

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

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

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 27, 2017**

**Released: October 27, 2017**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. By this Memorandum Opinion and Order, we dismiss to the extent indicated herein the above-captioned complaint filed by Word Network Operating Company d/b/a The Word Network (TWN) against Comcast Corporation and Comcast Cable Communications, LLC (collectively, Comcast).<sup>1</sup> In its complaint, TWN, an independently owned and operated religious programming network, alleges that Comcast, a vertically-integrated multichannel video programming distributor (MVPD), discriminated against TWN on the basis of affiliation or non-affiliation in the selection, terms, and conditions of carriage in violation of the non-discrimination condition set forth in the Commission's order approving Comcast's acquisition of NBCUniversal by reducing distribution of TWN without a valid business justification.<sup>2</sup> In addition, TWN alleges that Comcast demanded exclusive digital rights to TWN (i.e., rights to distribute TWN's programming content online) in violation of the *Comcast-NCBU Order's* non-discrimination condition.<sup>3</sup> TWN also alleges that Comcast violated Section 616(a)(1) of the

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

<sup>2</sup> *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4287, para. 121, 4358, Appx. A, Sec. III(1) (non-discrimination condition) (2011) (*Comcast-NBCU Order*).

<sup>3</sup> *Id.* at 4287, para. 121, 4358, Appx. A, Sec. III(1) (non-discrimination condition). TWN also alleges that Comcast demanded exclusive digital rights to TWN's programming in violation of the *Comcast-NCBU Order's* exclusivity and unfair practices conditions. *Id.* at 4361, Appx. A, Sec. IV(B)(3) (exclusivity condition); *id.* at 4363, Appx. A, Sec. IV(G)(1)(a) (unfair practices condition). Alleged violations of these conditions are not subject to the deadline for issuance of a *prima facie* determination under the program carriage rules. See 47 CFR § 76.1302(g) ("Within sixty (60) calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed), the Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of §76.1301."). We will address these allegations in a separate decision.

Communications Act of 1934, as amended, (Act), and Section 76.1301(a) of the Commission's rules, by refusing to negotiate with TWN unless TWN granted Comcast exclusive digital rights to TWN's programming.<sup>4</sup>

2. After reviewing the complaint, we find that TWN has failed to put forth sufficient evidence to establish a *prima facie* case that Comcast discriminated against it in violation of the non-discrimination condition by reducing distribution of TWN or by demanding exclusive digital rights to TWN's programming.<sup>5</sup> We also find that TWN has failed to establish a *prima facie* case that Comcast violated the financial interest provision of Section 616(a)(1) of the Act and Section 76.1301(a) of the Commission's rules by refusing to negotiate with TWN unless TWN granted Comcast exclusive digital rights to TWN's programming.

## II. BACKGROUND

3. Section 616(a) of the Act directs the Commission to establish rules governing program carriage agreements and related practices between cable operators or other MVPDs and "video programming vendors" that, among other things:

prevent [an MVPD] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;<sup>6</sup> and

prevent [an 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.<sup>7</sup>

In implementing these statutory provisions, the Commission adopted Section 76.1301(a) and (c) of its rules, which closely track the language of Section 616(a)(1) and (a)(3).<sup>8</sup> The Commission has established specific procedures for the review of program carriage complaints.<sup>9</sup> Those rules, among other things, describe the evidence a complainant must provide in its complaint to establish a *prima facie* case of a violation of the program carriage rules.<sup>10</sup>

4. When the Commission approved Comcast's acquisition of NBCU, it imposed conditions concerning carriage of unaffiliated video programming. Among other such conditions, the *Comcast-NBCU Order* barred Comcast from discriminating against video programming vendors on the basis of

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<sup>4</sup> 47 U.S.C. § 536(a)(1); 47 CFR § 76.1301(a).

<sup>5</sup> For purposes of this Order, we assume that Comcast demanded exclusive digital rights to TWN's programming. We do not, however, resolve the issue of whether Comcast in fact made such a demand.

<sup>6</sup> 47 U.S.C. § 536(a)(1).

<sup>7</sup> *Id.* § 536(a)(3).

<sup>8</sup> 47 CFR § 76.1301(a) ("No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems."); *id.* § 76.1301(c) ("No multichannel video programming distributor shall engage 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.").

<sup>9</sup> *Id.* § 76.1302.

<sup>10</sup> *Id.* § 76.1302(d).

affiliation or non-affiliation in the selection, price, terms or conditions of carriage.<sup>11</sup> Under this condition, a vendor need not prove that it was unreasonably restrained from competing, as it must under Section 616 of the Act and the program carriage rules.<sup>12</sup>

5. Launched in February 2000, TWN is an independently owned and operated cable programming network, unaffiliated with any MVPD, that provides original African-American oriented ministry programming.<sup>13</sup> Comcast began distributing TWN on certain Comcast systems in 2000 pursuant to an agreement executed on September 8, 2000.<sup>14</sup> This agreement, which [REDACTED],<sup>15</sup> TWN does not charge Comcast a per-subscriber fee for distribution and provides its signal to Comcast free of charge.<sup>16</sup> TWN is also distributed by DIRECTV, AT&T, Spectrum/Charter, Verizon, Cox, Cablevision, CenturyLink, Suddenlink, and other MVPDs.<sup>17</sup> TWN has also made its programming available through its website since August 2013.<sup>18</sup> TWN asserts that it has a strong online presence, with over 70,000 unique website hits per month, nearly a million followers on Facebook, 75,000 followers on Instagram, 41,700 followers on Twitter, and 12,400 followers on YouTube.<sup>19</sup>

6. Comcast is the nation's largest cable operator with more than 22 million video subscribers and serves customers in 40 states and Washington, D.C..<sup>20</sup> Comcast is also a vertically integrated content provider, owning the NBC and Telemundo broadcast networks, various national cable networks, and regional sports and news networks.<sup>21</sup>

7. TWN and Comcast provide distinctly different versions of the events giving rise to TWN's complaint. TWN states that on November 11, 2016, Jennifer Gaiski, Senior Vice President, Content Acquisition, Comcast Cable Communications, notified TWN by letter of Comcast's intent to

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<sup>11</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4287, para. 121, 4358, Appx. A, Sec. III(1).

<sup>12</sup> *Id.* at 4287, para. 121. See 47 CFR § 76.1302(d)(3)(iii)(A).

<sup>13</sup> Complaint at 8-9. TWN states that it is the largest African-American religious network in the world, reaching millions of viewers, including elderly and disabled viewers who are unable to leave their homes to attend services in person. Complaint at 9, 25.

<sup>14</sup> Complaint at 8-9; Comcast Answer (Answer) at 6.

<sup>15</sup> Answer at 6.

<sup>16</sup> Complaint at 26. TWN indicates that it charges ministers hourly fees to air their programming on its network. *Id.* at 27-28. We note that the definition of a "video programming vendor" eligible to file a program carriage complaint and to avail itself of the *Comcast-NBCU Order* non-discrimination condition is "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b) (emphasis added). See 47 CFR § 76.1300(e); *Comcast-NBCU Order*, 26 FCC Rcd at 4358, Appx. A, Sec. I (Definitions). TWN makes its programming available for free. Because Comcast admits in its Answer that TWN is a "video programming vendor," Answer at 39, we need not and do not reach the issue here of whether an entity that makes its programming available for free qualifies as a "video programming vendor" under the Act, our rules, and the *Comcast-NBCU Order* conditions. See *Liberman Broadcasting, Inc. and LBI Media, Inc. v. Comcast Corporation and Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 9551, 9556-57, para. 12 (MB 2016) (*Liberman v. Comcast*), *recon. pending*.

<sup>17</sup> Complaint at 9.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Id.* at 11; Answer at 39.

<sup>21</sup> Complaint at 11; Answer at 39.

eliminate distribution of TWN on 456 Comcast systems, reducing TWN's distribution on Comcast from approximately 12 million to 5 million subscribers.<sup>22</sup> The eliminated markets included key African American markets for TWN, such as Washington, D.C., Philadelphia, and Baltimore, as well as other major metropolitan areas such as Pittsburgh, Houston, Salt Lake City, San Francisco/Oakland, Denver, Boston, and Minneapolis/St. Paul.<sup>23</sup> TWN asserts that Ms. Gaiki's letter did not provide any explanation for Comcast's decision to reduce distribution of TWN and came without any prior warning of Comcast's decision.<sup>24</sup> TWN states that it was subsequently informed by Comcast that TWN would be replaced on these systems by the Impact Network (Impact), which also features African-American ministry programming.<sup>25</sup>

8. TWN asserts that following receipt of the November 11, 2016 letter, Kevin Adell, President and CEO of TWN, contacted Ms. Gaiki to find out why Comcast had reduced carriage of TWN and explore a solution.<sup>26</sup> TWN maintains that instead of offering any tangible explanation for the reduction in distribution, Ms. Gaiki told Mr. Adell that Comcast was reducing distribution of TWN "Because we are Comcast, and we can."<sup>27</sup>

9. TWN states that on November 22, 2016, Mr. Adell and John Mattiello, TWN's Director of Marketing and Affiliate Relations, met with Ms. Gaiki and her team at Comcast's Philadelphia headquarters.<sup>28</sup> According to TWN, when pressed for an explanation for Comcast's decision to reduce distribution of TWN, Ms. Gaiki said that TWN did not perform as well as it should, but would not explain how Comcast measured its performance or the specific markets where TWN supposedly did not adequately perform.<sup>29</sup> Additionally, Mr. Adell asserts that Ms. Gaiki demanded exclusive control over TWN's digital rights at this meeting.<sup>30</sup> Adell states that he rejected this request, explaining that TWN streams its content through TWN's website and does not license its digital rights to any distributors.<sup>31</sup> Mr. Adell maintains that Comcast then informed TWN that its policy is to not carry a video programming vendor unless the vendor grants Comcast its digital rights.<sup>32</sup> Mr. Adell states that he reiterated that TWN would not part with its exclusive worldwide rights, as TWN uses them as part of its business model, and Comcast subsequently refused to negotiate any further.<sup>33</sup>

10. TWN further states that after learning that Comcast intended to reduce distribution of TWN, Bishop Charles Ellis III, one of the more popular preachers featured on TWN, attempted to contact

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<sup>22</sup> Complaint at 13 and Exh. 9; Answer at 9.

<sup>23</sup> Complaint at 13 and Exh. 9.

<sup>24</sup> Complaint at 14 and Exh. 9.

<sup>25</sup> Complaint at 13; Declaration of Kevin Adell, President and Chief Executive Officer, The Word Network (Adell Decl.), at para. 16.

<sup>26</sup> Adell Decl. at para. 25.

<sup>27</sup> Complaint at 1-2; Adell Decl. at 25.

<sup>28</sup> Complaint at 14; Adell Decl. at para. 26.

<sup>29</sup> Complaint at 15; Adell Decl. at para. 29.

<sup>30</sup> Complaint at 15; Adell Decl. at para. 32.

<sup>31</sup> Complaint at 15; Adell Decl. at para. 32.

<sup>32</sup> Complaint at 15; Adell Decl. at para. 35.

<sup>33</sup> Complaint at 16; Adell Decl. at para. 35.

Ms. Gaiski, but Ms. Gaiski never responded to him.<sup>34</sup> Instead, TWN says, Antonio Williams, a director in Comcast's government affairs department, returned his call.<sup>35</sup> TWN asserts that when asked why Comcast was replacing TWN with the Impact Network on 456 of its systems, Mr. Williams responded that TWN had not been a good partner for Comcast, that TWN's programming was mediocre, and that Mr. Adell had not visited Comcast's headquarters.<sup>36</sup> Mr. Williams also stated that Comcast believed replacing TWN with Impact on these systems would give the African American community more options.<sup>37</sup> TWN notes that a second call, which included Mr. Williams, Bishop Ellis, Reverend Jesse Jackson, Sr., and Bishop Paul Morton, occurred "prior to Christmas" 2016.<sup>38</sup> During this call, the ministers explained to Mr. Williams the harm to African American ministers that would result if Comcast reduced its distribution of TWN and Mr. Williams agreed to relay their concerns to his superiors at Comcast.<sup>39</sup> However, TWN states that none of the ministers ever heard back from Mr. Williams or Comcast.<sup>40</sup>

11. Comcast provides a different version of events. Comcast asserts that in 2016, its Content Acquisition team, led by Ms. Gaiski, began a review of the religious networks carried on its systems, all of which are unaffiliated with Comcast, with a focus on their appeal among African American viewers.<sup>41</sup> The review included an examination of the networks, their program offerings, the level of consumer interest for their programming in particular regions, and the networks' level of engagement with Comcast and the local communities where they are carried.<sup>42</sup> In September and October 2016, Comcast reviewed the results of an audience survey of viewer preferences among African-American pay-TV subscribers that was conducted between June 21 and July 13, 2016.<sup>43</sup> The survey showed that Comcast carries multiple religious networks that are popular among African American viewers and that other religious networks had greater reach and higher intensity viewership among African American viewers than TWN.<sup>44</sup> Comcast's Content Acquisition team subsequently conducted additional research and analysis of programming available on the various religious networks.<sup>45</sup> Comcast states that this research showed that TWN's programming substantially overlapped with many of the other religious networks carried by Comcast, including Impact,<sup>46</sup> and that there would be adequate substitutes for TWN viewers if TWN were

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<sup>34</sup> Complaint at 16; Declaration of Bishop Charles H. Ellis III (Ellis Decl.) at para. 20.

<sup>35</sup> Complaint at 16; Ellis Decl. at para. 21.

<sup>36</sup> Complaint at 16; Ellis Decl. at para. 22.

<sup>37</sup> Complaint at 16-7; Ellis Decl. at para. 22.

<sup>38</sup> Complaint at 17; Ellis Decl. at para. 24.

<sup>39</sup> Complaint at 17-8; Ellis Decl. at para. 25.

<sup>40</sup> Complaint at 18; Ellis Decl. at para. 25.

<sup>41</sup> Answer at 6-7. Comcast explains that due to intense competition from other MVPDs and online video services, it continuously evaluates the programming lineup for its subscribers within the constraints of each system's bandwidth and strives to select programming that keeps them loyal customers. Gaiski Decl. at para. 8.

<sup>42</sup> Answer at 7.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* Comcast notes that at the time of this analysis, Impact was carried to approximately [REDACTED] million subscribers in the Heartland Region within Comcast's Central Division. *Id.*

no longer available on Comcast systems in certain markets.<sup>47</sup> Comcast states that the research further showed that Impact offers a broader selection of programming, spanning a greater variety of program genres, than TWN, which almost exclusively airs ministry-focused programming.<sup>48</sup> Other factors weighing in favor of increasing distribution of Impact, Comcast says, were the fact that, unlike TWN, Impact is an African American owned and operated network, adding to the diversity of independent programming carried by Comcast, and the fact that Impact has sponsored concerts and religious events in local communities that enhance Comcast's carriage of Impact in those communities.<sup>49</sup> Comcast asserts that based on all of these factors, and after consultation with executives in the regions where it carried TWN, the Content Acquisition team decided to increase carriage of Impact by adding it to systems in Comcast's Northeast, Central, and West Divisions and reduce carriage of TWN by removing it from systems in Comcast's Northeast and West Divisions.<sup>50</sup> As a result of these changes, Impact's carriage on Comcast's systems increased from approximately [REDACTED] million subscribers to approximately [REDACTED] million subscribers, while TWN's carriage decreased from approximately [REDACTED] million subscribers to approximately [REDACTED] million subscribers.<sup>51</sup>

12. Comcast acknowledges that on November 11, 2016, Ms. Gaiki sent a letter, via fax, to Mr. Adell informing TWN of its decision to remove TWN from Comcast systems in the Northeast and West Divisions.<sup>52</sup> Comcast states that on November 14, 2016, Ms. Gaiki and Justin Smith, Senior Vice President, Content Acquisitions, Comcast, spoke with Mr. Adell by phone and explained the reasons for Comcast's decision to reduce distribution of TWN.<sup>53</sup> On November 22, 2016, Ms. Gaiki and her team met with Mr. Adell and Mr. Mattiello at Comcast's Philadelphia headquarters and again explained the reasons for its decision to reduce TWN's carriage, including providing additional content and variety to its customers consistent with different systems' needs, as well as bandwidth constraints.<sup>54</sup> Comcast states that Ms. Gaiki agreed to consider TWN's request to maintain carriage on certain of the systems at issue and indicated that TWN was free to contact those systems as well.<sup>55</sup> Comcast, in three sworn declarations, denies that Ms. Gaiki ever told TWN that the reason for the reduction in distribution of TWN was "[b]ecause we are Comcast, and we can."<sup>56</sup> Comcast also denies that Ms. Gaiki demanded or

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<sup>47</sup> *Id.* Comcast states that its research showed that at least 25 of the ministers that appear on TWN also appear on other networks carried by Comcast and many of these ministers are also available on local religious broadcast stations that Comcast carries in nearly every market. Gaiki Decl. at 11.

<sup>48</sup> Answer at 7.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.* Comcast states that the Central Division, which includes TWN's home market in Detroit and had the necessary bandwidth, chose to continue to carry TWN. *Id.*; Gaiki Decl. at para. 15.

<sup>51</sup> Answer at 8.

<sup>52</sup> *Id.* at 9; Gaiki Decl. at para. 16. *See also* Complaint at Exh. 9.

<sup>53</sup> Gaiki Decl. at para. 17; Declaration of Justin Smith, Senior Vice President, Content Acquisition, Comcast Cable Communications (Smith Decl.), at para. 5.

<sup>54</sup> Answer at 9; Gaiki Decl. at para. 20. In addition to Ms. Gaiki, the meeting attendees for Comcast were Justin Smith, Sarah Gitchell (Senior Vice President, Deputy General Counsel and Chief Counsel, Content Acquisitions), Keesha Boyd (Executive Director, Multicultural Services), Bret Perkins (Vice President, External and Governmental Affairs), Antonio Williams (Director of Governmental and External Affairs), and Javier Garcia (Senior Vice President and General Manager, Multicultural Services). Gaiki Decl. at para. 18.

<sup>55</sup> Answer at 9; Gaiki Decl. at para. 22; Declaration of Keesha Boyd, Executive Director, Multicultural Services (Boyd Decl.), at para. 6; Smith Decl. at 5.

<sup>56</sup> Answer at 9; Gaiki Decl. at para. 23; Smith Decl. at para. 7; Boyd Decl. at para. 9.

sought any digital rights, let alone exclusive rights, to TWN's programming.<sup>57</sup> Comcast asserts that it would not have made sense to seek or demand such rights as Comcast was interested in reducing distribution of TWN, not obtaining additional distribution rights.<sup>58</sup>

13. Comcast states that, following the November 22 meeting, the Content Acquisition team began the process of identifying markets where it was willing to consider continued distribution of TWN, if supported by feedback from the local systems.<sup>59</sup> On November 30, 2016, Ms. Gaiski and Mr. Smith participated in a phone call with Mr. Adell and Mr. Mattiello.<sup>60</sup> During this call, Mr. Adell informed Comcast that the broadcast television station that he owns, WADL, Detroit, Michigan, would not renew its deal with NBCUniversal to carry certain NBCUniversal programming, that he was running ads against Comcast on his Detroit radio station, WFDF, and that he was planning a protest outside of Comcast's headquarters in Philadelphia for December 2, 2016.<sup>61</sup> Ms. Gaiski and Mr. Smith reiterated that Comcast was continuing internal discussions and reaching out to local systems regarding whether to maintain carriage of TWN in additional markets, but had not yet come to any final determination.<sup>62</sup> Comcast asserts that TWN subsequently launched a public relations campaign that encouraged its viewers to complain directly to Ms. Gaiski and Mr. Smith and organized protests outside of Comcast's headquarters in December 2016 and January 2017.<sup>63</sup> Additionally, Comcast asserts that in early January 2017, TWN published a letter on its website that purported to be from Reverend Al Sharpton accusing Comcast of violating its Memorandum of Understanding with African American leadership organizations submitted in the Comcast-NBCU merger proceeding.<sup>64</sup> Comcast states that on January 11, 2017, Reverend Sharpton sent Mr. Adell a letter advising that Mr. Adell had "misinformed" him regarding the facts and had "altered [the] letter without [his] consent."<sup>65</sup> Reverend Sharpton's letter further stated that Comcast had not made any changes that violated the MOU or undermined its commitment to the African American community and directed Mr. Adell to cease such misrepresentation.<sup>66</sup>

14. Comcast states that "[g]iven the non-productive and hostile nature of Word's conduct" and "the lack of any contrary feedback from the local systems," it proceeded with its planned reduction in carriage for TWN.<sup>67</sup> On January 12, 2017, Comcast discontinued carriage of TWN on the 456 systems

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<sup>57</sup> Answer at 9; Gaiski Decl. at para. 24; Smith Decl. at para. 6; Boyd Decl. at para. 8.

<sup>58</sup> Gaiski Decl. at para. 24

<sup>59</sup> Answer at 9.

<sup>60</sup> *Id.* at 10; Gaiski Decl. at para. 27; Smith Decl. at para. 8.

<sup>61</sup> Answer at 10; Gaiski Decl. at para. 27; Smith Decl. at para. 8.

<sup>62</sup> Answer at 10; Gaiski Decl. at para. 28; Smith Decl. at para. 8.

<sup>63</sup> Answer at 10; Gaiski Decl. at para. 29.

<sup>64</sup> Answer at 11; Gaiski Decl. at para. 30. *See Comcast-NBCU Order*, 26 FCC Rcd at 4492, App. G, Memorandum of Understanding Between Comcast Corporation, NBC Universal and the African American Leadership Organizations (MOU). The stated purpose of the MOU is "to enhance the policies and programs by which African Americans may realize greater participation in the five focus areas [(corporate governance, employment/workforce recruitment and retention, procurement, programming, and philanthropy and community investment)] and identify and pursue actions by which the National African American Leadership Organizations can support the growth of Comcast and NBCU's business within the African American consumer market." *Id.* at 4493.

<sup>65</sup> Answer at 11; Gaiski Decl. at para. 30.

<sup>66</sup> Answer at 11; Gaiski Decl. at para. 30.

<sup>67</sup> Answer at 11.

listed in Ms. Gaiki's November 11 letter and replaced TWN on those systems with the Impact Network.<sup>68</sup> Comcast states that following the reduction in TWN's carriage, it received fewer than 50 complaints from the approximately [REDACTED] million customers who were now receiving Impact instead of TWN.<sup>69</sup>

15. On February 6, 2017, Mr. Adell provided written notice to Comcast of TWN's intent to file a complaint pursuant to Section 76.1302(b) of the Commission's rules.<sup>70</sup> Comcast responded to this notice on February 16, 2017.<sup>71</sup> On May 19, 2017, TWN provided a supplemental notice to Comcast of TWN's intent to file a complaint.<sup>72</sup> Comcast responded to this notice on May 26, 2017.<sup>73</sup> On June 8, 2017, TWN filed a complaint against Comcast with the Commission alleging violations of the *Comcast-NBCU Order's* non-discrimination, exclusivity, and unfair practices conditions, Section 616(a)(1) of the Act, and Section 76.1301(a) of the Commission's rules.

### III. DISCUSSION

#### A. Applicability of *Prima Facie* Showing Requirement to Complaints Brought Under the *Comcast-NBCU Order* Non-Discrimination Condition

16. When filing a program carriage complaint, the complainant carries the burden of proof to establish a *prima facie* case that the defendant MVPD has engaged in unlawful behavior.<sup>74</sup> The Commission has specified the evidence a program carriage complainant must provide in its complaint to establish a *prima facie* case.<sup>75</sup> A Media Bureau finding that the complainant has established a *prima facie* case means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.<sup>76</sup> In contrast, if the Bureau finds that the complainant has not established a *prima facie* case, the Bureau will dismiss the complaint.<sup>77</sup>

17. We reject TWN's assertion that, unlike a non-discrimination complaint brought under the

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<sup>68</sup> Complaint at 18; Answer at 8.

<sup>69</sup> Answer at 11; Gaiki Decl. at para. 31.

<sup>70</sup> Complaint at 8 and Exh. 5; Answer at 12. See 47 CFR § 76.1302(b) ("Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.").

<sup>71</sup> Complaint at 8 and Exh. 6; Answer at 12.

<sup>72</sup> Complaint at 8 and Exh. 7; Answer at 12.

<sup>73</sup> Complaint at 8 and Exh. 8; Answer at 12.

<sup>74</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2654, para. 29 (1993) (*1993 Program Carriage Order*). See 47 CFR § 76.1302(d).

<sup>75</sup> 47 CFR § 76.1302(d).

<sup>76</sup> *Id.* § 76.1302(g)(3). The Bureau can make a decision on the merits based on the complaint, answer, and reply without discovery or after discovery, or it can refer the matter to an administrative law judge for a hearing. *Id.* § 76.1302(i).

<sup>77</sup> *Id.* § 76.1302(g)(4).



program carriage rules, a complaint brought by a video programming vendor under the non-discrimination condition in the *Comcast-NBCU Order* does not need to make a *prima facie* case to the Media Bureau.<sup>78</sup> TWN acknowledges that the non-discrimination condition in the *Comcast-NBCU Order* specifically applies the program carriage complaint procedures set forth in Section 76.1302 of the Commission's rules to discrimination complaints brought under that condition.<sup>79</sup> TWN asserts, however, that Section 76.1302(d) – which specifies the evidence that a complaint must contain “[i]n order to establish a *prima facie* case of a violation of § 76.1301” – requires that a *prima facie* case be made only for complaints of a violation of the prohibited practices in Section 76.1301, not for discrimination complaints brought under the *Comcast-NBCU Order*.<sup>80</sup> TWN argues that since it is not bringing a complaint alleging a violation of Section 76.1301 but rather for violation of the non-discrimination condition, it is not required to make a *prima facie* showing that Comcast violated the non-discrimination condition.<sup>81</sup> We disagree. The fact that the *prima facie* case requirement makes reference to a violation of 76.1301 does not render it inapplicable to complaints brought under the *Comcast-NBCU Order*'s non-discrimination condition. TWN's proffered interpretation would contravene the text of the condition and frustrate the Commission's intent regarding its scope.

18. The *Comcast-NBCU Order* states explicitly that for purposes of enforcing the non-discrimination condition, a programming vendor “may submit a dispute to the Commission in accordance with the program carriage complaint procedures, 47 C.F.R. § 76.1302.”<sup>82</sup> The *prima facie case* requirement is one of the complaint procedures listed in Section 76.1302,<sup>83</sup> and it is an integral part of these procedures.<sup>84</sup> As Comcast points out, the Commission has emphasized the importance of the *prima facie* showing to guard against frivolous complaints and promote the efficient use of Commission resources.<sup>85</sup> In the *2011 Program Carriage Order*, the Commission stated that “we believe that retaining this [*prima facie*] requirement is important to dispose properly of frivolous complaints and to ensure that only legitimate complaints proceed to further evidentiary proceedings.”<sup>86</sup> We know of no reason why the

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<sup>78</sup> Complaint at 19.

<sup>79</sup> *Id.* See *Comcast-NBCU Order*, 26 FCC Rcd at 4359, Appx. A, Sec. III(4) (“For purposes of enforcing the Conditions of this Section III, any Video Programming Vendor may submit a dispute to the Commission in accordance with the Commission's program carriage complaint procedures, 47 C.F.R. § 76.1302.”).

<sup>80</sup> Complaint at 19-20; Reply at 12. See 47 CFR 76.1302(d).

<sup>81</sup> Reply at 12-13.

<sup>82</sup> See *supra* note 79.

<sup>83</sup> 47 CFR 76.1302(d).

<sup>84</sup> Indeed, we note that the *2011 Program Carriage Order* referred to the *prima facie case* requirement in Section 76.1302(d) as a “procedure.” *Revision of the Commission's Program Carriage Rules*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11495-96, para. 2 (2011) (“we take initial steps to improve our procedures for addressing program carriage complaints by: Codifying in our rules what a program carriage complainant must demonstrate in its complaint to establish a *prima facie case*”) (*2011 Program Carriage Order*), rev. granted in part and denied in part, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2013); *id.* at 11501, para. 8.

<sup>85</sup> Answer at 14.

<sup>86</sup> *2011 Program Carriage Order*, 26 FCC Rcd at 11502, para. 10. See also *id.* at 11519, para. 33 (“In addition, we note that the number of cable-affiliated networks recently increased significantly after the merger of Comcast and NBC Universal, thereby highlighting the continued need for an effective program carriage complaint regime. The Commission noted that that transaction would ‘result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against  
(continued....)”).

same concerns about frivolous complaints should not apply to disputes brought under the non-discrimination condition, for which the Commission specifically incorporated the “procedures” in Section 76.1302.

19. Moreover, TWN points to nothing in the *Comcast-NBCU Order* that evinces an intent by the Commission to relieve video programming vendors bringing a complaint under the non-discrimination condition from complying with the *prima facie* case requirement. Had the Commission intended to make such a significant departure from the program carriage complaint procedures when extending these procedures to complaints brought under the non-discrimination condition, we believe it would have done so in clear and unmistakable language, as it did with another evidentiary requirement. Specifically, in the *Comcast-NBCU Order*, the Commission made it easier for programming vendors to establish a program carriage discrimination violation by expressly providing that “[a] vendor proceeding under this condition will not need to also prove that it was unreasonably restrained from competing, as it would under our program carriage rules.”<sup>87</sup> Indeed, the requirement to prove that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly is one of the elements of the *prima facie* case requirement.<sup>88</sup> If the Commission had intended to exempt complaints brought under the non-discrimination condition from complying with the *prima facie* case requirement in its entirety, there would have been no need to single out the unreasonable restraint element of the *prima facie* case requirement. Instead, the Commission would have simply stated that complaints brought under the non-discrimination condition need not comply with the *prima facie* case requirement.

20. Furthermore, there are other provisions in Section 76.1302 that make reference to a violation of Section 76.1301. The general pleading requirements and the pre-filing notice requirement in Section 76.1302, like the *prima facie* case requirement, both contain language referencing violations of Section 76.1301.<sup>89</sup> TWN concedes that these other procedural requirements apply to complaints brought under the non-discrimination condition, asserting that “[w]hat the Commission did not do was set up new *procedures* for filing complaints, instead using the existing process for general pleading requirements, pre-filing notification, complaint contents, answers, replies, time limits for filing and responses, remedies for violations, and petitions for temporary standstill.”<sup>90</sup> TWN, however, cites nothing in the *Comcast-NBCU Order* that would support the notion that the Commission intended to extend the general pleading requirements and the pre-filing notice requirement – both of which make reference to violations of Section 76.1301 – but not the *prima facie* case requirement to complaints brought under the non-

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unaffiliated video programming networks.’ The Commission specifically relied upon the program carriage complaint process to address these concerns.”) (citations omitted).

<sup>87</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4287, para. 121.

<sup>88</sup> 47 CFR § 76.1302(d)(3)(iii)(A) (providing that in order to establish a *prima facie* case of a discrimination violation, the complaint must contain “[e]vidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly.”).

<sup>89</sup> *Id.* § 76.1302(a) (“Any video programming vendor or multichannel video programming distributor *aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart* may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in §76.7 of this part with the following additions or changes:”) (emphasis added); *id.* § 76.1302(b) (“Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission *based on actions alleged to violate one or more of the provisions contained in §76.1301 of this part...*”) (emphasis added).

<sup>90</sup> Reply at 15 (emphasis in original).

discrimination condition. We agree with Comcast that TWN may not pick and choose the program carriage procedural rules that apply to it.<sup>91</sup>

21. The Bureau recently confirmed that the *prima facie* case requirement applies to discrimination complaints brought under the *Comcast-NBCU Order*'s non-discrimination condition.<sup>92</sup> The Bureau observed that in order to establish a *prima facie* case of a program carriage violation, the complaint must contain, among other things, evidence that the complainant is a "video programming vendor," as defined in Section 76.1300(e) of the Commission's rules.<sup>93</sup> TWN maintains that *Liberman v. Comcast* merely states what the *Comcast-NBCU Order* already makes clear—that "complaints under the non-discrimination condition may use the Commission's program carriage complaint procedures."<sup>94</sup> To the extent that TWN is suggesting that compliance with the procedural requirements in Section 76.1302 is permissive rather than mandatory, we find nothing in the *Comcast-NBCU Order* that supports this position. To the contrary, as the Bureau found in *Liberman v. Comcast*, "the *Comcast-NBCU Order* directs aggrieved video programming vendors to bring alleged violations of the program carriage conditions to the Commission pursuant to the program carriage complaint process established under section 616."<sup>95</sup>

22. Rather than satisfying the *prima facie* case requirement, TWN asserts that it "is required to show only that Comcast's decision to slash TWN's carriage would not have occurred but for its non-affiliation with Comcast."<sup>96</sup> In support of this argument, TWN cites the Commission's statement in the *Comcast-NBCU Order* that "[i]f program carriage disputes arise based on this non-discrimination condition, it will be sufficient for the aggrieved vendor to show that it was discriminated against on the basis of its affiliation or non-affiliation."<sup>97</sup> TWN's argument takes the Commission's statement out of its proper context. In the following sentence, the Commission stated that "[a] vendor proceeding under this condition will not need to also prove that it was unreasonably restrained from competing, as it would under our program carriage rules."<sup>98</sup> Thus, reading this language together, it is clear that the Commission

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<sup>91</sup> Answer at 15.

<sup>92</sup> In *Liberman v. Comcast*, the Bureau dismissed a program carriage complaint brought by Liberman Broadcasting, Inc. and LBI Media, Inc. (LBI), a television broadcast station licensee, alleging that Comcast had discriminated against LBI in the selection, terms, and conditions of carriage of LBI's Spanish language programming network, Estrella TV, on the basis of affiliation in violation of Section 616 of the Act, the program carriage rules, and the non-discrimination condition in the *Comcast-NBCU Order*. *Liberman v. Comcast*, 31 FCC Rcd 9551, para. 1.

<sup>93</sup> *Id.* at 9556, para. 9.

<sup>94</sup> Reply at 13.

<sup>95</sup> *Liberman v. Comcast*, 31 FCC Rcd at 9561, para. 21 (emphasis added); *id.* at 9553, para. 5 ("When the Commission approved Comcast's acquisition of NBCU, it imposed certain conditions on Comcast's carriage of unaffiliated video programming. Specifically, the Commission barred Comcast from discriminating against 'video programming vendors' based on affiliation, and it incorporated the same definition of 'video programming vendor' that appears in the Act and in the Commission's program carriage rules. The Commission directed claimants to bring claims for a violation of this condition pursuant to the program carriage complaint procedures.") (emphasis added).

<sup>96</sup> Reply at 11. According to TWN, it makes this showing by demonstrating first that it leads Impact in their programming genre, as evidenced by the fact that it commands higher fees from ministers for airtime and features more popular ministers, and second that Comcast treats its "poorly performing, affiliated networks" better than TWN. *Id.* at 12.

<sup>97</sup> *Id.* at 5 (citing *Comcast-NBCU Order*, 26 FCC Rcd at 4287, para. 121).

<sup>98</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4287, para. 121.

was simply making it easier for programming vendors to establish non-discrimination violations by Comcast by eliminating the unreasonable restraint element of the *prima facie* case requirement.<sup>99</sup> Nothing in the *Comcast-NBCU Order* suggests that the Commission intended to exempt a complainant from providing either direct or circumstantial evidence that the defendant MVPD discriminated on the basis of affiliation or non-affiliation.<sup>100</sup>

23. We conclude that the Commission intended to apply the *prima facie* case requirement – apart from the unreasonable restraint element of this requirement expressly excluded in the *Comcast-NBCU Order* – to complaints brought under the non-discrimination condition. We thus reject TWN’s assertion that it is not required to establish a *prima facie* case that Comcast violated the non-discrimination condition. Below, we consider whether TWN made a *prima facie* showing to support its allegations that Comcast violated the nondiscrimination condition.

#### **B. Alleged Violations of Non-Discrimination Condition**

##### **1. Allegation that Comcast Discriminated Against TWN by Reducing Distribution of TWN**

24. We conclude that TWN has failed to make a *prima facie* showing that Comcast discriminated against it on the basis of affiliation or non-affiliation in violation of the *Comcast-NCBU Order*’s non-discrimination condition.<sup>101</sup> In order to establish a *prima facie* case of discrimination, a complaint must contain, among other evidence, either direct or circumstantial evidence that the defendant MVPD discriminated on the basis of affiliation or non-affiliation.<sup>102</sup> We conclude that TWN has not established a *prima facie* case of discrimination because it has failed to show through direct evidence or circumstantial evidence that Comcast discriminated against it on the basis of affiliation or non-affiliation.

25. TWN fails to provide direct evidence to support its allegation that Comcast discriminated against it on the basis of affiliation or non-affiliation by reducing distribution of TWN. Direct evidence of discrimination consists of either documentary evidence or testimonial evidence supported by an affidavit from a representative of the complainant.<sup>103</sup> TWN suggests that “the evidence presented in the declaration of TWN CEO Kevin Adell could satisfy a finding of ‘direct evidence’ as it presents ‘an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting a claim that a representative of the defendant MVPD informed the vendor that the MVPD took an adverse carriage action because the vendor is not affiliated with the MVPD.’”<sup>104</sup> The evidence TWN points to includes Mr. Adell’s statement that “Comcast has been inflexible and unwilling to work to resolve this dispute,” and that “[i]ts behavior demonstrates that it is not making an

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<sup>99</sup> 47 CFR § 76.1302(d)(3)(iii)(A).

<sup>100</sup> See *supra* para. 19.

<sup>101</sup> Complaint at 3, 22-39. “[T]he Media Bureau’s determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only.” *2011 Program Carriage Order*, 26 FCC Rcd at 11506, para. 17.

<sup>102</sup> *2011 Program Carriage Order*, 26 FCC Rcd at 11503-04, paras. 13-14. As noted above, a programming vendor bringing a complaint under the non-discrimination condition need not provide evidence that it was unreasonably restrained from competing in order to establish a *prima facie* case, as it does under the Act and the program carriage rules. *Comcast-NBCU Order*, 26 FCC Rcd at 4287, para. 121. See 47 U.S.C. § 536(a)(3); 47 CFR § 76.1302(d)(3)(iii)(A).

<sup>103</sup> 47 CFR § 76.1302(d)(B)(1). See *2011 Program Carriage Order*, 26 FCC Rcd at 11503, para. 12.

<sup>104</sup> Reply at 16, n.47 (quoting *2011 Program Carriage Order*, 26 FCC Rcd at 11504, para. 13).

informed, logical business decision.”<sup>105</sup>

26. We disagree with TWN that these statements constitute direct evidence of discrimination on the basis of affiliation or non-affiliation. In *GSN v. Cablevision*, the Commission made clear that direct evidence is evidence that states directly – without further inference or presumption – that a carriage decision was based on affiliation or non-affiliation.<sup>106</sup> The Commission in *GSN v. Cablevision* explained that “direct evidence that a carriage decision was ‘based on’ affiliation or non-affiliation would be a statement, email, or other admission from an MVPD stating on its face that a carriage action was taken because a video programming vendor was or was not affiliated with the MVPD.”<sup>107</sup> Nowhere in his declaration does Mr. Adell state that Comcast admitted that it reduced distribution of TWN because TWN is not affiliated with Comcast. Rather, Mr. Adell appears to infer Comcast’s motivation in reducing distribution of TWN.<sup>108</sup> The evidence here does not on its face establish that Comcast reduced distribution of TWN because TWN is unaffiliated with Comcast. Accordingly, we conclude that TWN has failed to make a *prima facie* case through direct evidence that Comcast discriminated against it on the basis of affiliation or non-affiliation by reducing distribution of TWN.

27. We also conclude that TWN fails to make a *prima facie* case through circumstantial evidence that Comcast discriminated against it on the basis of affiliation or non-affiliation by reducing distribution of TWN. Circumstantial evidence of discrimination consists of (i) evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated with the defendant MPVD, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and (ii) evidence that the defendant MVPD has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming with respect to the selection, terms, or conditions for carriage.<sup>109</sup> TWN fails to provide evidence that the programming it provides is similarly situated to video programming provided by a vendor affiliated with Comcast. TWN compares its network with Impact, but Impact is an independent network and is not affiliated with Comcast.<sup>110</sup> Since Impact is not affiliated with Comcast, TWN cannot establish circumstantial evidence of discrimination by

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<sup>105</sup> In support of its suggestion that Mr. Adell’s declaration could satisfy a finding of direct evidence, TWN cites paragraph 25 of the declaration. Reply at 16, n.47. Paragraph 25 states:

Comcast has been inflexible and unwilling to work to resolve this dispute. The reduction in carriage was an unexpected development in our relationship, and Comcast has refused to provide any good-faith reason why it reduced TWN’s carriage. Its behavior demonstrates that it is not making an informed, logical business decision. I repeatedly tried to contact Jennifer Gaiski, Senior Vice President of Content Acquisition for Comcast Cable, to understand why Comcast had reduced our carriage and to try to explore a solution. Instead of offering any tangible explanation for the reduction in distribution, Ms. Gaiski told me that Comcast was reducing our distribution ‘Because we are Comcast, and we can.’

Complaint, Ex. 1 at para. 25.

<sup>106</sup> *Game Show Network, LLC v. Cablevision Systems Corp.*, Memorandum Opinion and Order, 32 FCC Rcd 6160, 6169, para. 27 (2017) (*GSN v. Cablevision*), pet. for review pending sub nom. *Game Show Network, LLC v. FCC*, No. 17-1203 (D.C. Cir. filed Sept. 11, 2017).

<sup>107</sup> *Id.* at para. 34.

<sup>108</sup> See *supra* note 105.

<sup>109</sup> 47 CFR § 76.1302(d)(B)(2). See *2011 Program Carriage Order*, 26 FCC Rcd at 11505-06, para. 14.

<sup>110</sup> Answer at 13 n.52.

demonstrating that its programming is substantially similar to programming provided by Impact.<sup>111</sup>

28. TWN also argues that Comcast treats its affiliated networks better than TWN.<sup>112</sup> TWN asserts that Comcast reduced distribution of TWN, which does not charge Comcast any per-subscriber fee for carriage and is “the most popular network in its genre,” while at the same time, it increased distribution and per-subscriber fees of Comcast-affiliated networks, such as NBC Universo and Syfy, that failed to perform and were not ratings leaders in their respective genres.<sup>113</sup> In addition, TWN asserts that all Comcast-affiliated networks for which data is available, including E!, the USA Network, Bravo, Syfy, the Oxygen Network, and NBC Universo, were distributed more broadly than TWN and that Comcast distributes its affiliated networks NBC Universo and the Oxygen Network more broadly than other major MVPDs.<sup>114</sup> TWN, however, does not offer evidence that any of these Comcast-affiliated networks provide programming that is similarly situated with programming provided by TWN.<sup>115</sup> To the contrary, TWN concedes in its reply that it “does not compare its content to the content of a similarly situated network owned by Comcast.”<sup>116</sup> We conclude, therefore, that TWN has failed to make a *prima facie* case through circumstantial evidence that Comcast discriminated against it on the basis of affiliation or non-affiliation by reducing distribution of TWN.

## **2. Allegation that Comcast Discriminated Against TWN by Demanding Exclusive Digital Rights to TWN’s Programming**

29. We further conclude that TWN fails to make a *prima facie* showing that Comcast discriminated against it on the basis of affiliation or non-affiliation by demanding exclusive digital rights to TWN’s programming.<sup>117</sup> TWN asserts that the non-discrimination condition in the *Comcast-NBCU Order* means that Comcast cannot require a programmer to become affiliated as a condition of carriage.<sup>118</sup> The *Comcast-NBCU Order* adopted the non-discrimination condition to address concerns that the vertical integration of Comcast’s distribution network with NBCU’s programming assets would increase Comcast’s ability and incentive to reduce competition from rival video programming networks by discriminating against or foreclosing unaffiliated programming.<sup>119</sup> A demand that an unaffiliated programmer become “affiliated” as a condition of carriage would be tantamount to a refusal to carry or

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<sup>111</sup> See *supra* note 109.

<sup>112</sup> Complaint at 32-34.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 35-38.

<sup>115</sup> In its February 26, 2017 pre-filing notice to Comcast, TWN asserted that at least one Comcast-affiliated network, the Oxygen Network, is similarly situated to TWN, arguing that these networks compete for viewers and offer competing content. Complaint, Ex. 5 at 2. For example, TWN stated that the Oxygen Network aired the “Preachers of LA” and “Preachers of Detroit” franchises that chronicle the lives of African American bishops and pastors in Los Angeles and Detroit. *Id.* In its February 16, 2017 response to TWN, Comcast asserted that the fact that the Oxygen Network focuses on “young, multicultural women” as its target audience and features shows such as “Bad Girls Club,” “Tattoos after Dark,” and “Celebrities Under Cover” is dispositive refutation of any similarity with TWN’s Christian ministry focus, notwithstanding an overlap in one featured program or pastor. *Id.*, Ex. 6 at 2-3. In its complaint, TWN does not assert or provide evidence that its programming is similarly situated to the programming aired by the Oxygen Network.

<sup>116</sup> Reply at 29.

<sup>117</sup> Complaint at 39-40; Reply at 25-26.

<sup>118</sup> Complaint at 39 (citing *Comcast-NBCU Order*, 26 FCC Rcd at 4282, para. 110, 4287, para. 121).

<sup>119</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4282, para. 110.

foreclosure of an unaffiliated programmer and would constitute discrimination on the basis of affiliation or non-affiliation. TWN avers that during the November 22, 2016 meeting, Comcast refused to negotiate with TWN for the reversal of its decision to reduce TWN's distribution unless TWN granted Comcast exclusive digital rights.<sup>120</sup> According to TWN, the exclusive digital rights Comcast demanded, if granted, would create an affiliation between Comcast and TWN and such demand constitutes unlawful discrimination against TWN on the basis of non-affiliation.<sup>121</sup> TWN maintains that the exclusive digital rights are at least [REDACTED], which TWN asserts would substantially exceed the Commission's threshold for attributable interest of an affiliate.<sup>122</sup>

30. We conclude that the grant of exclusive digital rights would not create an "affiliation" between Comcast and TWN for purposes of the non-discrimination condition. The *Comcast-NBCU Order* does not expressly define what constitutes an "affiliation" for purposes of the non-discrimination condition. Nevertheless, given the Commission's explicit direction that complaints brought under the non-discrimination condition use the program carriage complaint procedures specified in the Commission's rules,<sup>123</sup> we conclude that it is reasonable and appropriate to use the definition of "affiliated" set forth in the program carriage rules. Under this definition, "entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities."<sup>124</sup> Digital rights are not "attributable interests" under any of these criteria, which limit cognizable or attributable interests to certain specified common ownership or management interests.<sup>125</sup> Therefore, we find that the grant of digital rights would not create an "affiliation" between Comcast and TWN and any demand for such rights would not constitute discrimination against TWN on the basis of non-affiliation.

31. We are not persuaded by TWN's argument that we should reject the definition of "affiliated" set forth in the program carriage rules because the *Comcast-NBCU Order* explicitly incorporated the same definition of "attributable interest" as that found in the program carriage rules, but did not explicitly incorporate the definition of "affiliated" or otherwise indicate that "affiliated" entities require common ownership or management in the context of the non-discrimination condition.<sup>126</sup> The definition of "Attributable Interest" in the conditions adopted in the *Comcast-NBCU Order* is expressly limited to instances where this capitalized term appears in the conditions.<sup>127</sup> The capitalized term "Attributable

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<sup>120</sup> Complaint at 39-40; Adell Decl. at para. 32.

<sup>121</sup> Complaint at 40; Reply at 26.

<sup>122</sup> Complaint at 40; Adell Decl. at para. 32; Expert Report of Harold W. Furchtgott-Roth at para. 30.

<sup>123</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4359, App. A, Sec. III(4) ("For purposes of enforcing the Conditions of this Section III, any Video Programming Vendor may submit a dispute to the Commission in accordance with the Commission's program carriage complaint procedures, 47 C.F.R. § 76.1302.").

<sup>124</sup> 47 CFR § 76.1300(a). The program carriage rules provide that "attributable interest" shall be defined by reference to the criteria set forth in Notes 1 through 5 to Section 76.501, except as otherwise noted in Section 76.1300(b). *Id.* § 76.1300(b). *See id.* § 76.501 Notes 1 through 5.

<sup>125</sup> *Id.* § 76.501 Notes 1 through 5.

<sup>126</sup> Reply at 25-26.

<sup>127</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4355, Appx. A, Sec. I (Definitions) ("For purposes of the conditions set forth in Sections I-XX below ('Conditions'), capitalized terms shall have the meanings set forth below."). Under the Definitions in the *Comcast-NBCU Order*'s conditions, "'Attributable Interest' means a cognizable interest in an entity as defined pursuant to 47 C.F.R. § 76.1000(b)." *Id.* Section 76.1000(b) provides that for purposes of the program access rules, cognizable and attributable interests shall be defined by reference to the criteria set forth in

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Interest” appears only twice in the conditions – in the unfair practices condition and in footnote one to the conditions.<sup>128</sup> While the definition of “Attributable Interest” in the conditions is the same definition used in the program carriage rules,<sup>129</sup> the Commission did not explicitly apply this definition to the non-discrimination condition. Therefore, the Commission’s decision to include this definition in the conditions for the limited purposes noted above, but not to include the program carriage rules’ definition of “affiliated,” cannot be reasonably read to reflect an intent to use a different definition of “affiliated” for purposes of the non-discrimination condition than that used for purposes of the program carriage rules. To suggest otherwise strains credulity. The Commission has never treated digital rights as attributable interests that would create an affiliation between an MVPD and a programmer. Given the amount of digital rights that are assigned throughout the MVPD marketplace today, TWN’s interpretation would make affiliation between programmers and MVPDs nearly ubiquitous. If the Commission had intended such a radical departure from the definitions used in the program carriage rules, we believe it would have done so explicitly and explained the basis for its decision. We also read the Commission’s use of the term “affiliated” in the *Comcast-NBCU Order* condition in light of the Act’s definition of “affiliate,” which refers to “common ownership or control” of two entities, and defines “own” as “to own an equity interest (or the equivalent thereof) of more than 10 percent.”<sup>130</sup>

32. As discussed above, even if Comcast demanded exclusive digital rights from TWN, we conclude that the grant of digital rights to TWN’s programming would not create an “affiliation” between Comcast and TWN and any demand for such rights would not constitute discrimination against TWN on the basis of non-affiliation under the non-discrimination condition. Accordingly, we find that TWN cannot establish a *prima facie* case of discrimination and we dismiss TWN’s complaint as to this allegation.

### C. Alleged Violation of Financial Interest Provision of Program Carriage Rules

33. We conclude that TWN has failed to establish a *prima facie* case that Comcast violated the financial interest provision of Section 616(a)(1) of the Act and Section 76.1301(a) of the Commission’s rules, which prohibits an MVPD from requiring a financial interest in a program service as a condition for carriage.<sup>131</sup> In a complaint alleging a violation of the financial interest provision, the complaint must include “documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant’s systems.”<sup>132</sup> TWN alleges that Comcast demanded a “financial interest” in TWN when it allegedly demanded, during the November 22,

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Notes 1 through 5 to Section 76.501, except as otherwise noted in Section 76.1000(b). 47 CFR § 76.1000(b). This is the same definition used for “attributable interest” in the program carriage rules. 47 CFR § 76.1300(b).

<sup>128</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4363, Appx. A, Sec. IV(G)(1)(b) (“Neither Comcast nor C-NBCU shall unduly or improperly influence the decision of any vendor in which it has an Attributable Interest to sell, or unduly or improperly influence such vendor’s prices, terms and conditions for the sale of Video Programming to any unaffiliated MVPD or OVD for online distribution to subscribers or consumers.”); *id.* at 4356, Appx. A, Sec. I (Definitions), n.1 (footnote to definition of “C-NBCU Programmer”) (“Comcast and NBCU are prohibited from acquiring an Attributable Interest in any provider of Video Programming unless that provider is obliged to abide by the conditions set forth in this Appendix.”).

<sup>129</sup> See *supra* note 127.

<sup>130</sup> 47 U.S.C. § 153(2).

<sup>131</sup> 47 U.S.C. § 536(a)(1); 47 CFR § 76.1301(a).

<sup>132</sup> 47 CFR § 76.1302(d)(3)(i).



2016 meeting, that TWN grant Comcast exclusive digital rights to TWN.<sup>133</sup> TWN asserts that this demand would have created an attributable interest, as the value of TWN's digital rights is at least [REDACTED], which substantially exceeds the Commission's threshold for attributable interest of an affiliate.<sup>134</sup> TWN maintains that Mr. Adell's declaration establishes a *prima facie* case that Comcast demanded financial rights as a precondition for carriage.<sup>135</sup> Based on his more than 25 years of experience in the programming industry, TWN avers, Mr. Adell "recognized that Comcast's attempt to gain TWN's digital rights was an implicit threat that Comcast would slash distribution of TWN unless TWN gave Comcast a financial interest in his company."<sup>136</sup>

34. TWN does not allege in its complaint that Comcast demanded an ownership or equity interest in its digital rights. Even assuming for purposes of this Order that Comcast demanded an exclusive license in TWN's digital rights,<sup>137</sup> such a demand does not constitute a demand for a "financial interest" within the meaning of Section 616(a)(1) of the Act and Section 76.1301(a) of the Commission's rules. While neither the Act nor the Commission's rules expressly define the term "financial interest," the legislative history of Section 616 makes clear that Congress was concerned about cable operators using their market power to require programmers to give cable operators an ownership or equity interest as a condition of carriage. The Senate Report noted that "the major cable companies increasingly insist on *owning* a financial interest in shows and programs they use on their channels."<sup>138</sup> The Senate Report further observed that "[a]s a practical matter, it is almost impossible in the present environment to start a new cable system service without *surrendering equity* to the owners of the monopoly cable conduits."<sup>139</sup>

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<sup>133</sup> Complaint at 43.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 45.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 39-40 ("Instead of engaging with Mr. Adell during his attempts to negotiate a revocation of Ms. Gaiki's letter, Ms. Gaiki asked about TWN's online distribution rights, an unrelated matter in which Comcast had not previously expressed interest. Mr. Adell responded that TWN streams its content through TWN's website and has not *licensed* it, or provided any rights to, any other distributor."); Adell Decl. at para. 32 ("I informed Comcast that TWN streams its content on our own website and we do not *license* our digital rights to any distributors.") (emphasis added).

<sup>138</sup> S. REP. NO. 102-92, at 156 (quoting testimony of Ben Begdikian, *Media Ownership: Diversity and Concentration*, Hearings Before Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (101-257), June 14, 21, and 22, 1989, p. 88) (emphasis added).

<sup>139</sup> *Id.* (quoting testimony of Preston Padden, INTV, *Media Ownership: Diversity and Concentration*, p. 307) (emphasis added).

The Commission recently confirmed its view that Congress was concerned with ownership interests when it enacted Section 616, stating that

In 1992, a large number of the most popular cable programming networks were owned by cable operators. Congress was concerned that cable operators had the ability and incentive to thwart the competitive development of additional programming networks by refusing to carry unaffiliated networks or by insisting on an *ownership stake* in return for carriage.<sup>140</sup>

TWN argues that Congress's elucidation of a concern regarding ownership or equity interests cannot reasonably be read to limit "financial interest" to only ownership or equity interests.<sup>141</sup> We disagree. Neither the text or legislative history of Section 616(a)(1) nor Commission precedent supports TWN's broad reading of "financial interest." Given the clear statements in the legislative history and the Commission's recent statements regarding Congress's concern with ownership or equity stakes, and the concomitant absence of any support for TWN's more expansive reading, we find that it is reasonable and appropriate to interpret the term "financial interest" as limited to ownership or equity interests. The burden to establish a *prima facie* case is on TWN.<sup>142</sup> Because TWN does not allege that Comcast demanded an ownership or equity interest in its programming as a condition of carriage, we conclude that it has not made a *prima facie* showing that Comcast violated Section 616(a)(1) of the Act and Section 76.1301(a) of the Commission's rules. We therefore dismiss TWN's complaint as to this allegation.

35. TWN asserts that the Media Bureau previously found that a "financial interest" is broader than an ownership or equity interest and applies to licensing rights, citing a 2008 hearing designation order issued by the Bureau.<sup>143</sup> In that case, however, the Bureau did not provide any explanation for its finding that the NFL had made a *prima facie* showing that Comcast demanded a "financial interest" in the NFL's programming in exchange for carriage, nor did it address how its decision squared with the statements in Section 616's legislative history reflecting Congress's concern with ownership interests.<sup>144</sup> To the extent that the Bureau's decision in *WealthTV/NFL/MASN HDO* is inconsistent with our conclusion in the instant case, we disavow that decision.

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<sup>140</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 577, para. 22 n.38 (2017) (citing 47 U.S.C. § 536) (emphasis added). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, 31 FCC Rcd 4472, 4481, para. 21 n.26 (2015) (same).

<sup>141</sup> Reply at 32.

<sup>142</sup> *See supra* para. 16.

<sup>143</sup> Complaint at 44 (citing *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14829, para. 89 (MB 2008) (*WealthTV/NFL/MASN HDO*) (finding that NFL presented sufficient evidence to make a *prima facie* showing that Comcast demanded a financial interest in the NFL's programming based on allegations that Comcast had retaliated against the NFL by moving the NFL Network from the digital basic tier to a premium sports tier after the NFL refused to grant Comcast rights to a package of eight live NFL games for Comcast to feature on Versus, a programming network affiliated with Comcast).

<sup>144</sup> *WealthTV/NFL/MASN HDO*, 23 FCC Rcd at 14829, para. 89. The NFL's complaint subsequently was dismissed after the parties reached a settlement. *See NFL Enterprises LLC*, MB Docket No. 08-214, File No. CSR-7876-P, Order Dismissing Program Carriage Complaint with Prejudice and Terminating Proceeding, FCC 09M-42 (Chief ALJ Sippel, 2009). Thus, the full Commission never had the opportunity to consider the issue of whether distribution or licensing rights constitute a "financial interest" for purposes of Section 616(a)(1) of the Act and Section 76.1301(a) of the Commission's rules.

**IV. ORDERING CLAUSE**

36. Accordingly, **IT IS ORDERED**, that pursuant to Sections 4(i), 4(j), and 616 of the Communications Act of 1934, as amended 47 U.S.C. §§ 154(i), 154(j), and 536, Sections 76.7 and 76.1302 of the Commission's rules, 47 CFR §§ 76.7 and 76.1302, and the non-discrimination condition set forth in the *Comcast-NBCU Order*, the above-captioned complaint is **DISMISSED** to the extent indicated herein. This action is taken pursuant to the authority delegated to the Media Bureau in Sections 0.283 and 76.1302 of the Commission's rules, 47 CFR §§ 0.283 and 76.1302.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Chief  
Media Bureau