *Adelphia Order* states that a party aggrieved by the arbitrator’s award may file a petition seeking *de novo* review of an award.<sup>13</sup>

5. On January 17, 2007, TAC filed a notice (“Arbitration Notice”) with Comcast of its intent, as a qualifying RSN, to pursue arbitration in lieu of filing a program carriage complaint against Comcast.<sup>14</sup> In its Arbitration Notice, TAC claims that Comcast violated the Commission’s rules by refusing to enter into negotiations for carriage of TAC’s programming.<sup>15</sup> By filing its Arbitration Notice, TAC indicated its intent to seek the alternative remedy implemented by the Commission in the

<sup>10</sup> *Adelphia Order*, Appendix B. Appendix B modifies the AAA rules, to exclude rules relating to large, complex cases and include modifications to the rules set forth in Appendix C of the *Adelphia Order*.

<sup>11</sup> *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 190. We note that TAC filed its arbitration demand within the 30 day time limit imposed by the *Adelphia Order*. TAC bases its claim on Comcast’s refusal to negotiate, contained in a letter dated January 12, 2007, that TAC received on January 16, 2007. See letter dated January 12, 2007 from Madison Bond, Executive Vice President Content Acquisition, Comcast Cable to Doron Gorshein, CEO and President, The America Channel, LLC. Response, Exhibit G of Exhibit B. TAC filed its Arbitration Demand on February 12, 2007, within the 30 day period.

<sup>12</sup> *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 190, Appendix B.

<sup>13</sup> *Adelphia Order*, Appendix B, section 4 (a). Because Comcast may seek *de novo* review of the arbitrator’s decision by the Commission, the process is consistent with the Administrative Procedures Act and the Alternative Dispute Resolutions Act (“ADRA”), 5 U.S.C. § 575(a)(3), despite Comcast’s suggestion to the contrary. See Reply at 30, n. 102. We do not find the prohibition in section 575(a)(3) of the ADRA to apply because the arbitration here is non-binding (*i.e.*, either party may seek *de novo* review of the arbitration decision). Based on the structure of the ADRA, the usage of the term “arbitration” in other provisions of the ADRA to refer to “binding arbitration,” and the legislative history, we believe Congress used the term “arbitration” in section 575(a)(3) to mean binding arbitration. See, e.g., 5 U.S.C. § 580 (entitled “Arbitration awards,” the provision states that the award in an “arbitration” proceeding becomes final 30 days after it is served on the parties, that a final award is binding on the parties, and that it may be enforced pursuant to sections 9 through 13 of title 9, which are the enforcement provisions of the Federal Arbitration Act); 5 U.S.C. § 581(a) (provides that any person aggrieved by an award made in an “arbitration proceeding” under the ADRA may bring an action for review of that award only under the very narrow grounds of review contained in the Federal Arbitration Act, e.g., where the award was the result of corruption, fraud or undue means; where there was evident partiality or corruption by the arbitrators; or where the arbitrators exceeded their authority). See also S. Rep. No. 543, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990 reprinted at 1990 U.S.C.C.A.N. 3931, 3942-43 (stating that with regard to the sections of the ADRA that focus on arbitration, including what is now section 575(a)(3), the sections are “intended to be read in tandem with the Arbitration Act which is codified in Title 9 of the United States Code and which provides the statutory framework for binding arbitration in the private sector and, in many respects, in ongoing federal programs”). In any event, having accepted the conditional grant of the *Adelphia* applications, Comcast cannot now challenge the conditions that were integral to that grant. See *Central Television v. FCC*, 834 F. 2d 186, 190 (D.C. Cir. 1987) (“Having secured this benefit, authorized by an FCC ruling that clearly conditioned the transfer on Central’s accepting no additional compensation, Central now asserts its right to additional compensation. We find this position untenable.”).

<sup>14</sup> Response, Exhibit D of Exhibit B.

<sup>15</sup> *Id.* TAC argues that Comcast’s refusal to negotiate violates the Communications Act and the Commission’s rules prohibiting discrimination on the basis of affiliation or non-affiliation, because Comcast has treated TAC less favorably than Comcast’s affiliated RSNs. Response at 7; Response, Exhibit B at 2, citing 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). TAC asserts that Comcast’s refusal to carry its channel stifles competition and makes it less likely that any competition will be able to develop in the future. Response, Exhibit B at 3. TAC further asserts that it is in the public interest to reject Comcast’s Petition because TAC’s entry into the regional sports programming market will provide additional competition, prevent Comcast from thwarting competition, enhance programming diversity, and help reduce the costs of services to consumers. Response at 20-22.

*Adelphia Order* and to seek carriage of its programming on terms and conditions established through independent arbitration.

6. On January 24, 2007, after receiving TAC's Arbitration Notice and in anticipation of TAC's future action seeking arbitration, Comcast filed its Petition with the Commission.<sup>16</sup> In its Petition, Comcast asserts that TAC is not an RSN as defined by the *Adelphia Order* and is therefore not eligible to seek arbitration of its program carriage complaint. On February 12, 2007, TAC filed an Arbitration Demand with the AAA.<sup>17</sup> On February 15, 2007, Comcast sent a letter to the AAA asserting that TAC is not entitled to invoke the arbitration condition.<sup>18</sup> In its Response to Comcast's Petition, TAC argues that it is a qualified RSN and that Comcast must participate in arbitration.<sup>19</sup>

### III. DISCUSSION

7. Pursuant to the program carriage condition, an RSN is defined as "any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1."<sup>20</sup>

8. In the following discussion, we address each applicable element of the definition of RSN as provided in the *Adelphia Order* to determine if TAC meets all of the required elements: (1) Regional — distribution is within a limited geographic region; (2) Sports — provides live or same day sporting events of a sports team that is a member of NCAA Division I Football or Basketball and in any year, carries a minimum of 100 hours of such programming or 10% of the regular season games of at least one sports team; and (3) Network — is any non-broadcast video programming service.

9. *Regional.* Comcast asserts that TAC has always characterized its proposed network as a national service, plans to distribute its service nationally, and still seeks carriage on that basis, whereas the Commission specifically excluded certain sports networks from the definition of RSN because "those networks are distributed nationally, as opposed to within a limited geographic region."<sup>21</sup> Comcast argues that TAC cannot be both a national service and a regional service.<sup>22</sup> In its Reply, Comcast questions whether TAC will truly be providing regional programming.<sup>23</sup>

10. Although TAC has sought carriage on a national level in the past, we find that here, TAC is offering to provide sports programming within a limited geographic region as required by the definition of RSN in the *Adelphia Order*.<sup>24</sup> TAC has allocated its RSN programming among six distinct

<sup>16</sup> See, e.g., *TCR Sports Broadcasting Holding, LLP v. Comcast Corporation*, MB Docket No. 06-148, CSR-6911-N, FCC 06-111 (rel. July 31, 2006) (further Commission action on carriage complaint stayed pending complainant's decision to pursue arbitration in accordance with the *Adelphia Order*).

<sup>17</sup> Response, Exhibit C.

<sup>18</sup> Response, Exhibit D.

<sup>19</sup> Response at 23.

<sup>20</sup> *Adelphia Order* at Appendix B.

<sup>21</sup> See Petition at 16-19 (citing *Adelphia Order*, 21 FCC Rcd at 8275, n. 529).

<sup>22</sup> *Id.* (citing *Adelphia Order*, 21 FCC Rcd at 8237, ¶ 68).

<sup>23</sup> Reply at 18.

<sup>24</sup> See *Adelphia Order*, Appendix B, § A.

geographic regions: New England, Northeast, Mid-Atlantic, South, Mountain, and West.<sup>25</sup> TAC seeks carriage on Comcast's cable systems only in those six geographic regions, which encompass 20 designated market areas ("DMAs").<sup>26</sup> TAC states that it will deliver a separate regional video broadcast feed for each of the six regions.<sup>27</sup> Because TAC is offering its sports programming to a limited number of DMAs, on a limited regional basis, we find that TAC satisfies the regional prong of the definition of RSN. Consistent with this decision, we expect that TAC will seek arbitration only in those regions in which it has the rights to, and intends to carry, sports programming satisfying the sports prong of the RSN definition. That is, we expect that TAC will seek arbitration for a particular region only when it has sports rights to teams within the region and plans to air them in that region. For example, we would expect that TAC will be seeking arbitration regarding carriage of The America Channel - New England Region in the Boston DMA in order to carry games of regional interest to viewers in that DMA, such as the games of College of the Holy Cross, Harvard University, Northeastern University, and University of Maine, Orono, among others. For these reasons, we reject Comcast's assertion that TAC cannot qualify as an RSN because TAC has failed to show that the content it plans to distribute may be distributed only within a limited geographic area.

11. *Sports*. In its Petition, Comcast asserts that TAC does not meet the Commission's definition of an RSN because TAC has provided no evidence that it would actually produce and deliver the requisite amount and type of sports programming to qualify as an RSN.<sup>28</sup> In its Reply, Comcast argues that TAC's provision of 10 percent of certain teams' regular season NCAA Division I football or basketball games fails to satisfy an essential requirement necessary to qualify as an RSN, the provision of "core component" or "must have programming."<sup>29</sup> Comcast asserts that this essential programming must include the "rights to highly valued sports programming assets of fixed or finite supply that can only be distributed over a contractually limited geographic region."<sup>30</sup> Comcast argues that its interpretation is consistent with Commission precedent and industry standards.<sup>31</sup>

12. TAC counters that it qualifies as an RSN because it has entered into exclusive, multi-year, comprehensive video broadcast agreements with 14 NCAA Division I conferences including the Big South Conference, Southern Conference, Big West Conference, Colonial Athletic Association, Big Sky Conference, America East Conference, Patriot League, and Atlantic Sun Conference.<sup>32</sup> TAC asserts that under these agreements, it has secured video broadcast rights to more than 500 games and matches per year, including basketball, football, and conference championships of men's and women's soccer, volleyball, softball, men's and women's tennis, track and field, lacrosse, field hockey, and other sports.<sup>33</sup> TAC states that the agreements include games involving over 140 colleges or universities in about 77

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<sup>25</sup> Response at 17.

<sup>26</sup> *Id.* A DMA is a local television market area designated by Nielsen Media Research. There are 210 DMAs in the United States. See [www.nielsenmedia.com](http://www.nielsenmedia.com). TAC asserts that for each of the 20 DMAs for which TAC is seeking carriage, TAC has extensive qualifying regional sports rights, Comcast operates a cable system, and Comcast carries a competing affiliated RSN on its cable system. Response at 17-18.

<sup>27</sup> Response at 18.

<sup>28</sup> Petition at 14-16.

<sup>29</sup> Reply at 4. Comcast asserts that the 10% test should only apply in the program access context, not in the program carriage context. Reply at 5.

<sup>30</sup> Reply at 10. Comcast asserts that it is the exclusive and limited nature of the programming that increases its value. Reply at 12.

<sup>31</sup> *Id.*

<sup>32</sup> Response at 5-6. See also Gorshein Declaration, Response, Exhibit A.

<sup>33</sup> *Id.*

DMAs, including most of the top 20 television markets.<sup>34</sup> TAC further states that it has acquired these rights and at a minimum, will distribute at least 10 percent of the regular season basketball or football games of at least one team from each school in each conference, which it will broadcast live or the same day.<sup>35</sup>

13. We find that TAC's description of its sports programming satisfies the sports prong of the RSN definition in terms of the type and quantity of program carriage.<sup>36</sup> Specifically, TAC will carry live, or on the same day, 10% of the NCAA Division I football and basketball regular season games for at least one team in each region in which it seeks carriage. In order to apply the 10% test, we need to know the maximum number of NCAA Division I regular season basketball and football games. The maximum number of regular season games can be found at Figure 17-1 of Article 17 of the Operating Bylaws of NCAA Division I.<sup>37</sup> The maximum number of regular season games for a Division I basketball team is 29 games. The maximum number of regular season games for a Division I football team is 12 games.<sup>38</sup> In order to meet the 10% test, an RSN must carry at least three games of at least one basketball team or two games of at least one football team.<sup>39</sup>

14. TAC will provide regional coverage of a variety of college sports in six regions. We examine each region separately to determine whether the minimum amount of sports programming will be offered by TAC in each region. TAC's Response includes a sworn declaration by Doron Gorshein, TAC's Chief Executive Officer, that includes attachments outlining TAC's available sports programming.<sup>40</sup> Comparing the maximum number of regular season games with the number of games per college per region that TAC will carry, we find that TAC New England will carry at least 10% of the football, men's basketball, or women's basketball games for at least one of its 13 teams; TAC Northeast will carry at least 10% of the football, men's basketball, or women's basketball games for at least one of its 23 teams; TAC Mid-Atlantic will carry at least 10% of the football, men's basketball, or women's basketball games for at least one of its 11 teams; TAC South will carry at least 10% of the football, men's basketball, or women's basketball games for at least one of its 60 teams; TAC Mountain will carry at least 10% of the football, men's basketball, or women's basketball games for at least one of its 12 teams; and TAC West will carry at least 10% of the football, men's basketball, or women's basketball games for at least one of its 13 teams.<sup>41</sup> Although TAC has not yet launched, we are satisfied that TAC meets the 10% threshold because it has submitted evidence that it will distribute at least 10% of the programming of a qualifying team.<sup>42</sup> We find that TAC has obtained the rights and has the intent to carry the minimum required sports programming necessary to qualify as an RSN in

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> TAC is incorrect in asserting that a network can meet the 10% threshold simply by acquiring the rights to distribute 10% of a qualifying team's programming. Response at 19. The definition of RSN states that a network must actually "provide" 10% of such programming, not just acquire the rights to it.

<sup>37</sup> NCAA Operating Bylaws, Article 17, Figure 17-1. See 2006-2007 NCAA Division I Manual at 239. <http://www.ncaa.org>.

<sup>38</sup> The maximum number of games is 12 for teams in the Bowl subdivision and 11 for teams in the Championship subdivision. All of TAC's rights for football are with conferences in the Championship subdivision, except for the Sun Belt Conference.

<sup>39</sup> Comcast agrees that the minimum number of NCAA Division I games required to satisfy the 10% threshold is two football games or three basketball games. See Petition at 20, n. 44.

<sup>40</sup> See Gorshein Declaration, Response, Exhibit A.

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

<sup>42</sup> *Id.*

each of the six regions.

15. Comcast asserts that TAC must provide "core component" or "must have" sports programming in order to qualify as an RSN under the Commission's *Adelphia Order*. We reject this argument as there is no such language in the Commission's definition of RSN.<sup>43</sup>

16. *Network*. Comcast argues that TAC does not meet the Commission's definition of an RSN because TAC has never launched its network or produced any quantity of programming, and, according to Comcast, TAC has virtually no in-house programming expertise, and has not shown that it has a reliable source of funding to produce the required sports programming.<sup>44</sup> Comcast questions TAC's ability to fulfill its programming obligations as an RSN. Comcast claims that TAC is merely a concept, is not a "video programming service," and does not "provide" any video programming.<sup>45</sup> In its Reply, Comcast asserts that TAC must meet additional requirements, such as providing specific plans for local infrastructure and an advance program schedule, to qualify as a network.<sup>46</sup>

17. In response, TAC argues that it is a network that provides a video programming service because it has obtained exclusive rights to televise live sporting events, has assembled those rights in a package that it has offered to Comcast in exchange for carriage, and is able and willing to fulfill its contractual obligations.<sup>47</sup> TAC states its intention to video broadcast each game or event either live or on the same day it takes place.<sup>48</sup> Because these are future events, TAC asserts that it cannot have already produced the programs.<sup>49</sup> TAC states that it has formed partnerships with established production firms to produce the programming and will have adequate funding to do so.<sup>50</sup> TAC points out that the commercial arbitration condition adopted in the *Adelphia Order* was intended to protect potential RSN rivals attempting to enter the market as well as existing RSN competition.<sup>51</sup> TAC asserts that Comcast has the incentive to discriminate against potential rivals, such as TAC, that hold valuable regional sports rights that Comcast might want to acquire for its own affiliated RSNs.<sup>52</sup>

18. The Commission has broadly defined video programming networks as companies that produce their own programming and/or acquire programming produced by others and package and sell the programming as a network or group of networks to MVPDs for distribution to consumers.<sup>53</sup> The Commission has used the terms "video programming networks" and "video programmers" interchangeably to describe companies that package programming into networks for transmission over

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<sup>43</sup> We therefore make no finding whether TAC's programming is "must have" or possesses any particular value to consumers.

<sup>44</sup> Petition at 16.

<sup>45</sup> Petition at 14-15.

<sup>46</sup> See, e.g., Reply at 6.

<sup>47</sup> Response at 3-4.

<sup>48</sup> Response at 3, 16.

<sup>49</sup> Response at 4.

<sup>50</sup> Response at 13-14.

<sup>51</sup> Response at 12-13; Response, Exhibit B at 3, citing *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189.

<sup>52</sup> Response at 4.

<sup>53</sup> See *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312 at ¶ 10 (2001). Video programming has been defined as programming that is comparable to programming provided by a television broadcast station. See 47 U.S.C. § 522(20).

MVPD distribution systems.<sup>54</sup> Moreover, the Commission's program carriage rules may be invoked by a "video programming vendor," which is "a person engaged in the production, creation, or wholesale distribution of video programming for sale."<sup>55</sup>

19. For purposes of resolving this Petition, we see no need to draw a distinction between a "video programming vendor" under the Commission's program carriage rules and a person who provides a "video programming service" as that term is used in the *Adelphia Order*'s definition of an RSN.<sup>56</sup> We find that TAC meets both definitions. TAC is packaging this service as a network to MVPDs for distribution to consumers. Furthermore, as noted by TAC in its Response, the Commission has recognized that the term "'provide' is commonly understood to mean both 'furnish' and 'make available'" and may apply when a service is made available pursuant to some "concrete and specific legal obligation to furnish the item upon request" and is ready to be furnished once it is requested.<sup>57</sup>

20. We find that the impossibility of producing and delivering in advance video programming of future live events, such as sporting events, does not disqualify TAC from being a "non-broadcast video programming service" as contemplated by the definition of RSN in the *Adelphia Order*. The Commission made clear that it was concerned with the increased incentive to discourage rival RSNs from entering the market.<sup>58</sup> By applying the commercial arbitration condition to "potential" rivals, the Commission sought to stem discrimination against non-affiliated regional sports networks that were in danger of being denied carriage simply because they pose a risk of competition to affiliated RSNs.<sup>59</sup>

21. In reaching this decision, we note that TAC has set a firm date of no later than November 7, 2007, for production of its initial sports programming.<sup>60</sup> We find that by seeking carriage in December 2006 for a projected program carriage date no later than November 7, 2007, TAC sought carriage a reasonable period of time in advance of its future live video broadcasts of qualifying sports programming.<sup>61</sup> We find that a programming network may seek a carriage agreement a reasonable period of time before it produces and delivers the qualifying sports programming. It is commercially reasonable for TAC to seek carriage several months in advance of production, because video programming networks often require large upfront investments prior to their launch. These networks commonly reach carriage agreements with as many MVPDs as possible prior to launch in order to reduce the risk associated with the endeavor.<sup>62</sup> We also find TAC's approach to be reasonable, given

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<sup>54</sup> *Id.* at n. 41.

<sup>55</sup> 47 C.F.R. § 76.1300(e).

<sup>56</sup> As TAC noted in its Response, several provisions of the Cable Act define a "service" as something that is offered or made available for sale. Response at 9-10, citing 47 U.S.C. §§ 153(20) and 522(14).

<sup>57</sup> See Response at 12 (citing *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order*, 12 FCC Rcd 20543 at ¶ 110 and n. 244 (1997)).

<sup>58</sup> *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189.

<sup>59</sup> *Id.*

<sup>60</sup> Response, Exhibit B at 21. The parties have postponed arbitration pending this decision by the Commission. While we expect TAC to set a firm production date, it must be a realistic date in light of the timing of this decision and the arbitration process.

<sup>61</sup> See Petition, Exhibit 3.

<sup>62</sup> Examples include SportsNet NY, which launched on March 16, 2006 and had contracts with Comcast and Time Warner as of November 2005 (Sandomir, Richard, "New Network Not to Blame for Open-Wallet Policy" (New York Times, November 30, 2005 at D2));, and the Oxygen network, which launched in February 2000, and had carriage agreements with TCI in November 1998 (McConville, Jim, "TCI Takes Oxygen" (Electronic Media,

(continued....)



the amount of time that a programming network must allow in order to arbitrate a program carriage dispute.<sup>63</sup>

22. Our holding that TAC is an RSN should not be read to mean that any network that plans to provide sports programming covered by the definition but has not yet started providing it necessarily falls within the definition of RSN. Rather, we conclude that some limits on the interpretation of the term "provide" are necessary to ensure that cable operators are not forced by operation of the arbitration condition to displace other programming networks in order to carry a network that will not begin offering the requisite sports programming until some distant or indefinite time in the future. Accordingly, a less definitive or more distant projection for implementation of programming might not satisfy the "provides" prong of the RSN definition. Moreover, we note that to the extent that the qualifying sports programming is not actually provided to the cable operator within the time frame specified in the final contract, this would call into question whether the programmer was seeking RSN status in good faith and subject the RSN to appropriate penalties under the carriage agreement.<sup>64</sup>

23. For all the above reasons, we conclude that TAC is an RSN as that term is defined in the *Adelphia Order* and may pursue arbitration of its claim. We deny Comcast's Petition and find that Comcast must submit to arbitration as set forth in the *Adelphia Order*. While we find that TAC has met its burden to proceed to arbitration, the arbitrator will determine whether any of TAC's regional networks are entitled to carriage, and, if so, the terms and conditions of such carriage. We note that either party may appeal the arbitrator's threshold carriage decisions to the Commission.

24. *Suspension of Program Carriage Condition.* While we find that TAC meets the definition of RSN for purposes of the existing program carriage condition, after reviewing the various pleadings, comments and *ex parte* filings in this proceeding, we find that interested parties have a wide range of perspectives on what constitutes an RSN and whether that term as defined in the *Adelphia Order* for purposes of the program carriage condition is fully developed in light of previous Commission discussions of regional sports networks and industry standards concerning regional sports networks. The definition was crafted in the program access context to prevent Comcast or Time Warner from dispersing their affiliated sports programming among several channels, thus avoiding a minimum threshold requirement for making such programming available to competing video service providers under the program access condition.<sup>65</sup> The definition is less useful in assessing the RSN status of unaffiliated programmers seeking carriage - especially since the business model for regional sports programming is nascent and continues to evolve. In light of these difficulties, and in light of the anticipated revision of our program carriage procedures, we hereby suspend the program carriage condition, with the exception of those disputes in which the condition or arbitration has already been

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November, 2, 1998)), MediaOne in June 1999 (CableFax, June 15, 1999), Charter in June 1999 ("*Oxygen Wins Headline Battle*," (Multichannel News, June 21, 1999)), and Insight in October 1999 (CableFax, October 13, 1999).

<sup>63</sup> See *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 190 (establishing a 45-day period following appointment in which the Arbitrator is required to issue a decision, granting the Commission 60 days to decide an appeal from the Arbitrator's decision, and allowing the Commission to extend its appeal deadline by 60 days).

<sup>64</sup> We note that parties commonly include penalties, resets, and exit clauses in their carriage contracts to address situations in which programmers fail to honor their representations regarding programming. Thus, for example, an RSN may be subject to contractually agreed upon penalties for failure to provide programming within an agreed upon time frame. We would expect the parties to include these issues in their final offer contracts during the arbitration process.

<sup>65</sup> See *Adelphia Order*, 21 FCC Rcd at 8275, ¶ 158.

invoked.<sup>66</sup> Because parties requesting arbitration have already relied on the condition, we believe that it is equitable to allow them to go forward under it. Any future actions on this topic will not affect our decision today that these parties must proceed to arbitration regarding the current dispute and will not affect the outcome of the arbitration process.<sup>67</sup>

25. *Revised Program Carriage Complaint Procedures.* In lieu of attempting to revise the definition of RSN, we believe that providing an expedited and predictable program carriage complaint process at the Commission may be the most efficient way to proceed. Not only would this avoid the inherent difficulties of adopting a precise RSN definition, it would benefit all independent programmers seeking a timely resolution of program carriage disputes. In this vein, we note that the Commission intends to adopt a separate order establishing an expedited complaint process as quickly as possible after the close of the record in the program carriage proceeding.<sup>68</sup> Importantly, as noted above, this revised process would apply to all program carriage complaints, not just those involving RSNs. TAC, as well as any other programmers, would be required to follow these program carriage procedures in any future proceedings. Thus, these new procedures would replace the arbitration condition for program carriage disputes under the *Adelphia Order*.

#### IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, that pursuant to the authority contained in Sections 4(i), 303(r) and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 536, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that Comcast Corporation's Petition for Declaratory Ruling IS DENIED and The America Channel's request for relief IS GRANTED, as described herein.

27. IT IS FURTHER ORDERED, that The America Channel qualifies as a Regional Sports Network as that term is defined in the *Adelphia Order*, and may seek arbitration of its program carriage dispute with Comcast Corporation in lieu of filing a program carriage complaint with the Commission.

28. IT IS FURTHER ORDERED, that Comcast's Request for Temporary Suspension of the Program Carriage Arbitration Condition is DISMISSED AS MOOT.

29. IT IS FURTHER ORDERED, that Comcast Corporation shall proceed to cooperate with the American Arbitration Association and submit to arbitration of The America Channel's complaint for program carriage.

30. IT IS FURTHER ORDERED, that the program carriage condition, as defined herein, is suspended, with the exception of those disputes in which arbitration has already been invoked pursuant to the condition.

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<sup>66</sup> Our decision today does not affect any of the other merger conditions, such as the definition of RSN in the program access condition, and our suspension of the program carriage condition does not affect the current arbitration process between TAC and Comcast or the ongoing program carriage arbitration between MASN and Time Warner.

<sup>67</sup> On September 14, 2007, Comcast filed a request that the Commission suspend the program carriage condition until Comcast's Petition was resolved. We dismiss as moot Comcast's Petition.

<sup>68</sup> See *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rule Making (MB Docket No. 07-42), FCC 07-18 (rel. June 15, 2007). Any revisions to the complaint process will, of course, be based on the record in MB Docket No. 07-42.

31. IT IS FURTHER ORDERED, that Comcast Corporation and The America Channel shall file a status report with the Chief, Media Bureau, 30 days, 60 days and 90 days from the date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary