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June 5, 2007

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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Washington, DC 20554

FILED/ACCEPTED

JUN - 5 2007

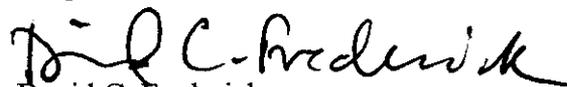
Federal Communications Commission
Office of the Secretary

Re: *In the Matter of Application for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation to Time Warner Cable Inc.; Adelphia Communications Corporation to Comcast Corporation; Comcast Corporation to Time Warner Inc.; Time Warner Inc. to Comcast Corporation, MB Docket No. 05-192*

Dear Ms. Dortch:

Pursuant to the Commission's Orders in the above referenced matters, TCR Sports Broadcasting Holding, L.L.P. ("TCR"), doing business as Mid-Atlantic Sports Network ("MASN"), hereby gives notice that, pursuant to Paragraph 190 and Appendix B of the Adelphia Order, today it is requesting arbitration with the American Arbitration Association ("AAA") against Time Warner Cable Inc. ("TWC") for its discriminatory refusal to carry MASN's programming. Enclosed please find a copy of the documents filed with the AAA today initiating the arbitration proceedings, with the exception of the "final offer" itself, which is subject to the confidentiality rules of the AAA pursuant to the Commission's *Adelphia* Order.

Respectfully submitted,



David C. Frederick
Counsel for TCR

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Marlene H. Dortch

June 5, 2007

Page 2

Encl.

cc: Henk Brands, Esq., Counsel to TWC
Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Michelle Carey, Senior Legal Advisor to Chairman Martin
Rick Chessen, Legal Advisor to Commissioner Copps
Rudy Brioché, Legal Advisor to Commissioner Adelstein
William Freedman, Legal Advisor to Commissioner Tate
Cristina Chou Pauzé, Legal Advisor to Commissioner McDowell

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June 5, 2007

VIA OVERNIGHT DELIVERY

Catherine Shanks
Vice President, Case Management Center
American Arbitration Association
950 Warren Avenue
East Providence, RI 02914
Telephone: 866-293-4053
Facsimile: 401-435-6529

Re: Arbitration Demand

Dear Ms. Shanks:

TCR Sports Broadcasting Holding, L.L.P. ("TCR"), doing business as Mid-Atlantic Sports Network ("MASN"), hereby demands arbitration with Time Warner Cable Inc. ("TWC") pursuant to the Federal Communications Commission's ("FCC") order in *In the Matter of Application for Consent to the Assignment and/or Transfer of Control of Licenses Adelpia Communications Corporation to Time Warner Cable Inc.; Adelpia Communications Corporation to Comcast Corporation; Comcast Corporation to Time Warner Inc.; Time Warner Inc. to Comcast Corporation*, MB Docket No. 05-192 ("Adelpia Order") (attached hereto). Enclosed please find: (1) a completed arbitration demand form; (2) two copies of the Adelpia Order; (3) a Statement of Claims, setting forth the nature of the controversy; (4) MASN's final offer of carriage; and (5) a check covering the initial filing fee. MASN's final offer of carriage has been attached pursuant to the requirements and limitations set forth in the Adelpia Order. Specifically, MASN's final offer may not be disclosed to TWC until after TWC has submitted its own final offer (which is to occur within two days of TWC being notified of the arbitration). See Adelpia Order, Appendix B, Section B(2)(f)-(i).

The Adelpia Order provides that the arbitration is to proceed under the American Arbitration Association's (the "AAA") expedited commercial arbitration rules, subject to certain modifications. See Adelpia Order ¶ 190 and Appendices B and C (authorizing the arbitration

Ms. Catherine Shanks
June 5, 2007
Page 2

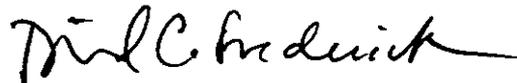
and setting forth the rules that shall apply). The FCC's order provides for "final offer" arbitration in which the arbitrator must decide between the final offers for carriage presented by the party. The arbitrator is to be chosen from a pool that is jointly developed by the AAA and the FCC. Once appointed, the arbitrator must decide the case within 45 days.

According to conversations between MASN's counsel and the FCC, the AAA should contact Marlene H. Dortch, Secretary of the Federal Communications Commission, to discuss potential arbitrators. Ms. Dortch can be reached at 445 12th Street, S.W., Washington, DC, 20554, and by telephone at (202) 418-0300.

In light of the complex nature of the dispute and the expedited procedures mandated by the FCC's order, MASN requests that the AAA convene an Administrative Conference pursuant to Rule R-9 as soon as possible.

MASN filed its demand for arbitration electronically on June 5, 2007. All documents that were uploaded during the electronic filing process are being sent via overnight delivery to the AAA along with a check covering the filing fee.

Sincerely,



David C. Frederick
Counsel for TCR

Enclosures

cc:¹ Henk Brands, Esq., Counsel to TWC (via hand and e-mail delivery)
Chairman Kevin J. Martin (via hand delivery)
Commissioner Michael J. Copps (via hand delivery)
Commissioner Jonathan S. Adelstein (via hand delivery)
Commissioner Deborah Taylor Tate (via hand delivery)
Commissioner Robert M. McDowell (via hand delivery)
Marlene H. Dortch, Secretary to The FCC (via hand delivery)
Michelle Carey, Senior Legal Advisor to Chairman Martin (via hand delivery)
Rick Chessen, Legal Advisor to Commissioner Copps (via hand delivery)
Rudy Brioché, Legal Advisor to Commissioner Adelstein (via hand delivery)
William Freedman, Legal Advisor to Commissioner Tate (via hand delivery)
Cristina Chou Pauzé, Legal Advisor to Commissioner McDowell (via hand delivery)

¹ All carbon copies are without the final offer enclosure.

**BEFORE THE
AMERICAN ARBITRATION ASSOCIATION**

In the matter of:)	
)	
TCR SPORTS BROADCASTING HOLDING,)	
L.L.P., d/b/a MID-ATLANTIC SPORTS)	
NETWORK)	
)	
Claimant,)	Case No. _____
)	
v.)	
)	
TIME WARNER CABLE INC.,)	
)	
Respondent.)	
_____)	

ARBITRATION DEMAND AND STATEMENT OF CLAIM

This case concerns unlawful discrimination by Time Warner Cable Inc. (“TWC”), the largest cable operator in North Carolina, against TCR Sports Broadcasting Holding, L.L.P. (“TCR”), doing business as Mid-Atlantic Sports Network (“MASN”)¹, a regional sports network (“RSN”) that owns the rights to televise the Major League Baseball (“MLB”) games of the Washington Nationals and Baltimore Orioles as well as a variety of North Carolina college sports. For nearly two years, TWC refused to entertain MASN’s request for carriage on TWC’s cable systems in MASN’s North Carolina Territory.² In early 2007, after being threatened with arbitration, TWC finally agreed to negotiate to carry MASN on TWC’s North Carolina cable system. But after stringing MASN along for nearly five months, TWC made clear that it never had any intention of

¹ MASN is the registered trade name of TCR. For convenience, and unless otherwise noted, MASN is used interchangeably to refer to both MASN and TCR.

² See the attached Territory Map (attached hereto as Exhibit B), which reflects the territory served by MASN. Unless otherwise noted, references to “North Carolina” refer to MASN’s North Carolina Territory.

carrying MASN on the basic or expanded basic tiers on which TWC (and all other cable operators) typically carry RSNs. TWC carries its affiliated RSN, News Channel 14, on the basic tier of its North Carolina systems, and its refusal to accord MASN comparable treatment is discriminatory on its face.

TWC has suggested that it might consider carrying MASN on its digital programming tier, but a substantial fraction of TWC's subscribers do not purchase that tier, which costs an extra \$15 per month or more. As TWC is aware, digital carriage is not viable from MASN's perspective and if MASN were forced to accept digital carriage it would also be detrimental to consumers because they would have to pay additional fees to gain access to MASN. This is why TWC carries its own RSNs – both in North Carolina and elsewhere – on its basic or expanded basic tiers. Indeed, upon information and belief, there is not another RSN in the country with rights to MLB games that TWC or any other cable operator has relegated to digital carriage.

TWC cannot credibly contend that it has a legitimate business justification for discriminating against MASN. Although TWC has claimed that there is low consumer demand for MASN in North Carolina, the facts show otherwise. Both the Orioles and Nationals are considered “hometown” baseball teams in MASN's North Carolina Territory – a determination made by MLB itself – and because of the unique nature of live sporting events, MASN's programming is considered “must have” by many North Carolina consumers. Indeed, prior to MASN's launch, TWC carried the hometown Orioles on the expanded basic tier of its North Carolina cable systems, when those games were carried by another RSN, known as Fox Sports Net South. The addition of the hometown Nationals to MASN's programming line-up guarantees that consumer demand

among North Carolinians will be even higher than it was when Fox Sports Net South aired only Orioles games. Finally, TWC is alone among the other three major MVPDs in North Carolina, including DirecTV, Charter, and EchoStar, in refusing to carry MASN on the same carriage terms MASN has requested.

TWC's discriminatory refusal to carry MASN on its basic or expanded basic tier violates the Cable Act and the FCC's carriage rules, which prohibit cable operators such as TWC from discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions of carriage.³ TWC's discrimination was anticipated by the Federal Communications Commission ("FCC") in an Order dated July 21, 2006 (the "*Adelphia Order*").⁴ The FCC found that TWC (and other cable operators like Comcast) had the incentive and ability to discriminate against RSNs like MASN in favor of TWC's affiliated programming content.⁵ Consequently, the FCC granted MASN the right to compel TWC to participate in final-offer arbitration over the terms pursuant to which TWC must carry MASN.⁶ Now that TWC has revealed its offer to negotiate as a sham, MASN demands an arbitration proceeding to determine which of the parties' respective final offers for carriage should prevail. MASN's "final offer" of carriage is attached as Exhibit A.⁷

³ See 47 U.S.C. § 536(a)(3); 47 C.F.R. §§ 76.1300-1302.

⁴ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation to Time Warner Cable Inc.; Adelphia Communications Corporation to Comcast Corporation; Comcast Corporation to Time Warner Inc.; Time Warner Inc. to Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*") (attached hereto as Exhibit C).

⁵ See *id.* ¶¶ 114, 116, 189.

⁶ See *id.* ¶ 190 & Appendix B.

⁷ This offer consists of a term sheet that contains all of the material terms of carriage. In the industry, such term sheets are the negotiating documents used by the parties. After a term sheet has been accepted, the parties may employ a long-form contract to govern various additional aspects of their relationship.

BACKGROUND

Major League Baseball in North Carolina

The Orioles and the Nationals are the “hometown” Major League Baseball teams for many North Carolina residents. MLB itself makes that decision based on its determination of the team that baseball fans in an area are most likely to support.

There is no MLB team physically located in North Carolina. Geographically, the nearest teams are the Baltimore Orioles, Washington Nationals, Atlanta Braves, and Cincinnati Reds. Pursuant to the by-laws of MLB, each of the 30 MLB teams is assigned the television rights to certain states and counties. Declaration of Mark C. Wyche ¶ 3 (“Wyche Decl.”) (attached hereto as Exhibit D); Declaration of James Cuddihy ¶ 3 (“Cuddihy Decl.”) (attached hereto as Exhibit E). Those areas encompass Designated Market Areas (“DMAs”), which are geographic areas made up of contiguous counties jointly covered by a group of television stations, or subsections of DMAs.⁸ Certain teams are granted exclusive television territories, while others are required to share part or all of their territory with other teams. Wyche Decl. ¶ 3; Cuddihy Decl. ¶ 3.

At least since 1981, MLB has determined that most of North Carolina should be the television territory of the Orioles, with the Orioles sharing the western part of the state with the Braves and the Reds. Cuddihy Decl. ¶ 4. This allocation was based in part on MLB’s determination that the Orioles would generate substantial fan interest in the various parts of North Carolina. *Id.* ¶ 5. Pursuant to the terms of a 2005 settlement agreement between MLB, the Orioles, and TCR that grew out of the move of the

⁸ See 17 U.S.C. § 122(j)(2)(C) (citing the area as defined by Nielsen Media Research); see also *Armstrong Utilities, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 13475, ¶ 2 (2006); 47 C.F.R. § 76.55(e). There are 210 DMAs in the United States. See Nielsen Media Research, *U.S. Television Household Estimates* at 2-4 (Sept. 2004).

Montreal Expos to Washington, D.C. to become the Nationals, the Orioles agreed to share the franchise's entire television territory with the Washington Nationals. *Id.* ¶ 4.

As a result of these agreements, the Orioles and Nationals hold the exclusive television rights for the five DMAs in the eastern part of North Carolina – Raleigh-Durham, Greenville-New Bern-Washington, Myrtle Beach-Florence, Wilmington, and Norfolk-Portsmouth-Newport News. Wyche Decl. ¶ 5; Cuddihy Decl. ¶ 4. They also share with the Atlanta Braves and the Cincinnati Reds the television territory for two DMAs in the western part of the state – Charlotte and Greensboro-High Point-Winston Salem.⁹ Wyche Decl. ¶ 5; Cuddihy Decl. ¶ 4. Thus, the Orioles and Nationals are the only hometown MLB teams for many North Carolina residents, and are two of the four hometown teams for most of the remainder.

The Launch of MASN

MASN is the registered trade name of TCR Sports Broadcasting Holding, L.L.P. (“TCR”). In 1996, the Baltimore Orioles formed TCR as the holding company for the franchise's television production and exhibition rights. Between 1996 and 2006, TCR licensed the production and exhibition rights to certain Orioles games to another RSN, Home Team Sports (subsequently controlled by Comcast and re-named Comcast SportsNet Mid-Atlantic), rather than produce and exhibit those games itself. The agreement with Home Team Sports expired at the conclusion of the 2006 MLB season. *See* Wyche Decl. ¶ 7 & n.3. TCR decided not to renew that agreement upon its expiration, and instead opted to produce and exhibit all Orioles games itself rather than to license certain games to a third party network.

⁹ The Orioles/Nationals do not have the television rights to serve the Greenville-Spartanburg-Asheville-Anderson DMA that covers the western tip of North Carolina as well as parts of South Carolina.

Under the settlement agreement with MLB that enabled the Nationals to share the Orioles' television territory, MASN obtained the production and exhibition rights to Washington Nationals games, in addition to the production and exhibition rights to the Orioles. Although it is unusual for one baseball team to control the television rights of another team, the agreement sought to accomplish several important goals: it attempted to compensate the Orioles for the loss in revenue that was expected to occur (and has occurred) from having an MLB team so close to Baltimore that would draw away paying spectators from Orioles games; and it enabled the Nationals to share in the Orioles' large and significant television territory, which had been a critical component of the record purchase price the Orioles ownership group had paid when purchasing the franchise in 1993. Pursuant to the agreement, MASN will guarantee the Nationals significant compensation in the form of annual rights fees that are initially mandated under the agreement but in any event are guaranteed to be set at market-competitive rates.¹⁰ The agreement also reserves for the Nationals a ten percent profits interest (that MLB transferred to the Nationals ownership group upon the sale of the team to Ted Lerner's ownership group in 2006), which increases over time to a one-third interest in MASN's profits.

Although TCR had operated previously under a different trade name, MASN launched its telecasts of Nationals games on Opening Day of the 2005 MLB Season. In MASN's first two years of operations – the 2005 and 2006 seasons – it televised only Nationals games. Beginning in the 2007 season, MASN is also televising Orioles games. In addition, MASN has acquired or developed a significant amount of additional

¹⁰ *The Washington Post* has noted that MASN provides the Nationals “a guaranteed local TV revenue stream that will rank in the sport's top 10.” Thomas Boswell, *White Sox, Astros Give Nats Hope*, Wash. Post, Oct. 28, 2005, at E1.

programming of special interest to North Carolina viewers. For example, MASN maintains an extensive NCAA men's basketball programming schedule, featuring more than 150 top national games each season and encompassing several of the most competitive conferences.

In addition to telecasts of the home-team Orioles and Nationals, MASN will present a significant amount of regional sports and other programming geared specifically toward the North Carolina market, including Hooters Pro Cup Series stock car racing. Cuddihy Decl. ¶ 10. MASN's programming also includes 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 competing in men's basketball, men's lacrosse, women's basketball, baseball, softball, and wrestling, as well as football and basketball coaches' shows for North Carolina State University and East Carolina University. *Id.* Exhibit F contains a full list of MASN's North Carolina programming, including live college events over the past five months.

North Carolina Fan Interest in the Orioles and Nationals

Because North Carolina – like most states – does not have an MLB team that plays its home games within the state, baseball fans in the state have traditionally allied with out-of-state teams. As the home team in North Carolina, the Orioles have cultivated a loyal following in the state. The team's continuing popularity is evidenced by the fact that Orioles games have been televised in North Carolina for more than two decades – most recently on Fox Sports Net South, another RSN operating in North Carolina, which aired Orioles games through the end of the 2006 MLB season.¹¹ The Orioles' recent

¹¹ Fox Sports Net South licensed those broadcast rights from Comcast SportsNet Mid-Atlantic, which held the production and exhibition rights to Orioles games through the 2006 MLB season. *See* Chuck Carree,

acquisition of a minor league farm team, the Norfolk Tides – located in the Norfolk-Portsmouth-Newport News DMA that straddles the North Carolina-Virginia border – will add to the Orioles’ presence and popularity in North Carolina.

There is also every reason to expect that North Carolina fan interest will be at least as strong for the Nationals as it has been for the Orioles. The Nationals are centered in the nation’s capital, Washington, D.C., which makes it a unique franchise. MASN has already advertised in print and radio media throughout North Carolina to raise excitement about the new MLB season and, moreover, plans to conduct a marketing blitz in the state and to take other steps designed to build fan interest in the Nationals and to increase in interest in the Orioles. Cuddihy Decl. ¶ 8. By contrast, Fox Sports Net South did little to promote the Orioles among North Carolina fans while it was airing the team’s games. *Id.* ¶ 9.

Consistent with the fact that there is significant fan interest in the Nationals and Orioles in North Carolina, the second, third, and fourth largest MVPDs in the state have agreed to carry MASN on their principal programming tiers. Wyche Decl. ¶ 15.

Area TV and Radio; Fox Sports Working on Coverage Kinks, Morning Star (Wilmington, NC), Mar. 28, 2002, at 7C. Fox acquired SportsSouth from Turner Broadcasting in 1996 and changed the name to Fox Sports South, and then subsequently to Fox Sports Net South. (Time Warner acquired Turner Broadcasting late in 1996 and never owned this network.) Time Warner launched Turner South (which carries Atlanta Braves telecasts) in 1999 and then sold Turner South (which now broadcasts as SportsSouth) to Fox in 2006 for \$375 million, a substantial premium above the estimates of some industry analysts that the network would not sell for more than \$200 million. See Scott Leith, *Fox to buy Turner South; Channel may focus on Atlanta sports*, The Atlanta Journal-Constitution, Feb. 24, 2006, at 1E. Time Warner’s sale of SportsSouth is therefore best understood as an exceptional profit opportunity, rather than disinterest in regional sports programming on Time Warner’s part. Moreover, the fact that TWC still carries SportsSouth on its North Carolina cable system highlights TWC’s discriminatory treatment of MASN. TWC initially decided to carry SportSouth in 2000 (then known as Turner South) when it was an affiliated network. See Wyche Decl. ¶¶ 25-26. Once that initial decision to carry a RSN is made, it is extremely rare for a cable operator to remove that network, due to concerns that subscribers will protest. *Id.* ¶ 26. Thus, TWC’s decision to continue carrying SportSouth after selling it to Fox in no way proves that TWC is willing to tolerate competition from unaffiliated RSNs; rather, it reflects the fact that TWC initially granted that RSN carriage when it was affiliated and has merely maintained distribution of the network to avoid potential subscriber backlash. *Id.*

DirectTV, one of the two Direct Broadcast Satellite operators and the second largest MVPD in MASN's North Carolina Territory, has agreed to carry MASN on its principal programming tier, known as Total Choice. *Id.* Charter Cable, the third largest cable operator in the country and second largest in MASN's North Carolina Territory, has agreed to distribute to MASN in North Carolina on its expanded basic tier. *Id.* Most recently, MASN has reached carriage agreements with the third and sixth largest MVPDs in MASN's North Carolina Territory – EchoStar (which operates the Dish Network) and Mediacom. *Id.* Both will carry MASN on their basic or expanded basic tiers. *Id.* TWC is thus the *only* MVPD among the four major MVPDs in MASN's North Carolina Territory that has refused to carry MASN.

Finally, North Carolina fan interest in the Nationals and Orioles is evidenced by the fact that SportsSouth, an RSN formed by Time Warner in 1999 (and then known as Turner South) but since sold to Fox and currently operating as a sister network to Fox Sports Net South, expressed interest in carrying Orioles and Nationals games in the event that MASN's North Carolina launch did not go forward. Wyche Decl. ¶ 7. As explained below, SportsSouth is the only RSN carried on TWC's cable systems in eastern North Carolina, with the exception of TWC's carriage of its own RSN, News Channel 14, on its Raleigh-Durham cable systems.

TWC's Refusal To Carry MASN

Since 2005, MASN has sought carriage on the basic or expanded basic tier of TWC's North Carolina cable systems. Carriage by TWC on a basic or expanded basic tier is critical for MASN to establish a presence in North Carolina, because TWC is the largest MVPD in the state by a wide margin. Unless MASN can obtain carriage on the

basic or expanded basic tiers of TWC's North Carolina cable systems, it will not be able to distribute its programming to the more than 1.3 million basic subscribers in MASN's North Carolina Territory. According to data from Nielsen that are widely used in the industry, that number represents more than 80 percent of the 1.6 million basic cable subscribers in MASN's North Carolina Territory, and more than 55 percent of the 2 million MVPD subscribers. TWC is more than twice as large as the second largest MVPD, DirecTV, which provides service via satellite. Charter, the second largest cable operator in MASN's North Carolina Territory, serves approximately 124,000 basic subscribers. Both Charter and DirecTV signed affiliate agreements with MASN in 2005 and have been distributing MASN's programming on a dedicated channel since the launch of MASN as a 24/7 channel on July 31, 2006.

MASN first initiated negotiations with TWC in March 2005. On April 21, 2005, TWC announced that it was acquiring the North Carolina cable systems of Adelphia Cable, as part of a larger transaction that also involved Comcast, the nation's largest cable operator.¹² Soon after that transaction was announced, TWC's negotiations with MASN lapsed.

As discussed below, in July 2006, the FCC approved the Adelphia transaction subject to several conditions designed to prevent TWC and Comcast from using their position as dominant MVPDs to discriminate against unaffiliated RSNs and competing MVPDs. On July 27, 2006, TWC indicated in writing that it would resume carriage negotiations with MASN.¹³

¹² See *Adelphia Order* ¶ 9 & n.49; see also <http://www.timewarner.com/corp/newsroom/pr/0,20812,1052294,00.html>.

¹³ See Letter from Michelle Kim to David C. Frederick (July 27, 2006) (attached hereto as Exhibit G).

Those talks proceeded until TWC announced in a January 3, 2007 letter that it would not carry MASN.¹⁴ TWC's January 3, 2007 letter to MASN claims that "there is no significant interest among our customer base in receiving, or paying for, MASN, which has as its anchor programming Washington Nationals and (starting in 2007) Baltimore Orioles baseball games." As discussed above, that explanation does not withstand scrutiny. Indeed, because MASN offers a package of MLB games unequaled by what most other RSNs offer, the other three major MVPDs in MASN's North Carolina Territory (DIRECTV, Charter, EchoStar) and also MediaCom, the sixth largest MVPD in MASN's North Carolina territory, have agreed to carry MASN on the same terms that have been offered to TWC.

The January 3 letter spurred still more negotiations. But after repeated requests from MASN, TWC refused to provide MASN with a carriage offer of any kind. On April 24, 2007, MASN informed TWC in writing that it was treating TWC's refusal to provide a carriage offer as a formal denial of carriage.¹⁵ MASN further informed TWC that, in light of this carriage refusal, it planned to file a demand for arbitration pursuant to the *Adelphia Order*. TWC replied two days later, on April 26, 2007, and stated its "willingness to negotiate for carriage of MASN on a digital tier."¹⁶

A final exchange of letters followed. On May 4, 2007, MASN wrote to TWC and recounted the more than two years' worth of unproductive negotiations, and also TWC's

¹⁴ See Letter from Mickey Carter, Senior Director Programming, Time Warner Cable, to John Angelos, Executive Vice President, MASN (Jan. 3, 2007) ("TWC Jan. 3, 2007 Letter") (attached hereto as Exhibit H).

¹⁵ See Letter from David C. Frederick to Henk Brands (Apr. 24, 2007) (attached hereto as Exhibit I).

¹⁶ Letter from Henk Brands to David C. Frederick (Apr. 26, 2007) (attached hereto as Exhibit J).

unwillingness to make a formal carriage offer of any sort.¹⁷ TWC responded on May 16, 2007, and advanced a number of reasons why it would not accept carriage on a basic or expanded basic programming tier.¹⁸ TWC stated that it would consider further negotiations for digital-tier carriage, while also emphasizing its “belief that it should retain editorial discretion not to make MASN programming available on any of its systems.”¹⁹

The Market for Regional Sports Programming in North Carolina

TWC’s refusal to carry MASN on the basic or expanded basic tiers of its North Carolina cable systems is not due to the reasons it asserts in its January 3 and May 16 letters, but instead has the purpose and effect of favoring TWC’s own affiliated regional sports network, News Channel 14, and other affiliated content. The discriminatory motives at the core of TWC’s refusal to carry MASN are best understood in the context of two aspects of the market for regional sports programming in North Carolina: first, the substantial differences between TWC’s regional sports offerings in the eastern and western parts of the state; and second, TWC’s distribution of News Channel 14, its own affiliated RSN, in North Carolina’s three largest television markets. In addition, the history behind TWC’s development of News Channel 14 as an RSN illustrates the competitive pressures that arise in markets like North Carolina that contain affiliated and unaffiliated RSNs.

The sports programming offered by TWC on its North Carolina cable systems varies significantly between the western and eastern parts of the state. In western North

¹⁷ See Letter from David C. Frederick to Henk Brands (May 4, 2007) (attached hereto as Exhibit K).

¹⁸ See Letter from Henk Brands to David C. Frederick at 2 (May 16, 2007) (“TWC May 16, 2007 Letter”) (attached hereto as Exhibit L).

¹⁹ *Id.*

Carolina – an area that includes the Greensboro-High Point-Winston Salem and Charlotte DMAs and accounts for more than half of TWC’s subscribers within MASN’s North Carolina Territory – TWC offers two unaffiliated RSNs, Fox Sports Net South and SportsSouth, on its expanded basic programming tier.²⁰ Together, these two RSNs air a significant number of Atlanta Braves and Cincinnati Reds games per season and, by virtue of their carriage on expanded basic, are made available to virtually all of TWC’s subscribers. By comparison, TWC’s cable systems in eastern North Carolina – an area that encompasses slightly less than half of all TWC subscribers in the state and includes the Raleigh-Durham, Greenville-North Bern-Washington, Myrtle Beach-Florence, Wilmington, and Norfolk-Portsmouth-Newport News DMAs – offer Fox Sports Net South, but not SportsSouth.²¹ Moreover, because eastern North Carolina is the exclusive MLB territory of the Orioles and Nationals, the version of Fox Sports Net South that TWC carries on its cable systems there does not air any Braves or Reds games – or, indeed, any local MLB games at all. Thus, in western North Carolina, TWC’s subscribers have regular access to Braves and Reds games, whereas TWC’s subscribers in eastern North Carolina have no regular access to such programming.

In addition to TWC’s carriage of Fox Sports Net South throughout North Carolina and SportsSouth in the western part of the state, TWC also owns and operates a third RSN, News Channel 14, that has significant implications for the market for regional sports programming in the state. As noted above, the story of TWC’s creation of News Channel 14 is particularly instructive because it illustrates the competitive pressures that

²⁰ See Time Warner Cable, *Channel Lineups*, <http://www.timewarnercable.com/CustomerService/CLU/TWCCLUs.ashx>.

²¹ See *id.*

characterize markets for regional sports programming that, like North Carolina, contain both affiliated and unaffiliated RSNs.

In 2004, the Charlotte Bobcats (a National Basketball Association (“NBA”) franchise) created their own RSN – Carolinas Sports and Entertainment Television or “C-SET” – to be the primary television vehicle for that newly formed NBA team.²² TWC refused to carry C-SET on its basic or expanded basic programming tier – the only tiers available to a sizable majority of TWC subscribers.²³ TWC instead agreed to carry C-SET solely on its expensive digital basic tier, which at the time only approximately 40 percent of TWC’s subscribers purchased.²⁴ As a result, C-SET was never able to obtain access to enough subscribers to be a viable network, and was forced to shut down operations after less than one year on the air.²⁵ As the Charlotte Business Journal reported at the time: “Without significant audience reach, the Bobcats were hampered by C-SET because most fans in the area were unable to watch the majority of the team’s games on TV.”²⁶

²² Wyche Decl. ¶ 19; *see also* Erik Spanberg, *Will Bobcats Net Work?*, Charlotte Business Journal (Dec. 17, 2004), <http://www.bizjournals.com/charlotte/stories/2004/12/20/story2.html>.

²³ Kurt Badenhausen, *Full-Court Press*, Forbes, Jan. 9, 2006, at 128 (“The rocky season hit a low point last June when the team had to shut down its regional sports channel, C-SET. Time Warner had insisted that C-SET be carried as a premium digital service instead of basic cable, which reduced its reach to only 600,000 homes, less than half the market. ‘It clearly was a mistake,’ says Marc Ganis of SportsCorp, a Chicago sports-business consulting firm. ‘It hindered their growth by not reaching a bigger audience.’”).

²⁴ Chris Roush, *Heels Should Put Bobcats on Better Footing with Fans*, Business Dateline, Sept. 1, 2005, at 24.

²⁵ As the FCC noted in the *Adelphia Order*, even TWC’s own documents indicate that C-SET ceased operations because it did not think that it “would be profitable if it were offered only on a digital tier.” *Adelphia Order*, ¶ 176 n.569.

²⁶ Erik Spanberg, *Bobcats Shutting Down C-SET Network*, Charlotte Business Journal (June 28, 2005), <http://charlotte.bizjournals.com/charlotte/stories/2005/06/27/daily11.html>; *see also* Rick Bonnell & David Scott, *Bobcats Notebook; Owner Not Fazed by Failure of C-SET*, Charlotte Observer, Nov. 6, 2005, at 5C (“[Bobcats’ Owner Bob Johnson] said C-SET’s demise grew in part from Time-Warner’s desire to draw customers to the digital tier. That pushed C-SET far up the dial, limiting the audience for Bobcats games and other programming.”); Wyche Decl. ¶ 19.

After C-SET folded, TWC entered into an agreement to televise the Bobcats on TWC's own affiliated RSN, News 14 Carolina.²⁷ However, unlike most cable programming networks, which are delivered via satellite, News 14 is delivered on terrestrial facilities. Consequently, TWC invoked a loophole in the Communications Act that enabled TWC to deny making News 14 available to competing MVPDs – such as DirecTV. Pursuant to Section 628 of the Communications Act, cable operators are required to provide affiliated programming to competing MVPDs, but a loophole in the statute excludes from this requirement programming delivered over terrestrial facilities.²⁸ In general, cable programming networks are delivered more efficiently through satellite. It is therefore only in rare instances that cable operators carry local or regional programming, such as sports and news, via terrestrial networks.

TWC thus used News Channel 14 to execute a two-part strategy designed to thwart competition. First, it denied meaningful carriage to C-SET, which forced C-SET to fold so that TWC could acquire the rights to the Bobcats in what was a terrible deal for

²⁷ Although News 14 was previously a 24-hour local news and weather channel, TWC's decision to use News 14 as the exclusive channel for the televising of Bobcats games rendered that channel a regional sports network under the FCC's definition in the *Adelphia Order* because it has the rights to air more than 10 percent of the games of the Charlotte Bobcats, an NBA team. See *Adelphia Order* ¶ 158 & App. B § A.

²⁸ See 47 U.S.C. § 548; 47 C.F.R. § 76.1002. The Commission has “long recognized that the terrestrial distribution of programming – particularly RSN programming – by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming.” *Application for Transfer of Control, General Motors Corp. and Hughes Elec. Corp., Transferors, and News Corp. Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 133 (2004) (citing its annual reports on the status of competition in the video market from 1999 to 2002). The Commission has acknowledged that “terrestrial distribution of programming could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market,” but determined that it lacks authority to close the “terrestrial loophole.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, ¶¶ 71, 73 (2002) (“*Program Exclusivity Order*”). (Amendments to eliminate the loophole were proposed in the Advanced Telecommunications and Opportunity Reform Act (S.2686) bill introduced by Senator Ted Stevens in 2006.)

the basketball franchise but a highly lucrative agreement for TWC.²⁹ Second, TWC placed the Bobcats on a network that was delivered over terrestrial facilities so that it would not have to make the Bobcats available to competing MVPDs.³⁰

Most importantly, by destroying C-SET and acquiring the Bobcats rights, TWC gained a substantial foothold for News Channel 14 in the market for valuable regional sports programming. News Channel 14 is a powerful vehicle through which TWC can carry regional sports programming going forward because News Channel 14 straddles the eastern and western parts of the state – encompassing North Carolina’s three largest television markets, Greensboro-High Point-Winston Salem, Charlotte, and Raleigh-Durham – and reaches 85 percent of TWC’s subscribers in MASN’s North Carolina Territory. Accordingly, News Channel 14 is now a dominant force in the market for regional sports programming in North Carolina.

The Adelfphia Order

On July 21, 2006, the FCC issued the *Adelfphia Order*. The FCC authorized TWC to acquire certain of Adelfphia’s cable assets (and to swap cable assets with Comcast) subject to certain merger conditions. In addition, the *Adelfphia Order* placed numerous

²⁹ Erik Spanberg, *What's missing in model for Bobcats' vision? You*, Charlotte Business Journal (Jan. 22, 2007), <http://charlotte.bizjournals.com/charlotte/stories/2007/01/22/story1.html> (noting the “glaring holes” in a broadcast deal that leaves 60 percent of Charlotte’s 1 million TV households without any access to Bobcats games); Erik Spanberg, *Stern: Bobcats on the right track*, Charlotte Business Journal (Dec. 15, 2006) (noting that Bobcats games are broadcast on a local channel that is unavailable to homes without cable and does not reach “outlying, affluent suburbs”).

³⁰ Because regional sports is considered “must have” programming by consumers, see *Adelfphia Order* at ¶¶ 42, 124, TWC’s scheme to deny its competitors access to Bobcats games placed those competing MVPDs at a distinct disadvantage vis-à-vis TWC. See *Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Services*, Report, 5 FCC Rcd 4962, ¶ 118 (1990); *Program Exclusivity Order* ¶ 34. The FCC recognized the harms to consumers from TWC’s abuse of the terrestrial loophole, and specifically ordered TWC to make its RSNs available to other MVPDs such as DirecTV. See *Adelfphia Order* ¶¶ 156, 162. Notwithstanding that Order, TWC continues to flout the law by refusing to allow DirecTV and other MVPDs access to that valuable programming.

restrictions on TWC and Comcast. Those restrictions were, in large part, responses to objections MASN raised to TWC's and Comcast's acquisition of Adelphia.³¹

When TWC and Comcast requested approval for those acquisitions and swaps of cable licenses in early 2005, numerous affected third parties, including MASN, objected to the Adelphia deal, on the ground that it would increase the incentives and ability of TWC and Comcast to discriminate against unaffiliated programmers like MASN and to deny carriage to competing MVPDs of affiliated programming (such as DirecTV of News Channel 14's programming of Bobcats games). TWC vigorously opposed those objections and fought the conditions that commenters such as MASN suggested that the FCC impose. With the *Adelphia Order*, the FCC approved the acquisitions and license swaps, subject to certain conditions proposed by MASN and others.

The FCC first concluded that the acquisition of Adelphia's assets by Time Warner would increase its "incentive and ability" to discriminate against non-affiliated RSNs such as MASN.³² The FCC noted that "the programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated."³³ The FCC concluded that, in light of the clear value of RSN programming, TWC has an "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 . . . Time Warner to obtain the valuable programming for its affiliated RSNs."³⁴ The FCC noted that Time

³¹ In MASN's North Carolina Territory, Adelphia served approximately 90,000 subscribers. *See* Letter from Arthur H. Harding, Fleischman & Walsh, L.L.P., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192 (June 21, 2005). The Adelphia transaction accordingly increased TWC's presence in the state by approximately eight percent.

³² *Adelphia Order* ¶ 116, 189.

³³ *Id.* ¶ 189; *see also id.* ¶ 124 (referring to RSNs as "must-have" programming).

³⁴ *Id.* ¶ 189.

Warner would also gain a competitive advantage over competing cable and satellite providers by obtaining valuable regional sports programming for its affiliated RSNs.³⁵

Finally, the *Adelphia Order* specifically warned that Time Warner could temporarily or permanently withhold valuable regional programming from competing MVPDs by engaging in various types of “foreclosure strateg[ies]” or “stealth discrimination,” including, among other things, offering regional sports programming exclusively on terrestrial delivery platforms.³⁶ To “prevent such behavior,” the FCC ordered that Time Warner submit itself to arbitration of disputes regarding carriage of unaffiliated RSNs.³⁷ The arbitration procedure set forth by the FCC’s order provides for forward-looking, final offer arbitration by a single arbitrator. That arbitrator, chosen from a list of potential arbitrators constructed jointly by the AAA and the FCC, must decide the carriage terms under which TWC should be compelled to carry MASN on TWC’s cable system.³⁸ In deciding on the carriage terms to impose, the arbitrator’s discretion is limited to choosing between the final offers made by the parties.³⁹

Moreover, the *Adelphia Order* provides that the arbitration should be conducted in an

³⁵ *See id.*

³⁶ *Id.* ¶¶ 120, 123.

³⁷ *Id.* ¶ 189; *see id.* ¶ 190. The arbitration rules are drafted primarily to focus on the context in which a TWC-affiliated RSN is making unreasonable demands on (or is refusing to provide its programming to) an independent cable or satellite provider. The FCC clearly stated that these rules would also apply to the context of TWC refusing to carry an unaffiliated RSN on its cable system. *See Adelphia Order* ¶ 190. Because the arbitration rules were drafted for a different context, they envision that the parties shall be an “MVPD” and an affiliate of TWC. In this case, where the rules refer to the “MVPD” they should be understood to refer to MASN.

³⁸ *See id.* ¶ 190 & App. B.

³⁹ *See id.* App. B, § (B)(3)(c). Although the *Adelphia Order* provides that the parties may generally consent to alterations of the arbitration procedures, the Order specifically provides that the parties may not modify the requirement that the arbitration be conducted as a choice between the final offers presented by the parties. *See id.* App. B, § B(3)(b).

expedited fashion, with the arbitrator issuing a decision within 45 days of being appointed.⁴⁰

ARGUMENT

TWC's refusal to carry MASN in North Carolina violates Section 616 of the Communications Act of 1934, FCC rules implementing that provision, and the *Adelphia Order* itself. TWC's refusal to carry MASN in these markets is an attempt to protect its own RSN, News Channel 14, as well as other affiliated programming content – the very anti-competitive conduct that the FCC sought to prevent in its *Adelphia Order*. Moreover, MASN's request that it be carried on a basic or expanded basic programming tier – as set forth in the attached “final offer” – is reasonable and mirrors the key carriage terms to which the other three largest MVPDs in MASN's North Carolina Territory have already agreed, and also the terms by which TWC carries comparable RSNs in other markets similar to North Carolina.

TWC Has Refused Carriage To MASN To Favor Its Own RSN and Other Affiliated Content

TWC's refusal to carry MASN is discriminatory – it has the purpose and effect of favoring TWC's own affiliated RSN and other affiliated content, and is part of a broader strategy of cementing TWC's dominance in the MVPD marketplace. Accordingly, TWC is in violation of Section 616 of the Communications Act of 1934 and the rules adopted by the FCC under that provision.

MASN's programming is of considerable value to local viewers in North Carolina. Indeed, the Orioles and Nationals are the *only* baseball teams that are authorized by MLB to televise their games on paid television in the eastern part of the

⁴⁰ See *id.* ¶ 190.

state. At present, TWC's subscribers in the eastern part of the state do not have regular access to the games of *any* local MLB team on paid television. In addition, TWC's refusal to carry MASN denies TWC's subscribers in the western part of the state regular access to the games of any local American League team and to the regular programming of Washington Nationals games. TWC's subscribers are also denied MASN's North Carolina college sports programming, including NCAA Division I men's basketball games, which the FCC has also found to be "must have" programming.⁴¹

TWC's refusal to carry MASN on a basic or expanded basic tier is motivated by the very anti-competitive desires that the FCC sought to remedy in the *Adelphia Order*. In short, TWC wants to drive MASN out of North Carolina. TWC's denial of carriage serves multiple anti-competitive purposes.

First, TWC's refusal to carry MASN on a basic or expanded basic programming tier vastly increases TWC's leverage over MASN, as TWC learned when it denied carriage on its basic or expanded basic tier to C-SET and thereby gained television rights to Charlotte Bobcats games. By suggesting that MASN would be carried only on the expensive digital tier that a substantial fraction of TWC's subscribers do not purchase, TWC is limiting MASN to an economically infeasible alternative. By repeating the strategy it used to counter the Bobcats' contract with C-SET, TWC is once again attempting to squeeze a rival into selling valuable sports programming at below-market rates.

Second, by denying broad carriage of MASN in North Carolina, TWC prevents MASN from becoming a competitor for broadcasting Charlotte Bobcats games and other

⁴¹ See *Adelphia Order* App. B § A.

regional sports programming in North Carolina. As a competitive RSN with valuable marquee programming, MASN could bid against TWC for the right to broadcast Bobcats games and other sports. Eliminating MASN as a potential competitor increases TWC's chances of both retaining the Bobcats broadcast rights and doing so at cheaper prices. TWC also likely views MASN as a competitor for the rights to televise preseason games of the NFL's Carolina Panthers, which News Channel 14 has previously expressed interest in carrying. *See* Cuddihy Decl. ¶ 11. Once MASN is firmly established in the North Carolina market, it would be in a position to bid competitively for the rights to such games. TWC's monopoly power as a programming distributor enables it to depress the price it would be forced to pay for the Bobcats, Panthers, or other television rights in the future.

TWC's treatment of other RSNs outside of North Carolina provides further evidence that TWC's refusal to carry MASN on its basic or expanded basic tier is anticompetitive and discriminatory in nature. TWC repeatedly asserted during the failed negotiations that North Carolina's status as an "extended inner" market for Orioles and Nationals games could not justify placement of MASN on a basic or expanded basic programming tier. But in reality, TWC carries similarly situated RSNs in nearly a dozen television markets outside of North Carolina that closely resemble the very same "extended inner" markets in which TWC is refusing MASN carriage. The principal difference in those markets is that TWC is not seeking to protect an affiliated RSN.

For instance, in northern Mississippi, TWC carries Fox Sports Net South on its expanded basic tier, despite the fact that the Atlanta Braves play their home games some