

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

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

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2010

Released: December 22, 2010

By the Commission: Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this decision, we grant the Application for Review¹ filed by Time Warner Cable Inc. (“TWC”) of an October 2008 Media Bureau (“Bureau”) *Order*² denying TWC’s *Petition for Review* of an arbitration ruling issued pursuant to the *Adelphia Order*.³ The arbitration ruling found that TWC had engaged in program carriage discrimination in violation of Section 616(a)(3) of the Communications Act of 1934, as amended (“the Act”).⁴ Based upon our review of the Bureau’s *Order* and the records below, we find that TWC has provided legitimate and non-discriminatory reasons for its decision to decline to carry TCR Sports Broadcasting Holding, L.L.P, d/b/a Mid-Atlantic Sports Network (“MASN”) on an analog tier in its North Carolina cable systems. We therefore reverse the Bureau’s *Order*.⁵

¹ *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Application for Review (filed Nov. 26, 2008) (“*Application for Review*”).

² *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, DA 08-2441 (rel. October 30, 2008) (“*Order on Review*” or “*Order*”).

³ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable Inc., et al.*, Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203, 8287, ¶¶ 189-90, Appendix B (2006) (“*Adelphia Order*”).

⁴ 47 U.S.C. § 536(a)(3).

⁵ Appendix B of the *Adelphia Order* provides, in relevant part, that “[a] party aggrieved by the arbitrator’s award may file with the Commission a petition seeking *de novo* review of the award.” *Adelphia Order*, 21 FCC Rcd at 8339, Appendix B, § B.4.a. Pursuant to this condition, the Commission may not hold another evidentiary hearing or allow the parties to adduce new evidence. Rather, the *Adelphia Order* provides that “[i]n reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.” *Id.*, Appendix B, § B.4.c. Although the Commission thus reviews the award, including the arbitrator’s ruling on both the discrimination and fair market value issues, on the record of the arbitration, the Commission may depart from the arbitrator’s findings based on its *de novo* review of the record. Similarly, the Commission need not defer to a Bureau’s findings or conclusions in disposing of an application for review of a Bureau decision. See 47 U.S.C. § 155(c)(5) (“In passing upon applications for review, the Commission may grant, in whole or in part . . . such

(continued....)

2. Specifically, we find that TWC considered the following legitimate and non-discriminatory factors in reaching its decision not to carry MASN: (i) the limited demand in North Carolina for MASN, which includes as its anchor programming the Major League Baseball (“MLB”) games of the Baltimore Orioles and Washington Nationals; (ii) the cost of carrying MASN on an analog tier in North Carolina; and (iii) the amount of channel capacity demanded by MASN. Based on these factors, we find that TWC has provided evidence adequate to refute MASN’s claim of unlawful program carriage discrimination in violation of Section 616(a)(3) of the Act, the Commission’s program carriage rules, and the *Adelphia Order*.⁶ We conclude that the Bureau’s finding of unlawful program carriage discrimination in violation of Section 616(a)(3) was erroneous, and we reverse the *Order*. We also vacate the Bureau’s directive that TWC carry MASN on an analog tier in its North Carolina systems.⁷

II. BACKGROUND

3. In July 2006, the Commission adopted the *Adelphia Order*, which approved TWC’s acquisition of cable systems owned by Adelphia Communications Corporation, subject to certain conditions.⁸ One of those conditions imposed on TWC a duty to engage in commercial arbitration with any unaffiliated Regional Sports Network (“RSN”) that was unable to reach a carriage agreement with TWC, upon election by the RSN.⁹ The condition was premised on the Commission’s finding that certain RSNs constitute “must have” programming and that the Adelphia transaction would give TWC “an increased incentive to deny carriage to rival unaffiliated RSNs with the intent of forcing the RSNs out of business or discouraging potential rivals from entering the market, thereby allowing [TWC] to obtain the valuable programming for its affiliated RSNs.”¹⁰ The Commission thus adopted the condition to mitigate

(...continued from previous page)

applications without specifying any reasons therefore”); *id.* § 155(c)(6) (“If the Commission grants the application for review, it may . . . set aside the order [or] decision. . . .”); *see also* 47 C.F.R. § 1.115(g), (h)(1)(i).

⁶ The case presents the issue of whether it was a program carriage violation for TWC to deny carriage to MASN on an analog basic tier in all of its cable systems in North Carolina. We note that TWC has claimed throughout this proceeding that it has offered to carry MASN on a digital tier in its North Carolina systems and has inquired as to MASN’s willingness to agree to carriage of MASN on an analog tier only in its Eastern North Carolina systems. *See In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Petition for Review (filed July 2, 2008) (“*Petition*” or “*Petition for Review*”), at 6-7, 52, 83; *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Opposition to Petition for Review (filed July 17, 2008) (“*MASN Opposition*”), at 16; *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Reply (filed July 28, 2008) (“*TWC Reply*” or “*Reply*”), at 24, 46-48; Declaration of Andrew Rosenberg, April 28, 2008, at ¶¶ 3, 5 (“*Rosenberg Decl.*”).

⁷ *Order on Review* at ¶ 55. The Commission’s rules provide that a program carriage decision of the staff or an Administrative Law Judge (“ALJ”) that requires deletion of existing programming from an MVPD’s system will not become effective unless and until the decision is upheld by the Commission. *See* 47 C.F.R. § 76.1302(g). Consistent with this provision, TWC does not currently carry MASN on its systems in North Carolina despite the Bureau’s Order to carry MASN because, according to TWC, carriage of MASN on an analog tier would have required deletion of existing programming from TWC’s system. *See* Third Declaration of Carol Hevey, May 7, 2008, at ¶ 8 (“*Third Hevey Decl.*”). Accordingly, our decision to reverse the Bureau’s order will not result in any loss of existing programming for TWC’s subscribers in North Carolina.

⁸ *Adelphia Order*, 21 FCC Rcd at 8207, ¶ 5. A more comprehensive discussion of the factual background and procedural history relating to the parties’ dispute is set forth in the *Order on Review*, and thus is not reiterated at length here. *See Order on Review* at ¶¶ 2-18.

⁹ *Adelphia Order*, 21 FCC Rcd at 8287-8288, ¶¶ 189-191.

¹⁰ *Id.* at 8287, ¶ 189. The lack of adequate substitutes for RSN programming derives from “the unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that

(continued....)

concerns regarding TWC's potential incentive and ability to deny carriage on its cable systems to unaffiliated RSNs, and to provide such RSNs with an alternative path for seeking redress of alleged program carriage violations.¹¹

4. In June 2007, MASN invoked the condition and filed with the American Arbitration Association ("AAA") a request for commercial arbitration of a dispute with TWC regarding carriage of MASN on TWC's North Carolina cable systems.¹² Among other things, MASN claimed that TWC had engaged in discrimination by denying MASN carriage on TWC's widely penetrated analog tier in violation of Section 616(a)(3) of the Act, the Commission's program carriage rules, and the *Adelphia Order*.¹³ Based on an extensive record, an AAA-appointed arbitrator, in June 2008, rendered a *Decision and Award* in favor of MASN.¹⁴ In reaching this decision, the Arbitrator acknowledged that an open issue was the legal standard or framework to apply in a program carriage dispute alleging discrimination.¹⁵ The Arbitrator determined that the "governing standard to be applied here is akin to the standard applicable with respect to alleged discrimination in the program access context" pursuant to Section 628 of the Act.¹⁶ Under this framework, the Arbitrator explained that once the complainant has established a *prima facie* case, "the burden shifts to respondent to justify treatment of a non-affiliated programmer."¹⁷ Applying this standard, the Arbitrator found that (i) TWC had discriminated against MASN on the basis of affiliation, contrary to the Commission's program carriage rules and the *Adelphia*

(...continued from previous page)

there is no good substitute for watching their local and/or favorite team play an important game." *Id.* at 8258-59, ¶ 124, citing *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 535, ¶ 133 (2004) ("*News Corp.-Hughes Order*").

¹¹ *Adelphia Order*, 21 FCC Rcd at 8287, ¶ 189. The procedures for filing a program carriage complaint are codified in Section 76.1302 of the Commission's rules. See 47 C.F.R. § 76.1302. The Commission adopted this and other program carriage provisions to implement Section 616 of the Act, which directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." 47 U.S.C. § 536(a). Section 616 was intended, among other things, to prohibit multichannel video programming distributors ("MVPDs") from discriminating against video programming vendors based on their affiliation or non-affiliation, and thus required the Commission to establish regulations that:

contain provisions designed to prevent a[n] [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors.

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

¹² *In the Matter of the Arbitration between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable, Inc., Respondent*, Arbitration Demand and Statement of Claim (filed June 5, 2007) ("*MASN Arbitration Demand*").

¹³ *Id.*

¹⁴ *In the Matter of Arbitration between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable Inc., Respondent*, Case No. 71 472 E 00697 07, Decision and Award, June 2, 2008 ("*Decision and Award*" or "*Award*").

¹⁵ See *id.* at 6.

¹⁶ See *id.* at 8.

¹⁷ See *id.* at 7, 10; see also *id.* at 13 ("In response to MASN's *prima facie* showing of discrimination, the burden shifts to TWC.").

Order, and that such discrimination unreasonably restrained the ability of MASN to compete fairly; and (ii) MASN's final offer more closely reflected the fair market value of the rights to carry MASN in TWC's North Carolina territory.¹⁸ The arbitrator awarded MASN carriage on TWC's North Carolina systems in accordance with terms and conditions set forth in MASN's final offer, which would require TWC to carry MASN on an analog basic tier at a rate of [REDACTED].¹⁹ Shortly thereafter, TWC filed with the Commission a *Petition for Review* of the arbitration ruling, in which it defended its decision to decline to carry MASN on an analog tier as a legitimate business decision and urged the Commission to set aside the ruling.²⁰ On October 30, 2008, the Media Bureau issued its decision denying TWC's petition, which is the basis for the instant *Application for Review*.

5. The Bureau's *Order* sets forth the following principal facts about which there is little dispute between the parties. TWC is a multiple system operator ("MSO") of cable television systems in several states nationwide, including North Carolina, where TWC is the dominant provider of pay television service.²¹ All of TWC's customers subscribe to the "basic" tier, which includes broadcast stations and public access services, and approximately [REDACTED] of its customers subscribe to the "cable programming services tier" ("CPST"), which generally includes other popular programming services.²² By contrast, roughly [REDACTED] of TWC's customers subscribe to TWC's digital basic tier, which features a multitude of additional programming services.²³ Thus, the overwhelming majority of TWC's North Carolina customers subscribe to the basic tier and CPST, otherwise known as TWC's "analog" tiers.

6. Among other programming interests, TWC is affiliated with News 14, a regional programming service that provides local news and weather programming, and that telecast the games of the Charlotte Bobcats of the National Basketball Association ("NBA") for a brief time during the pendency of MASN's carriage request.²⁴ In addition, at the time MASN requested carriage on TWC's systems and for a fairly brief period of time thereafter, TWC was also affiliated with Turner South, an RSN that held the distribution rights for several professional sports teams, including the Atlanta Thrashers of the National Hockey League ("NHL"), the Atlanta Hawks NBA team, and the Atlanta Braves of

¹⁸ *See id.* As noted in the *Order on Review*, the AAA appointed this arbitrator after a previous arbitrator had been removed from the proceedings in response to a motion to disqualify filed by TWC. *Order on Review* at ¶ 4. In light of the AAA's removal of the first arbitrator, the Bureau limited its *de novo* review to the June 2, 2008 *Decision and Award* and the record developed in that proceeding. *See id.* at ¶ 4 n.19.

¹⁹ *Decision and Award* at 22.

²⁰ *Petition for Review* at 33-52.

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

²² *Id.* at 4.

²³ *Id.* at 5.

²⁴ *Id.* at 25-26; *see also MASN Arbitration Demand* at 12-16. TWC no longer carries the Bobcats games on News 14. *See Petition for Review* at 23, 50.

MLB.²⁵ During the period that TWC was affiliated with News 14 and Turner South, TWC carried both programming services on an analog tier in its North Carolina cable systems.²⁶

7. MASN is an RSN that owns the rights to produce and exhibit nearly all of the games of two MLB franchises – the Baltimore Orioles and the Washington Nationals.²⁷ From its inception in 2005, MASN has pursued carriage on the systems of MVPDs throughout its television territory, which encompasses a seven-state region, including North Carolina.²⁸ In North Carolina, where MASN has sought carriage on TWC systems since March 2005, MLB has designated the Orioles and Nationals as “home teams” in a vast portion of the state, which includes seven of the eight DMAs in North Carolina.²⁹ Because of the distance between the teams’ home cities and their North Carolina territory, however, North Carolina is considered to be part of the teams’ “extended inner market,” as compared with their “inner market” territories of Baltimore, Maryland, and Washington, D.C.³⁰

8. TWC advances several legal and policy arguments in support of its *Application for Review*. First, TWC asserts that the *Order on Review* constitutes an impermissible exercise of the Bureau’s delegated authority because both the *Adelphia Order* and the Commission’s rules required the full Commission to adjudicate TWC’s petition.³¹ Consequently, TWC argues, the Commission is now

²⁵ *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Nos. 12 494 E 000326 07, 71 472 E 00697 07, Claimant’s Proposed Findings of Fact (filed May 2, 2008) at 8 (“*MASN Proposed Findings of Fact*”). TWC sold Turner South prior to issuance of the *Adelphia Order*.

²⁶ Declaration of Mark C. Wyche, June 1, 2007, at ¶ 20 (“Wyche Declaration”).

²⁷ *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case No. 12 494 E 000326 07, Claimant’s Pre-Hearing Arbitration Brief (filed November 9, 2007) at 4-5 (“*MASN Pre-Hearing Brief*”).

²⁸ *Id.* MASN’s footprint is co-extensive with the shared television territories of the Orioles and Nationals, as designated by MLB. *Id.* n.4. That territory includes designated market areas (“DMAs”) within the states of Maryland, Virginia, Delaware, and Washington, D.C., as well as parts of Pennsylvania, West Virginia, and North Carolina. *Id.*

²⁹ The Orioles and Nationals have exclusive television rights in the eastern part of the state, Wyche Declaration at ¶¶ 5-6, and share television rights with the Atlanta Braves and Cincinnati Reds in the central region. *Petition for Review* at 12.

³⁰ Wyche Declaration at ¶¶ 5-6.

³¹ *Application for Review* at 1, citing *Adelphia Order*, 21 FCC Rcd at 8203, ¶ 190 (“The Commission shall issue its findings and conclusions not more than 60 days after receipt of a petition for review of the arbitrator’s award, which may be extended by the Commission for one period of 60 days.”); 47 C.F.R. § 0.283(b), (c) (requiring action by the full Commission on an “[a]pplication for review of actions taken pursuant to delegated authority” or “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines”). Because we find that MASN has failed to demonstrate discrimination and thus grant TWC’s *Application for Review*, we need not address TWC’s claim that the *Order on Review* constituted an improper exercise of the Bureau’s delegated authority under both the *Adelphia Order* and the Commission’s rules. Nevertheless, we note that the Bureau has authority, pursuant to Section 0.61(f)(7) of the Commission’s rules, to “[a]dminister and enforce rules and policies regarding . . . program carriage,” see 47 C.F.R. § 0.61(f)(7), subject to the limitations on the Bureau’s delegated functions set forth in Section 0.283 of the Commission’s rules. See 47 C.F.R. § 0.283. In addition, the Bureau has authority to resolve program carriage disputes at the staff level, and has long resolved such disputes. See, e.g., 47 C.F.R. § 76.1302(g) (stating that a carriage decision of the staff or ALJ that requires deletion of existing programming from an MVPD’s system will not become effective unless and until the decision is upheld by the Commission); *Classic Sports Network, Inc. v. Cablevision*, 12 FCC Rcd 10288, 10290-91, ¶ 6 (CSB 1997) (directing the ALJ to issue a recommended decision on certain factual issues and indicating that the Bureau will make the requisite legal determinations).

compelled to conduct a *de novo* review of the arbitrator's award.³² In addition, TWC contends that the Bureau's carriage mandate will harm consumers by imposing on all of TWC's North Carolina subscribers the costs of carrying MASN, despite MASN's appeal "to only a small group of North Carolinians."³³ TWC further asserts that the Bureau misinterpreted and misapplied the program carriage provisions because it: (i) failed to accord any deference to TWC's editorial judgment;³⁴ (ii) shifted the burden of proof to TWC after MASN was found to have proven a *prima facie* case of unlawful program carriage discrimination;³⁵ (iii) reached an improper result even under the Bureau's own view of the applicable legal framework;³⁶ and (iv) interpreted erroneously the second prong of the program carriage provision, which requires a showing that the effect of discrimination is "to unreasonably restrain the ability of an unaffiliated programming vendor to compete fairly."³⁷ Finally, TWC asserts that the *Order's* carriage mandate is an unconstitutional infringement of its First Amendment rights.³⁸

9. MASN filed an Opposition to TWC's *Application for Review*.³⁹ MASN counters that (i) the Bureau appropriately concluded that TWC engaged in affiliation-based discrimination based in part by applying a burden-shifting framework;⁴⁰ (ii) even under TWC's standard, MASN would prevail;⁴¹ (iii) the Bureau appropriately concluded that the effect of TWC's conduct was to "unreasonably restrain the ability of [MASN] to compete fairly";⁴² (iv) carriage of MASN will not harm consumers;⁴³ and (v) the Bureau's *Order* is consistent with the First Amendment.⁴⁴

III. DISCUSSION

10. Based on our review of the *Order* and the records below, we find that MASN has failed to demonstrate that TWC has impermissibly discriminated pursuant to Section 616(a)(3) of the Act and its implementing rules. Accordingly, we reverse the Bureau's *Order* and vacate its directive that TWC carry MASN on an analog tier in its North Carolina systems.⁴⁵ In particular, we conclude that, although

³² *Application for Review* at 1.

³³ *Id.* at 7.

³⁴ *Id.* at 9-12.

³⁵ *Id.* at 13-14.

³⁶ *Id.* at 14-19.

³⁷ *Id.* at 19 (citing 47 C.F.R. § 76.1301(c)); *see also* 47 U.S.C. § 536(a)(3).

³⁸ *Application for Review* at 19-25.

³⁹ *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Opposition to Application for Review (filed Dec. 11, 2008) ("*MASN Opposition to AFR*").

⁴⁰ *See id.* at 5-16.

⁴¹ *See id.* at 16-19.

⁴² *See id.* at 19-20.

⁴³ *See id.* at 20-22.

⁴⁴ *See id.* at 22-25.

⁴⁵ *Order* at ¶ 55. We note that Section 1.115(g) of the Commission's rules provides the Commission discretion to "grant [an] application for review in whole or in part, or . . . deny [an] application [for review] *with or without* specifying reasons therefor." 47 C.F.R. § 1.115(g) (emphasis added); *see also* 47 U.S.C. § 155(c)(5). Despite our authority to summarily resolve TWC's *Application for Review*, we find that the public interest will be served by setting forth the principal reasons underlying our decision.

MASN has proven a *prima facie* case of program carriage discrimination, TWC has provided evidence establishing legitimate and non-discriminatory reasons for its decision to decline to carry MASN on an analog tier in its North Carolina cable systems.

11. As a threshold matter, we note that our decision reverses the Bureau's finding of liability on the narrow basis that TWC has provided evidence that is adequate to refute MASN's claim of unlawful program carriage discrimination. Consequently, we see no need to review at this time other aspects of the *Order* regarding the appropriate legal framework for assessing program carriage discrimination under Section 616 of the Act or our program carriage rules.⁴⁶ MASN claims that the Commission should apply the program *access* discrimination framework.⁴⁷ Under that framework, after MASN establishes a *prima facie* case of discrimination, the burdens of production and persuasion would shift to TWC to establish legitimate and non-discriminatory reasons for its carriage decision.⁴⁸ TWC contends that the Commission should instead apply an intentional discrimination framework.⁴⁹ Under that framework, after MASN establishes a *prima facie* case of discrimination, TWC would be required to produce evidence of legitimate and non-discriminatory reasons for its carriage decision, which MASN would then have the burden of showing are so implausible that they constitute pretexts for discrimination.⁵⁰ It is unclear from the *Order* which framework the Bureau applied. We need not, and do not, address in this decision the issue of the appropriate legal framework, however, because we find that TWC would prevail under either framework. That is, even assuming that the burdens of production and persuasion shift to TWC to establish legitimate and non-discriminatory reasons for its carriage decision after MASN establishes a *prima facie* case of discrimination, we find that TWC prevails because it has established legitimate reasons for its carriage decision that are borne out by the record and are not based on the programmer's affiliation or non-affiliation. Thus, under either framework there would be no unlawful program carriage discrimination in violation of Section 616(a)(3). Moreover, because we conclude that TWC did not discriminate against MASN within the meaning of Section 616(a)(3) of the Act, we do not reach the question of which final offer – that of TWC or MASN – more closely reflects the fair market value of the right to carry MASN, and we therefore vacate the Bureau's finding on that issue.⁵¹

⁴⁶ See *Order* at ¶¶ 21-25. We likewise do not revisit the Bureau's application of such framework as a basis for its finding that MASN has proven a *prima facie* case of discrimination. See *id.* at ¶¶ 26-31.

⁴⁷ See *MASN Opposition to AFR* at 5-9; *MASN Opposition* at 29-35.

⁴⁸ See *MASN Opposition to AFR* at 6; *MASN Opposition* at 30-31.

⁴⁹ See *Application for Review* at 10-14; *Petition for Review* at 21-22, 33-37, 60-62; *TWC Reply* at 8-28. We note that the Bureau summarily rejected TWC's assertion that the applicable standard for assessing discrimination under Section 616 is derived from "the body of law that has arisen under Title VII [of the Civil Rights Act of 1964]'s prohibition on racial discrimination, the [Age Discrimination in Employment Act of 1967]'s prohibition on age discrimination, and other similar statutes." See *Order* at ¶ 23. Due to the lack of an in-depth analysis in the Bureau's *Order* on this issue and our decision here to defer ruling on the appropriate legal framework under Section 616 of the Act and our program carriage rules, we vacate this portion of the Bureau ruling without deciding the issue on substantive grounds. We leave for another day the issue of the relevance of this body of law to program carriage cases.

⁵⁰ See *TWC Reply* at 9; *Petition for Review* at 35, 40-41; see also *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) ("And in attempting to satisfy this burden, the plaintiff -- once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision -- must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" (citations omitted)).

⁵¹ See *Order* at ¶¶ 42-48.

12. TWC contends, among other things, that the Bureau erred in failing to afford sufficient deference to TWC's editorial judgment.⁵² We agree. The plain language of Section 616(a)(3) permits a finding of program carriage discrimination only in cases where such discrimination is carried out "on the basis of [an unaffiliated programming vendor's] affiliation or nonaffiliation."⁵³ While the *Order* correctly concluded that, under this standard, a vertically-integrated MVPD "[may treat] unaffiliated programmers differently from affiliates, so long as it can demonstrate that such treatment did not result from the programmer's status as an unaffiliated entity,"⁵⁴ we find that the Bureau misapplied Section 616(a)(3)'s standard by failing to give due credit to TWC's proffered reasons for declining to carry MASN on an analog tier. In defense of its claim that the carriage decision was a reasonable exercise of editorial discretion, TWC asserts that it conducted a cost-benefit analysis and determined that the benefits of adding MASN to an analog tier in North Carolina would not outweigh the substantial costs.⁵⁵ TWC contends that its decision was motivated by a variety of factors, including MASN's lack of strong appeal to North Carolina residents and the high cost of carrying MASN.⁵⁶ As discussed below, we find that these reasons, which are unrelated to MASN's affiliation status, have an adequate basis in the factual record and are thus sufficient to refute MASN's *prima facie* case.⁵⁷ We also reject the Bureau's conclusions that TWC's failure to document its carriage decision and its incentive as a vertically integrated cable operator to discriminate against unaffiliated programmers militate in favor of a finding for MASN. Accordingly, we reverse the Bureau's decision that TWC violated Section 616(a)(3) of the Act and our program carriage rules by discriminating against MASN on the basis of affiliation.⁵⁸

1. Limited Demand for MASN in North Carolina

13. We find that TWC has provided evidence that limited demand for MASN's programming in North Carolina was one reason for its refusal to carry MASN on an analog tier in its North Carolina cable systems.⁵⁹ We find no basis in the record to conclude that this is anything other than a legitimate and non-discriminatory reason for TWC's carriage decision. TWC provided evidence demonstrating that, while MASN is carried by four MVPDs in North Carolina, MASN's ratings in the state have been

⁵² *Application for Review* at 9-12.

⁵³ See 47 U.S.C. § 536(a)(3).

⁵⁴ *Order* at ¶ 24.

⁵⁵ *Petition for Review* at 37-40.

⁵⁶ *Id.* at 24-25, 37-39, 41-44.

⁵⁷ In adopting its program carriage complaint procedures, the Commission concluded that "the burden of proof will be on the programming vendor to establish a prima facie showing that the defendant multichannel distributor has engaged in behavior that is prohibited by Section 616. . . ." *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 9 FCC Rcd 2642, 2654, ¶ 29 (1993) ("*Program Carriage Second Report and Order*"). The complaint procedures further provide that the defendant MVPD will put forth an answer "that refutes each allegation made . . . or supports any affirmative defenses." *Id.* at 2654-55, ¶ 30.

⁵⁸ We note that each of TWC's principal reasons for denying analog carriage is countered by MASN, and that the Bureau, in finding that TWC engaged in unlawful discrimination, found MASN's assertions to be more persuasive than those of TWC. See *Order on Review* at ¶¶ 33-41. Based on our review of the record, we find that the weight of evidence resides with TWC and thus reach a contrary conclusion. However, even if there were an evidentiary equipoise in this case, TWC still would prevail absent a preponderance of evidence favoring MASN.

⁵⁹ *Id.* at ¶ 34.

relatively low, even in the period after MASN began televising the Orioles in 2007.⁶⁰ TWC provided evidence that, in each of the major North Carolina DMAs, MASN scores [REDACTED], as compared with MASN's rating of [REDACTED] in its home DMA of Baltimore.⁶¹ MASN is available to more than [REDACTED] in North Carolina,⁶² yet its ratings, even when tripled, amount to [REDACTED].⁶³ TWC has provided evidence that comparable ratings of other RSNs often exceed [REDACTED].⁶⁴ Although MASN contends that TWC discriminated in its carriage decision by examining ratings,⁶⁵ TWC provided testimonial evidence that it routinely considers "present subscriber interest in individual programming services" as a factor in its carriage decisions concerning both affiliates and non-affiliates.⁶⁶

⁶⁰ *TWC Answering Statement* at 29; see also Supplemental Declaration of Joanne Wayne, November 30, 2007, at ¶ 3 ("Wayne Supp. Decl.") (showing that MASN's highest average ratings during the 2007 baseball season were [REDACTED] in the three most populous North Carolina DMAs). Nielsen ratings are expressed in terms of the percentage of TV households that watch a given channel at a particular time in a certain geographic area. Declaration of Joanne Wayne, June 29, 2007, at ¶ 3 ("Wayne Decl."). Thus, for example, a Nielsen rating for a particular television program of "5.3" indicates that 5.3 percent of the households that owns one or more television sets watched the program. *Id.* For the purpose of its showing on the issue of ratings, TWC evaluated MASN's ratings in the three most heavily populated North Carolina DMAs during different parts of the day: prime time weekday (Monday to Friday, 7 p.m. to 10 p.m.), late night weekday (Monday to Friday, 10 p.m. to 1 a.m.), weekend afternoon (Saturday/Sunday, 1 p.m. to 4 p.m.), weekend late afternoon (Saturday/Sunday, 4 p.m. to 7 p.m.), and Saturday late night (10 p.m. to 1 a.m.). Wayne Supp. Decl. at ¶ 2. TWC's ratings assessment reflects MASN's "highest average" ratings, which expresses the day part in which MASN received the highest ratings. *Id.* This assessment reflects ratings for MASN's entire programming schedule, including Orioles programming. *Id.*

⁶¹ Supplemental Declaration of Anthony Portelli, May 7, 2008, Exhibit 1 ("Portelli Supp. Decl."); Wayne Supp. Decl. at ¶ 3. In light of this ratings evidence, we do not find it significant that MASN televises a large number of sporting events in North Carolina. See *MASN Opposition* at 7.

⁶² See *Petition for Review* at 24; *TWC Reply* at 29.

⁶³ See *Application for Review* at 43; Portelli Supp. Decl. at ¶ 8; *TWC Reply* at 30. MASN claims that its ratings do not reflect MASN's true potential because a significant portion of its distribution in North Carolina comes from DBS carriers, which "typically offer more robust sports offerings, drawing sports fans away from any particular sports offering." *MASN Opposition* at 59. We agree with TWC, however, that if North Carolina residents demanded MASN, the availability of other sports should be irrelevant. See *TWC Reply* at 30. MASN's claim is even less persuasive considering that one DBS operator devoted all of the launch support resources provided for in its carriage agreement with MASN to a promotional campaign targeted exclusively to North Carolina residents. *Order on Review* at ¶ 47.

⁶⁴ See *Application for Review* at 15; *Petition for Review* at 43; *TWC Reply* at 29-31; Portelli Supp. Decl., Exhibit 1. The Bureau noted that MASN's most popular programming, Orioles games, earned the following average ratings during the 2006 season when the games were televised on FSN-South: [REDACTED]. See *Order* at ¶ 33; Wayne Decl. at ¶ 5; Supplemental Declaration of Mark C. Wyche, November 9, 2007, at ¶ 5 ("Wyche Supp. Decl."); *TWC Reply* at 31. We do not believe, however, that it is sufficient to analyze ratings for only the most popular programming on a network (in this case, the Orioles games). By contrast, other ratings provided by TWC were either for (i) MASN's average ratings for the Monday - Friday, 7:00 PM to 10:00 PM time slot for July 2007, reflecting MASN's entire programming schedule, including Orioles games (see Portelli Supp. Decl. at ¶ 2 [REDACTED]); or (ii) MASN's highest average ratings during the entire 2007 baseball season, reflecting the day part in which MASN received the highest ratings, which includes MASN's entire programming schedule, to include Orioles games (see Wayne Decl. at ¶ 9; Wayne Supp. Decl. at ¶¶ 2-3 ([REDACTED])). In any event, even the MASN ratings for Orioles games in Baltimore are less than the ratings for RSNs in other markets nationwide. See *Application for Review* at 15; *TWC Reply* at 29-31.

⁶⁵ *MASN Opposition* at 67.

⁶⁶ See Declaration of Carol Hevey, July 2, 2007, at ¶¶ 9-10 ("Hevey Decl.").

Ratings are one component of present subscriber interest.⁶⁷ Thus, TWC has provided evidence that it evaluated MASN's demand for carriage in the same manner that it has evaluated other such requests.⁶⁸

14. The *Order* notes that the 2006 ratings for the Orioles' games in the Charlotte DMA surpassed ratings for the Bobcats games in the same market during the 2005-2006 season, yet TWC nonetheless placed its affiliated News 14 channel carrying the Bobcats games on an analog tier.⁶⁹ TWC, however, has provided evidence that News 14 is largely a news channel that was allocated an analog channel at a time when TWC's analog tier was not full.⁷⁰ TWC has provided evidence that its carriage of Bobcats games on News 14 did not impose the same direct and opportunity costs as would carriage of MASN on an analog tier.⁷¹ [REDACTED].⁷² Moreover, unlike carriage of MASN, carriage of the Bobcats games did not require TWC to allocate a full six MHz channel because it preempted News 14's regular programming on limited occasions to show these games.⁷³ TWC notes that sports programming consumed only two percent of total air time on News 14.⁷⁴ Thus, TWC's decision to carry lower-rated, but lower cost (both in terms of money and bandwidth), Bobcats games on an analog tier does not undermine TWC's evidence that limited demand was one reason for its decision to decline to carry the higher rated, but higher cost, MASN on an analog tier.⁷⁵

⁶⁷ *TWC Reply* at 31.

⁶⁸ The Bureau appeared to place some significance on the fact that TWC has carried all of its affiliated RSNs nationwide on basic or expanded basic tiers. *See Order at Review* at ¶ 29. We find, however, that TWC provided credible justifications for its decision to carry these RSNs on basic or expanded basic tiers while refusing such carriage for MASN. As TWC notes, certain of its affiliated RSNs, such as SportsNet New York and Turner South, carry popular professional teams. *See Petition for Review* at 51-52; *TWC Reply* at 40-41. SportsNet New York carries the games of the New York Mets in New York City and has ratings that substantially exceed MASN's ratings in North Carolina. *See Petition for Review* at 52; *TWC Reply* at 40-41; Portelli Supp. Decl., Exhibit 1 (stating that SportsNet New York earned an average rating of [REDACTED]). Turner South carried the games of the Atlanta Braves in Central and Western North Carolina. *See Petition for Review* at 51. As noted below, MASN's own survey concluded that the Atlanta Braves is a more popular team than the Orioles among sports fans in North Carolina. *See infra* ¶ 16. Other affiliated RSNs, such as Time Warner Cable SportsNet – Rochester and Metro Sports, provide local high-school and minor league sports programming which does not impose a significant cost burden on TWC subscribers. *See Petition for Review* at 51-52; *TWC Reply* at 41-42. We find no basis in the record to conclude that TWC's carriage of its affiliated RSNs on basic or expanded basic tiers while refusing such carriage to MASN was motivated by considerations of affiliation rather than by the demand, cost, and bandwidth considerations presented by each network.

⁶⁹ *Order on Review* at ¶¶ 29, 33.

⁷⁰ *TWC Answering Statement* at 25-27; Hevey Decl. at ¶¶ 30-32, 36 (stating that the overwhelming majority – more than 98 percent – of News 14 Carolina programming consists of local news and weather).

⁷¹ TWC began using News 14 to televise games only in 2005, when Carolinas Sports and Entertainment Television (“C-SET”), the programming service that previously carried the Bobcats games, ceased operations. Supplemental Declaration of Brian Kelly, May 5, 2008, at ¶¶ 5-6 (“Kelly Supp. Decl.”).

⁷² *Id.*; *see Petition for Review* at 38.

⁷³ Kelly Supp. Decl. at ¶¶ 5-6.

⁷⁴ *See Petition for Review* at 14 (citing Hevey Decl. ¶ 36).

⁷⁵ The Bureau noted that when the Bobcats were carried on the unaffiliated C-SET network, TWC carried the network on a digital tier. *Order on Review* at ¶ 40. TWC explains that C-SET, as a Bobcats-only network, was unable to obtain analog tier carriage. *See TWC Reply* at 45-46. Conversely, when TWC carried the Bobcats on News 14 on an analog tier, News 14 was still predominantly a news channel with a minor amount of sports programming. *See Petition for Review* at 48-49.

15. While the *Order* notes that the Orioles games were broadcast in North Carolina for nearly two decades prior to the 2007 MLB season, when MASN began to produce and exhibit the games,⁷⁶ we do not believe this undermines TWC's evidence of limited demand for MASN in North Carolina. Before MASN acquired the Orioles' exhibition rights, the games were telecast on another RSN, the unaffiliated FSN-South, which TWC carries on an analog tier in its North Carolina systems.⁷⁷ TWC provided evidence, however, that FSN-South also carried the games of two other professional teams: the North Carolina-based Carolina Hurricanes (NHL) and the Atlanta Braves (MLB), which MASN's own survey concluded is a more popular team than the Orioles among sports fans in North Carolina.⁷⁸ Thus, TWC's carriage of FSN-South and its three professional sports teams on an analog tier in North Carolina does not call into question TWC's decision to decline to accept similar carriage terms for MASN and its two Washington/Baltimore-based professional sports teams.⁷⁹ The record further indicates that TWC received no appreciable subscriber complaints regarding either FSN-South's cessation of Orioles telecasts or the absence of MASN in TWC's programming lineup.⁸⁰ Moreover, TWC's failure to carry MASN neither

⁷⁶ *Order on Review* at ¶ 34.

⁷⁷ *See id.*; *Petition for Review* at 6. Prior to FSN-South, the Orioles games were carried by Home Team Sports, which was later acquired by Comcast and renamed Comcast SportsNet Mid-Atlantic. *See MASN Opposition* at 8. TWC argues that the decision of Comcast SportsNet Mid-Atlantic to sublicense the Orioles games to FSN-South demonstrates that Comcast SportsNet Mid-Atlantic believed that "North Carolinians were not sufficiently interested in the Orioles to sustain an RSN having the Orioles as its anchor." *Petition for Review* at 44. While MASN argues that there is no record support for this contention, MASN fails to provide an alternative explanation. *See MASN Opposition* at 55.

⁷⁸ *See Petition for Review* at 45; *MASN Opposition* at 61-62; *see also infra* ¶ 16. The Bureau found significant that Fox expressed an interest in carrying Orioles and Nationals games on its two RSNs in North Carolina in the event that MASN's launch in the state did not succeed. *See Order on Review* at ¶ 34 (citing Wyche Declaration at ¶ 7). As TWC points out, however, there is a difference "between a programmer's decision to add sports programming to an existing service and a cable operator's decision to carry a service that carries nothing but that programming." *Application for Review* at 15.

⁷⁹ Because the Orioles and Nationals have exclusive television rights in Eastern North Carolina, MLB black-out rules require FSN-South to black out the Braves games in Eastern North Carolina. *See Petition for Review* at 45; *TWC Reply* at 47-48. (Eastern North Carolina encompasses the Greenville-New Bern-Washington, Myrtle Beach-Florence, Norfolk-Portsmouth-Newport News, Raleigh-Durham (Fayetteville), and Wilmington DMAs. *See Wyche Supp. Decl.* at ¶¶ 13-16.) Accordingly, MASN notes that FSN-South carries only the Carolina Hurricanes in Eastern North Carolina and argues that TWC cannot justify allocating an analog channel to a single hockey team while declining to allocate an analog channel to games of the Orioles and Nationals. *See MASN Opposition* at 55. We find that TWC has provided a sufficient explanation for this decision: (i) TWC would like to carry the Braves in Eastern North Carolina but is not permitted to do so because of the black out rules; (ii) TWC inquired whether MASN was willing to agree to carriage in only Eastern North Carolina, but MASN has been unwilling to entertain this proposal; (iii) RSNs, such as FSN-South and MASN, typically require carriage throughout their service territory, which would require TWC to carry FSN-South (without the Braves) in Eastern North Carolina in order to carry FSN-South (with the Braves) in Central North Carolina; and (iv) other cable operators that serve Eastern North Carolina, such as Suddenlink and Charter, do not carry MASN there, further calling into question whether it makes editorial or business sense to carry MASN in that area of the state. *See Application for Review* at 16; *Petition for Review* at 45; *TWC Reply* at 47-48, 50.

⁸⁰ *See Application for Review* at 16; *Petition for Review* at 43-44; *TWC Answering Statement* at 12, 34; Hevey Decl. at ¶ 21; Declaration of Brian Kelly, November 30, 2007, at ¶ 18 ("Kelly Decl."). The Bureau noted that MASN produced complaints from various North Carolina residents, including state and local officials, minor league baseball teams, MASN affiliates (including local colleges and universities), and consumers who filed complaints with the North Carolina Attorney General. *Order* at ¶ 34. In response, TWC argues that "these were anonymous and unverified complaints by people who clicked a button on a MASN-sponsored website." *Application for Review* at 16. At most, these complaints may demonstrate that there are some TWC subscribers in North Carolina that

(continued....)

has increased the level of customer defections to DBS service, nor prompted TWC competitors that carry MASN to advertise the programming discrepancy.⁸¹ In addition, the record reflects that only one broadcast television station in North Carolina, a low power station, has ever telecast games of the Orioles.⁸² That station was located only a few miles from the Virginia state line, and ceased the broadcasts in 2006.⁸³ Further, the Orioles' radio network does not cover North Carolina,⁸⁴ and coverage of the Orioles and Nationals by North Carolina newspapers appears marginal.⁸⁵

16. We do not find it significant that the Orioles and Nationals have been designated by MLB as "home teams" in most of North Carolina.⁸⁶ There is no evidence in the record that shows that MLB's "home team" designations are based on customer demand or interest in a team in a particular locality or any other criteria that MVPDs consider in making carriage decisions. The Bureau's *Order* would effectively allow MLB to dictate the carriage decisions of MVPDs by designating certain areas a "home" market. In fact, surveys conducted by both TWC and MASN reflect only moderate interest in the Orioles and Nationals among North Carolina residents. A survey put forth by TWC showed that, of 500 North Carolinians who were asked what sports teams they followed, only four mentioned the Orioles, none mentioned the Nationals, and 25 other professional sports teams received more mentions than the Orioles.⁸⁷ A survey commissioned by MASN itself revealed that, out of 100 North Carolina sports fans asked about their "favorite Major League Baseball team," the Orioles received only 9 percent of the vote – ranking third behind the Atlanta Braves and the New York Yankees.⁸⁸

17. We also find no basis to conclude that the potential future popularity of MASN in North Carolina undermines TWC's evidence of limited present demand for MASN in that state.⁸⁹ Potential

(...continued from previous page)
would like to view MASN.

⁸¹ See *Application for Review* at 16; *Petition for Review* at 44; Hevey Decl. at ¶ 20; Hevey Supp. Decl. at ¶ 12.

⁸² See *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case No. 12 494 E 000326 07, Time Warner Cable's Pre-Hearing Brief, at 45 ("TWC Pre-Hearing Brief"); see also *Petition for Review* at 51.

⁸³ See *TWC Pre-Hearing Brief* at 45; see also *Petition for Review* at 51.

⁸⁴ See Supplemental Declaration of Joe King, November 29, 2007, at ¶ 7 ("King Supp. Decl."); see also *Petition for Review* at 51. TWC offered the testimony of Joe King, partner and founder of Sports Media Group, LLC (a consulting company that specializes in the television distribution and sports programming industry) on the issue of MASN's programming popularity in North Carolina. Although the arbitrator accorded more weight to the testimony of MASN's expert witness on the subject of programming demand, *Decision and Award* at 14 n.12, we find no legitimate basis in the record to discount the assertions of Mr. King. Even if, as the arbitrator concluded, "Mr. King's testimony was offered more for the purpose of attacking . . . [the] theories [of MASN's expert witness] . . . than advancing TWC's own arguments regarding demand for such program rights," it is not unreasonable for TWC's witnesses to assume a purely defensive posture in refuting claims of unlawful discrimination. Indeed, as noted *supra*, our carriage complaint procedures expressly contemplate that the defendant MVPD will put forth an answer "that refutes each allegation made . . . or supports any affirmative defenses." *Program Carriage Second Report and Order*, 9 FCC Rcd at 2654-55, ¶ 30.

⁸⁵ See *TWC Pre-Hearing Brief* at 46; Hevey Decl. at ¶ 16; see also *Petition for Review* at 52.

⁸⁶ *Order on Review* at ¶¶ 28, 34.

⁸⁷ See *Petition for Review* at 6; Declaration of Howard Horowitz, June 29, 2007, at ¶¶ 9-13 ("Horowitz Decl.").

⁸⁸ *MASN Opposition* at 61-62.

⁸⁹ *Order on Review* at ¶¶ 34, 35. We note, however, that if the demand for MASN's programming increases in the future in North Carolina or elsewhere, MASN is free to approach TWC at any time for a carriage deal.

future popularity may have little bearing on a current carriage decision. While the Bureau suggested that “the proximity of the Nationals to North Carolina, and their status as a relatively new franchise, suggest a much greater potential for MASN’s popularity than that posited by TWC,” we find no basis in the record to quantify this potential future popularity, to assess whether or when this future popularity will come to fruition, to conclude that TWC failed to consider any alleged future popularity, or to second guess TWC’s assessment of the future popularity of MASN relative to other networks.⁹⁰ Moreover, the fact that other current sports programming shown on MASN may be of potential interest to North Carolina residents does not undermine TWC’s evidence of limited current demand for MASN in North Carolina.⁹¹ There is no evidence in the record indicating that this programming receives significant ratings or supporting a conclusion that the popularity of this programming should outweigh TWC’s concerns with cost and bandwidth.⁹²

18. We find that the carriage decisions of non-vertically integrated cable operators in North Carolina provide independent evidence that TWC did not engage in discrimination on the basis of affiliation. Contrary to the Bureau’s finding, the fact that almost every other cable system in North Carolina has declined to carry MASN suggests a lack of interest in MASN’s programming statewide.⁹³ MASN is carried by [REDACTED] that account for only [REDACTED], or just over [REDACTED] of the non-TWC cable customers in North Carolina.⁹⁴ TWC provided evidence that those systems reside in the northeastern region of the state, which is proximate to Virginia and favored by vacationers from the Washington, DC and Baltimore region.⁹⁵ TWC also provided evidence that MASN is not carried by a single cable system in North Carolina that is as far from Baltimore as TWC’s systems.⁹⁶ Additionally, Suddenlink, a cable operator with more than [REDACTED] subscribers in Eastern North Carolina, has declined to enter into an agreement with MASN at all for similar reasons as TWC.⁹⁷ While the Bureau

⁹⁰ The Bureau also noted that subscribers in Eastern North Carolina do not have regular access on analog cable to the home market games of any MLB franchise and thus “disagree[d] with TWC that the prospects for MASN’s success in North Carolina are so low as to justify its denial of carriage on an analog tier.” *Id.* at ¶ 34. As TWC notes, however, other cable operators in Eastern North Carolina, such as Suddenlink and Charter, have reached the same decision to decline to carry MASN in that area despite the lack of home market MLB games on an analog tier. *See Application for Review* at 16; *Petition for Review* at 45; *TWC Reply* at 48; *see also infra* note 94.

⁹¹ *See Order on Review* at ¶ 34. Such programming includes Hooters Pro Cup Series stock car racing; basketball, lacrosse, baseball, softball and wrestling events of local NCAA Division I teams such as UNC-Charlotte, UNC-Wilmington, UNC-Greensboro, UNC-Chapel Hill, North Carolina State, Winston Salem State University, and Duke University; and football and basketball coaches’ programs for North Carolina State University and East Carolina University. *See id.* (citing Declaration of James Cuddihy, June 4, 2007, at ¶ 10).

⁹² *See Petition for Review* at 50 (citing Declaration of Joe King, June 29, 2007, at ¶¶ 30-40 (“King Decl.”)). The record reflects that Suddenlink reached a similar conclusion regarding MASN’s non-baseball programming. *See Declaration of Jerald L. Kent*, November 30, 2007, at ¶ 5 (“Kent Decl.”).

⁹³ *See Order on Review* at ¶ 34.

⁹⁴ *Petition for Review* at 41. [REDACTED]

⁹⁵ *See Petition for Review* at 41; King Decl. at ¶ 45. While the Bureau noted that some of those systems are inland rather than on the coast, it is undisputed that these systems are located in the northeastern region of the state, either on or near the Virginia border or the coast. *See Order on Review* at n.139 (citing Transcript of May 21, 2008 Hearing, 541:11-18 (Arbitrator Margolis and Mr. Brands)); *but see TWC Reply* at Exhibit 3 (providing map showing location of cable systems carrying MASN in North Carolina).

⁹⁶ King Decl. at ¶ 45.

⁹⁷ *See Petition for Review* at 42; *TWC Pre-Hearing Brief* at 40; Kent Decl. at ¶¶ 1, 4, 6. The Bureau noted that MASN presented evidence that Suddenlink was in the process of selling some of its systems and was reluctant to take on additional carriage obligations when it denied MASN carriage. *See Order on Review* at n.139 (citing

(continued....)

found MASN's carriage by the two DBS operators to be significant,⁹⁸ TWC explained that those MVPDs have many subscribers in Baltimore and Washington, DC, where the demand for MASN is indisputably much greater and thus providing DBS operators with little choice but to carry MASN.⁹⁹ TWC provided evidence that, once a DBS provider makes its signal available to subscribers in the Baltimore and Washington, DC areas, the signal is available to subscribers in North Carolina as well.¹⁰⁰ In contrast to cable operators, therefore, DBS providers incur no opportunity cost by making the service available there.¹⁰¹ Moreover, TWC provided testimony that MASN presumably demanded footprint-wide carriage as a condition for carriage in Baltimore and Washington.¹⁰²

2. Cost of Carriage of MASN

19. We find that TWC has provided evidence that the high cost of carriage of MASN was a reason for its refusal to carry MASN on an analog tier in its North Carolina cable systems.¹⁰³ We find no basis in the record to conclude that this is anything other than a legitimate and non-discriminatory reason for TWC's carriage decision. The record indicates that, in declining to carry MASN on an analog channel, TWC's executives considered that adding MASN to the expanded basic tier would incur the significant cost of approximately [REDACTED] per year.¹⁰⁴ The evidence further shows that, comparing

(...continued from previous page)

Supplemental Declaration of David Gluck, May 17, 2008, at ¶ 5). We find more persuasive the actual testimony from Suddenlink's executive explaining the basis for its carriage decision. See Kent Decl.

⁹⁸ The Bureau noted that, when considering all MVPDs, including DBS operators, four of the five largest MVPDs (other than TWC) in North Carolina carry MASN on a widely available tier. See *Order on Review* at ¶ 34. [REDACTED]. See *MASN Opposition* at 56.

⁹⁹ See King Decl. at ¶ 42; see also *Petition for Review* at 46; *TWC Reply* at 34.

¹⁰⁰ See King Decl. at ¶ 42; see also *Petition for Review* at 46; *TWC Reply* at 34.

¹⁰¹ See King Decl. at ¶ 42; see also *Petition for Review* at 46. The Bureau noted MASN's testimony that the carriage decisions of DBS operators are a more appropriate meter for gauging programming demand than those of smaller cable operators because DBS operators provide service throughout the state, rather than to scattered pockets of subscribers like the smaller cable operators, and because DBS carriers face similar bandwidth constraints as cable operators. See *Order on Review* at ¶ 47. We find no basis, however, to completely ignore the carriage decisions made by the majority of cable operators in North Carolina, including Charter and Suddenlink, which have over [REDACTED] respectively, in the state. Moreover, even assuming that the carriage decisions made by DBS operators are relevant for assessing TWC's carriage decisions, the record evidence reveals that only two MVPDs at most distribute MASN broadly to their subscribers while all other MVPDs have made the same decision as TWC to either distribute MASN to only a limited percentage of subscribers or to refrain from distributing MASN at all. Thus, the record does not support the position that MVPDs have overwhelmingly decided to carry MASN in North Carolina such that it can be inferred that TWC's decision to decline to carry MASN on an analog tier was motivated by considerations of affiliation.

¹⁰² See King Decl. ¶ 15; Declaration of Stanley M. Besen, May 7, 2008, at ¶¶ 24-25; see also *TWC Reply* at 34-35. Unlike the Bureau, we do not find significant that DIRECTV devoted all of the launch support resources provided for in its carriage agreement to a promotional campaign targeted exclusively to North Carolina residents. *Order on Review* at ¶ 47. Because the vast majority of cable systems in North Carolina do not carry MASN, it makes sense for DIRECTV to focus its resources in areas where its product offering differs from its competitors.

¹⁰³ See *Order on Review* at ¶ 36.

¹⁰⁴ See *Petition for Review* at 38 (explaining that because MASN demanded [REDACTED] per subscriber per month, and because TWC has about [REDACTED] subscribers to its expanded basic tier in North Carolina, TWC would have to pay roughly [REDACTED] per year); *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Nos. 12 494 E 000326 07, 71 472 E 00697 07, Time Warner Cable's Proposed Findings of Fact, May 2, 2008, at ¶ 17 ("*TWC Proposed Findings* (continued....)

MASN's considerable price to its unremarkable ratings, MASN provides significantly less value to TWC's North Carolina subscribers than do other RSNs.¹⁰⁵ TWC explained that adding MASN to an analog tier thus would cause TWC to incur a loss absent either an increase in rates (at the risk of subscriber churn), or MASN's attraction of a large number of new TWC subscribers, an unlikely event given the thin demand for MASN in North Carolina.¹⁰⁶

3. Bandwidth Constraints

20. We find that TWC has provided evidence that the channel capacity demanded by MASN was a reason for its refusal to carry MASN on an analog tier in its North Carolina cable systems.¹⁰⁷ We find no basis in the record to conclude that this is anything other than a legitimate and non-discriminatory reason for TWC's carriage decision. Unlike the carriage of Bobcats games on News 14, which did not require a separate channel and, in fact, reflected only about one percent of total programming on TWC's News 14 channel in 2007,¹⁰⁸ carriage of MASN would require a full six MHz channel on TWC's analog tier for MASN as well as a second "overflow" channel for MASN2, the service that carries games when the Orioles and Nationals play simultaneously.¹⁰⁹ The record demonstrates that TWC, under pressure from DBS competition, is seeking to free up as much spectrum as possible to add new HD services.¹¹⁰ TWC asserts that allocating a full analog channel to MASN would stymie that effort and place TWC at a competitive disadvantage by imposing an opportunity cost of two or three fewer HD services, and we find

(...continued from previous page)

of Fact"). While the Bureau noted that these cost estimates do not account for TWC's ability to recoup a portion of those costs from the sale of advertising spots and from the launch support TWC would receive from MASN, TWC explained that [REDACTED]. See *Order on Review* at ¶ 36; *TWC Reply* at 36.

¹⁰⁵ See *Petition for Review* at 27 ("On average, RSNs charge about [REDACTED] per subscriber per month for a full ratings point MASN is about [REDACTED] as expensive"); *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Case Nos. 12 494 E 000326 07, 71 472 E 00697 07, Time Warner Cable's Stage 2 Opening Brief, May 9, 2008, at 14-15 ("*TWC Stage 2 Opening Brief*"). [REDACTED]

¹⁰⁶ See *Petition for Review* at 37-38; *TWC Proposed Findings of Fact* at ¶¶ 17-21. We note that, in assessing the fair market value of MASN, the Arbitrator and the Bureau relied on a per-subscriber-per-major-pro-event ("PSPPE") metric and a regression analysis to conclude that MASN's fee in North Carolina was reasonable relative to fees that TWC has agreed to pay for RSN programming in other markets nationwide, including extended inner markets. See *Order on Review* at ¶ 36. As an initial matter, we note that the PSPPE analysis (which divides the RSN's annual per-subscriber license fee by the total number of live major professional sporting events shown by the RSN) appraises the value of RSNs based on the number of games carried, not whether consumers actually watch those games. See *Petition for Review* at 71; *TWC Reply* at 64-65. While MASN carries a significant number of games, we find that ratings evidence is a far better indicium of consumer demand for the network. We find that the fair market value analysis has little bearing on the question whether TWC engaged in unlawful discrimination in declining to carry MASN on an analog tier in North Carolina. Nothing in the fair market value analysis calls into question the evidence provided by TWC that limited demand for MASN in North Carolina, along with cost and bandwidth constraints, motivated its decision to decline to carry MASN on an analog tier.

¹⁰⁷ See *Order on Review* at ¶ 36.

¹⁰⁸ Hevey Decl. ¶ 36.

¹⁰⁹ See *TWC Reply* at 36.

¹¹⁰ See *TWC Reply* at 36; Third Hevey Decl. at ¶ 17; Kent Decl. at ¶ 7 ("There is a growing demand for additional high definition channels, video on demand channels, and other programming that all could absorb available channel capacity.").

no valid basis in the record to question TWC's claim.¹¹¹ Moreover, we note that TWC states that it has not completely refused to carry MASN under any circumstances; rather, TWC has claimed throughout this proceeding that it has offered to carry MASN on a digital tier in its North Carolina systems.¹¹² We find that TWC's consideration of digital tier carriage, rather than analog carriage, is consistent with its stated concern regarding the channel capacity required to carry MASN on an analog tier.¹¹³

4. TWC's Failure to Document Reasons for Carriage Decision

21. Contrary to the Bureau's suggestion, the paucity of documentation corroborating TWC's defenses does not necessarily undermine TWC's assertions.¹¹⁴ As an initial matter, there is no evidence in the record that cable operators typically document their internal carriage discussions.¹¹⁵ Moreover, as TWC suggests, nothing in Section 616 of the Act or its implementing rules requires program carriage defendants to memorialize any aspect of their decision making process.¹¹⁶ Thus, even in cases where litigation is reasonably foreseeable, and prudence dictates that defendant MVPDs document the reasons for their carriage denials, our existing rules impose no obligation to do so. Absent such documentation, we find it reasonable in this case to credit the testimony of the factual witnesses put forth by TWC on this issue.¹¹⁷ We note, however, that had TWC taken even modest steps to document its asserted reasons for denying analog carriage at the time it considered MASN's request, it might have avoided or truncated the protracted litigation that followed from its decision.¹¹⁸

¹¹¹ See *Petition for Review* at 38-39; *TWC Reply* at 36-37; Hevey Decl. at ¶¶ 11, 13; Third Hevey Decl. at ¶¶ 17, 19; Declaration of Paul Conway, March 17, 2008, at ¶ 17 ("Conway Decl."); *TWC Proposed Findings of Fact* at ¶ 9. The Bureau stated that TWC did not put forth evidence quantifying the opportunity cost to TWC from foreclosing its ability to carry other services of greater interest to North Carolinians or demonstrating that the net revenue derived from carriage of MASN would be less than the opportunity cost imposed by TWC's inability to offer more desirable programming services, including HD services. See *Order* at ¶ 36. It is unclear from the *Order* whether the Bureau applied the program access framework, whereby the burdens of production and persuasion are shifted to the defendant to demonstrate that its conduct is permissible. As noted above, we need not, and do not, address the issue of whether it is appropriate to apply the program access framework in this case. See *supra* ¶ 11. Even if the burden of proof shifted to TWC after MASN had proven its *prima facie* case, TWC would prevail because the reasons it has advanced for its carriage decision are borne out by the record and are not based on the programmer's affiliation or non-affiliation.

¹¹² See *Petition for Review* at 6-7; 52, 83; *TWC Reply* at 24, 46-47; Rosenberg Decl. at ¶ 3.

¹¹³ According to TWC, one six MHz channel can accommodate only one Standard Definition ("SD") service when analog transmission is used, but can accommodate 16 SD services and up to three HD services when digital transmission is used. See *Petition for Review* at 9.

¹¹⁴ See *Order on Review* at n.127.

¹¹⁵ See *Application for Review* at 18.

¹¹⁶ *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, v. Time Warner Cable Inc., Respondent*, Nos. 12 494 E 000326 07, 71 472 E 00697 07, Time Warner Cable's Stage 1 Opening Brief, May 8, 2008, at 9 ("*TWC Stage 1 Opening Brief*").

¹¹⁷ See e.g., Hevey Decl. at ¶ 10 (explaining that "considerations of affiliation never played a role" in the carriage decision at issue); Kelly Decl. at ¶¶ 17-20 (discussing TWC's consideration of the demand for MASN's programming in North Carolina).

¹¹⁸ For this reason, we encourage vertically integrated MVPDs to contemporaneously memorialize the reasons underlying their program carriage denials. While it might be impracticable to document every decision as TWC suggests, *Petition for Review* at 58, such measures are likely to prove worthwhile given the time and resources involved in defending against claims of unlawful discrimination.

5. TWC's Incentive to Discriminate

22. The fact that a vertically integrated MVPD possesses economic incentives to discriminate during the relevant time period does not support a finding of liability where, as here, the MVPD's reasons for denying carriage are reasonable and supported by the record.¹¹⁹ Because arguably all vertically integrated MVPDs have incentives to engage in anticompetitive conduct, the relevant inquiry is not whether TWC possessed a motive to discriminate, but whether it acted upon any such motive in reaching its carriage decision. Given that TWC has advanced credible justifications for its denial of analog carriage, we find that TWC's decision was driven by factors other than a desire to force MASN out of business or discourage MASN from entering the market, thereby clearing a path for TWC's acquisition of MASN's sports programming.¹²⁰

IV. CONCLUSION

23. Based on the foregoing analysis, we conclude that TWC has provided evidence adequate to refute MASN's claim of unlawful program carriage discrimination in violation of Section 616(a)(3) of the Act and the Commission's program carriage rules when TWC declined to carry MASN on an analog tier in its North Carolina cable systems. Moreover, because we conclude that TWC did not discriminate against MASN within the meaning of Section 616(a)(3), we do not reach the merits of (i) MASN's claim that TWC's decision to decline to carry MASN on an analog tier unreasonably restrained the ability of MASN to compete fairly;¹²¹ (ii) which final offer – that of TWC or MASN – more closely reflected the fair market value of the right to carry MASN;¹²² or (iii) TWC's First Amendment claim.¹²³ Accordingly, we vacate the Bureau's findings on these issues as moot.

V. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), 5(c), and 616, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(c), 536, and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Media Bureau's *Order* in the above-captioned proceeding **IS REVERSED** to the extent described herein.

25. **IT IS FURTHER ORDERED** that the *Application for Review* filed by TWC pursuant to Section 1.115(d) of the Commission's rules, 47 C.F.R. § 1.115(d), **IS GRANTED** to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹⁹ See *Order on Review* at ¶ 37.

¹²⁰ See *Adelphia Order*, 21 FCC Rcd at 8287-88, ¶¶ 189-191. Indeed, that TWC was willing to consider carrying MASN on an analog tier on its eastern North Carolina systems lends credence to TWC's claim that broad carriage of MASN was unjustified given the limited demand for its programming statewide. Rosenberg Decl. at ¶ 5.

¹²¹ See *Order on Review* at ¶¶ 30-31.

¹²² See *id.* at ¶¶ 42-48.

¹²³ See *id.* at ¶ 49.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*

In the Order granting the license transfer from Adelphia to Time Warner, the FCC imposed an arbitration condition to address a finding that Time Warner would have the ability to deny carriage to rival regional sports networks.

The arbitration process was duly followed upon complaint from the MASN network that Time-Warner had engaged in program carriage discrimination against it. MASN prevailed on the merits. The arbitrator found that Time Warner had indeed engaged in unlawful discrimination by refusing to carry MASN on an analog tier. In fact, two arbitrators found discrimination against MASN.

In 2008, our Media Bureau agreed with these findings. I find no compelling evidence or rationale in the Memorandum Opinion and Order currently before us to reverse the findings of the two arbitrators and the 2008 Media Bureau decision.

I therefore am compelled to dissent.