

MB 08-214

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

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In the Matter of)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7709-P
Complainant)	
v.)	
Time Warner Cable Inc.)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7822-P
Complainant)	
v.)	
Bright House Networks, LLC,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7829-P
Complainant)	
v.)	
Cox Communications, Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7907-P
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	
)	
NFL Enterprises LLC,)	File No. CSR-7876-P
Complainant)	
v.)	
Comcast Cable Communications, LLC,)	
Defendant)	
)	
TCR Sports Broadcasting Holding, L.L.P.,)	File No. CSR-8001-P
d/b/a Mid-Atlantic Sports Network,)	
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	

MEMORANDUM OPINION AND HEARING DESIGNATION ORDER

Adopted: October 10, 2008

Released: October 10, 2008

By the Chief, Media Bureau

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION	2
II. BACKGROUND	5
III. DISCUSSION	8
A. WealthTV	9
1. WealthTV v. TWC.....	11
a. Background	12
b. Similarly Situated.....	13
c. Differential Treatment.....	19
d. Harm to Ability to Compete.....	20
e. Alleged Business and Editorial Justifications for TWC's Refusal to Carry WealthTV	21
f. Conclusion.....	25
2. WealthTV v. BHN.....	26
a. Background	27
b. Similarly Situated.....	28
c. Differential Treatment.....	29
d. Harm to Ability to Compete.....	30
e. Alleged Business and Editorial Justifications for BHN's Refusal to Carry WealthTV	32
f. Conclusion.....	36
3. WealthTV v. Cox.....	37
a. Background	38
b. Procedural Issues.....	39
c. Similarly Situated.....	40
d. Differential Treatment.....	41
e. Harm to Ability to Compete.....	42
f. Alleged Business and Editorial Justifications for Cox's Refusal to Carry WealthTV	44
g. Conclusion.....	47
4. WealthTV v. Comcast.....	48
a. Background	49
b. Similarly Situated.....	52
c. Differential Treatment.....	53
d. Harm to Ability to Compete.....	54
e. Alleged Business and Editorial Justifications for Comcast's Refusal to Carry WealthTV	56
f. Conclusion.....	58
5. Conclusion	59
B. NFL Enterprises v. Comcast	60
1. Background.....	61
2. Procedural Issues	69
a. Program Carriage Statute of Limitations.....	70
b. Dismissal Pending Litigation	72
c. Specificity of Requested Relief.....	74
d. Signature and Verification Requirements	75
2. Discrimination Claim.....	76

a.	Similarly Situated.....	76
b.	Differential Treatment.....	77
c.	Harm to Ability to Compete.....	78
d.	Alleged Business and Editorial Justifications for Comcast's Refusal to Carry NFL Network on an Expanded Basic Tier.....	80
e.	Conclusion.....	86
3.	Financial Interest Claim.....	87
C.	MASN v. Comcast.....	91
1.	Background.....	93
2.	Procedural Issues.....	102
a.	Program Carriage Statute of Limitations.....	103
b.	Res Judicata.....	107
3.	Similarly Situated.....	109
4.	Differential Treatment.....	110
5.	Harm to Ability to Compete.....	111
6.	Alleged Contract-Based, Business and Editorial Justifications for Comcast's Refusal to Carry MASN on the Unlaunched Systems.....	112
a.	Contract-Based Justifications.....	113
(i)	Term Sheet.....	113
(ii)	Release.....	115
b.	Editorial and Business Justifications.....	116
(i)	License Fee.....	117
(ii)	Bandwidth.....	118
(iii)	Demand.....	119
7.	Conclusion.....	120
IV.	REFERRAL TO ADMINISTRATIVE LAW JUDGE OR ALTERNATIVE DISPUTE RESOLUTION.....	121
V.	ORDERING CLAUSES.....	123
A.	WealthTV v. TWC.....	123
B.	WealthTV v. BHN.....	127
C.	WealthTV v. Cox.....	131
D.	WealthTV v. Comcast.....	135
E.	NFL v. Comcast.....	139
F.	MASN v. Comcast.....	143

I. INTRODUCTION

1. Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV") has filed program carriage complaints against Time Warner Cable Inc. ("TWC"), Bright House Networks, LLC ("BHN"), Cox Communications, Inc. ("Cox"), and Comcast Corporation ("Comcast").¹ WealthTV, a video programming vendor, alleges that TWC, BHN, Cox, and Comcast, all multichannel video programming distributors ("MVPDs"), discriminated against WealthTV's programming in favor of a similarly situated video

¹ See Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against TWC, File No. CSR-7709-P (filed December 20, 2007) ("WealthTV Complaint Against TWC"); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against BHN, File No. CSR-7822-P (filed March 13, 2008) ("WealthTV Complaint Against BHN"); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Cox, File No. CSR-7829-P (filed March 27, 2008) ("WealthTV Complaint Against Cox"); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast, File No. CSR-7907-P (filed April 21, 2008) ("WealthTV Complaint Against Comcast").

programming vendor, MOJO, which is affiliated with TWC, BHN, Cox, and Comcast,² in violation of Section 76.1301(c) of the Commission's rules.³ As discussed below, we direct these matters to an Administrative Law Judge ("ALJ") and order that the ALJ return Recommended Decisions in these matters to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Memorandum Opinion and Hearing Designation Order* ("Order").

2. NFL Enterprises LLC ("NFL") has filed a program carriage complaint against Comcast Cable Communications, LLC, a subsidiary of Comcast.⁴ The NFL owns the NFL Network, a video programming vendor. The NFL alleges that Comcast, an MVPD, has (i) discriminated against the NFL Network in favor of its affiliated video programming vendors in violation of Section 76.1301(c) of the Commission's rules;⁵ and (ii) required a financial interest in the NFL's programming as a condition for carriage of the NFL Network, in violation of Section 76.1301(a) of the Commission's rules.⁶ As discussed below, we direct this matter to an ALJ and order that the ALJ return Recommended Decisions in these matters to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Order*.

3. TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network ("MASN") has filed a program carriage complaint against Comcast.⁷ MASN alleges that Comcast, an MVPD, has discriminated against MASN in favor of its affiliated video programming vendors in violation of Section 76.1301(c) of the Commission's rules.⁸ As discussed below, we direct this matter to an ALJ and order that the ALJ return a Recommended Decision in this matters to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Order*.

II. BACKGROUND

4. Section 616 of the Communications Act of 1934, as amended (the "Communications Act"), directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."⁹ Among other things, Congress directed that the regulations:

(1) include provisions designed to prevent a cable operator or other [MVPD] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;¹⁰ [and]

² MOJO is owned by iN DEMAND L.L.C., which is owned 54.1% by Comcast iN DEMAND Holdings, Inc.; 15.6% by Cox Communications Holdings, Inc.; and 30.3% by Time Warner Entertainment-Advance/Newhouse Partnership ("TWE-A/N"). See *infra* n. 34.

³ 47 C.F.R. § 76.1301(c).

⁴ See NFL Enterprises LLC, Program Carriage Complaint, File No. CSR-7876-P (filed May 6, 2008) ("NFL Complaint Against Comcast").

⁵ 47 C.F.R. § 76.1301(c).

⁶ 47 C.F.R. § 76.1301(a).

⁷ See TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Program Carriage Complaint, File No. CSR-8001-P (filed July 1, 2008) ("MASN Complaint Against Comcast").

⁸ 47 C.F.R. § 76.1301(c).

⁹ 47 U.S.C. § 536. Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹⁰ 47 U.S.C. § 536(a)(1); see 47 C.F.R. § 76.1301(a) (implementing financial interest provision).

* * *

(3) contain provisions designed to prevent a [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.¹¹

5. The Commission adopted rules in 1993 to implement Section 616.¹² Specifically, Sections 76.1301(a) and (c) were added to the Commission's rules to prohibit a cable operator or other MVPD from requiring a financial interest in any program service as a condition for carriage of such service¹³ or engaging in conduct that unreasonably restrains the ability of an unaffiliated programming vendor to compete fairly by discriminating against such vendor on the basis of its nonaffiliation.¹⁴

6. In addition to establishing rules governing program carriage, the *Second Report and Order* also established procedures for the review of program carriage complaints and appropriate penalties and remedies. The Commission adopted procedures by which cases would be resolved on the basis of a complaint, answer and reply.¹⁵ Additional pleadings are generally not considered unless specifically requested by reviewing staff.¹⁶ The Commission recognized that "resolution of Section 616 complaints [would] necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred."¹⁷ The Commission anticipated that the "staff would be unable to resolve most carriage agreement complaints on the sole basis of a written record...."¹⁸ In such cases, if the staff determines that the complainant has established a *prima facie* case but that "disposition of the complaint would require the resolution of factual disputes or other extensive discovery," the staff is to notify the parties that they have the option of choosing Alternative Dispute Resolution ("ADR") or an adjudicatory hearing before an Administrative Law Judge.¹⁹ The Commission stated that the appropriate relief for program carriage violations would be determined on a case-by-case basis, and that appropriate remedies and sanctions would include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.²⁰

III. DISCUSSION

7. When filing a program carriage complaint, the burden of proof is on the video programming vendor to establish a *prima facie* case that the defendant MVPD has engaged in behavior

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

¹² See 47 C.F.R. §§ 76.1300 – 76.1302; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642 (1993) ("*Second Report and Order*").

¹³ 47 C.F.R. § 76.1301(a).

¹⁴ 47 C.F.R. § 76.1301(c).

¹⁵ See 47 C.F.R. § 76.1302(c), (d), (e).

¹⁶ See 47 C.F.R. § 76.7(e)(2); see also 47 C.F.R. 76.1302(a).

¹⁷ *Second Report and Order*, 9 FCC Rcd at 2648.

¹⁸ *Id.* at 2652.

¹⁹ *Id.* at 2656.

²⁰ *Id.* at 2653.

that is prohibited by Section 616 and the Commission's program carriage rules.²¹ After reviewing the pleadings and supporting documentation filed by the parties in each case, we find that the complainants have established a *prima facie* showing of a violation of the program carriage rules in each case. We also find that the pleadings and supporting documentation present several factual disputes, such that we are unable to determine on the basis of the existing records whether we can grant relief based on these claims.²²

A. WealthTV

8. WealthTV is a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's rules.²³ WealthTV focuses on "inspirational and aspirational programming about prosperous and fulfilling lifestyles."²⁴ WealthTV states that it is a "truly independent stand-alone programming service" and is not supported by or affiliated with any MVPD, telephone company, or broadcaster.²⁵ WealthTV is currently carried by over 75 MVPDs.²⁶

9. As discussed below, WealthTV had filed program carriage complaints against TWC, BHN, Cox, and Comcast. WealthTV asks the Commission to order TWC, BHN, Cox, and Comcast to provide WealthTV carriage on all TWC, BHN, Cox, and Comcast systems without delay, pursuant to the terms of a carriage agreement similar to that accorded to MOJO.²⁷ To the extent one or more of the

²¹ See *id.* at 2654.

²² See *id.* at 2655.

²³ See 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e); see also WealthTV Complaint Against TWC at ¶ 3; WealthTV Complaint Against BHN at ¶ 4; WealthTV Complaint Against Cox at ¶ 4; WealthTV Complaint Against Comcast at ¶ 4.

²⁴ See WealthTV Complaint Against TWC at ¶ 8; WealthTV Complaint Against BHN at ¶ 9; WealthTV Complaint Against Cox at ¶ 9; WealthTV Complaint Against Comcast at ¶ 9.

²⁵ See WealthTV Complaint Against TWC at ¶ 9; WealthTV Complaint Against BHN at ¶ 10; WealthTV Complaint Against Cox at ¶ 10; WealthTV Complaint Against Comcast at ¶ 10.

²⁶ These MVPDs include GCI, Charter Communications, Verizon, WideOpenWest, Qwest, Armstrong Cable, SureWest, Metrocast, Grande Communications, Service Electric, Sunflower Cable, Western Broadband, AT&T Universe, and OEN Fision. See WealthTV Complaint Against TWC at ¶¶ 9, 16; WealthTV Complaint Against BHN at ¶¶ 10, 16; WealthTV Complaint Against Cox at ¶¶ 10, 16; WealthTV Complaint Against Comcast at ¶¶ 10, 15. TWC, BHN, and Comcast state that this represents a modest number of the 6,600 cable systems nationwide and only one of the top-ten cable multiple system operators ("MSOs") (Charter). See Time Warner Cable Inc., Answer, File No. CSR-7709-P (February 5, 2008), at 12 ("TWC Answer"); Bright House Networks, LLC, Answer, File No. CSR-7822-P (April 14, 2008), at 17 ("BHN Answer"); Comcast Corporation, Answer, File No. CSR-7907-P (May 21, 2008), at 22 ("Comcast Answer to WealthTV").

²⁷ See WealthTV Complaint Against TWC at 28; WealthTV Complaint Against BHN at 23; WealthTV Complaint Against Cox at 25; WealthTV Complaint Against Comcast at 25. We note that, at the time WealthTV requested carriage, the defendants carried MOJO in the relevant cable systems. Although iN DEMAND recently announced that MOJO will cease operations on December 1, 2008, this does not render moot or discredit WealthTV's discrimination claim. See Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, File No. CSR-7907-P (filed October 10, 2008); Letter from Arthur H. Harding, Counsel for TWC, to Marlene H. Dortch, Secretary, FCC, File No. CSR-7709-P (filed October 10, 2008). The fact that MOJO will cease operations in the future is not relevant to the issue of whether the defendants engaged in unlawful discrimination during the period that WealthTV sought carriage. Our conclusion is consistent with the Commission's finding in other contexts that steps taken by a licensee following a violation do not eliminate the licensee's responsibility for the period during which the violation occurred. See *SBC Communications, Inc.*, Order of Forfeiture, 16 FCC Rcd 5535, 5542, ¶ 18; see also *Coleman Enters., Inc. d/b/a Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24388, ¶ 8 (2000); *America's Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22350, 22355, ¶ 15 (continued....)

systems claim to lack capacity to add an additional channel, WealthTV asks the Commission to order the system to delete an affiliated programming service to accommodate the addition of WealthTV.²⁸ WealthTV also urges the Commission to order TWC, BHN, Cox, and Comcast to comply with any documentary and interrogatory discovery that may be reasonably necessary to resolve the issues in dispute.²⁹ Moreover, WealthTV requests the Commission to order the ALJ to use “baseball style arbitration” rules to resolve the complaints.³⁰

1. WealthTV v. TWC

10. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). TWC is an MVPD and the second largest cable operator in the nation as measured by number of subscribers.³¹ As of September 30, 2007, TWC operated cable systems that pass approximately 26 million homes and provided service to 13.3 million basic video subscribers in 33 states.³² TWC operates the largest cable systems as measured by number of subscribers in the nation’s two largest cities, New York City and Los Angeles.³³ TWC is affiliated with MOJO, a video programming vendor.³⁴ According to TWC, MOJO’s orientation is “exclusively male” and its principal programming consists of sports, movies, music concerts, and reality series.³⁵ On May 7, 2007, WealthTV provided TWC with a pre-filing notice pursuant to Section 76.1302(b) of the Commission’s rules informing TWC of its intent to file a program carriage complaint.³⁶ On December 20, 2007, WealthTV filed its complaint, alleging that TWC violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.³⁷

(Continued from previous page)

(2001). In addition, if carriage of WealthTV is ultimately required, the fact that the defendants will no longer be carrying MOJO on the relevant cable systems indicates that they will have a vacant channel on which to accommodate WealthTV.

²⁸ See WealthTV Complaint Against TWC at 28; WealthTV Complaint Against BHN at 23; WealthTV Complaint Against Cox at 26; WealthTV Complaint Against Comcast at 25.

²⁹ See WealthTV Complaint Against TWC at 28; WealthTV Complaint Against BHN at 24; WealthTV Complaint Against Cox at 26; WealthTV Complaint Against Comcast at 26.

³⁰ See WealthTV Complaint Against TWC at 29; WealthTV Complaint Against BHN at 24; WealthTV Complaint Against Cox at 27; WealthTV Complaint Against Comcast at 26.

³¹ See TWC Answer at 42.

³² See *id.*

³³ See WealthTV Complaint Against TWC at ¶ 10; TWC Answer at 42.

³⁴ MOJO is distributed by iN DEMAND L.L.C., which is owned 54.1% by Comcast iN DEMAND Holdings, Inc.; 15.6% by Cox Communications Holdings, Inc.; and 30.3% by Time Warner Entertainment-Advance/Newhouse Partnership. See TWC Answer at 9 n.13. Due to the structure of the TWE-A/N partnership, TWC claims that its actual interest in MOJO is less than 25.9%. See *id.*

³⁵ See *id.* at 9 n.13, 20, and 42.

³⁶ See WealthTV Complaint Against TWC, Exhibit 1.

³⁷ See *id.* at ¶ 69.

a. Background

11. WealthTV states that it has been seeking carriage on TWC systems since prior to its launch in June 2004.³⁸ WealthTV explains that it proposed to provide its high definition (“HD”) video on demand (“VOD”) service to TWC free of charge provided that TWC grant it a “hunting license”³⁹ and commit to launch WealthTV in its linear line-up in one TWC system.⁴⁰ TWC rejected this proposal because it was unwilling to commit to a linear launch on even one system.⁴¹ In December 2007, TWC offered a compromise whereby it agreed not to launch WealthTV’s free HD VOD service until after it launched WealthTV in its linear line-up in one system.⁴² According to TWC, this proposal was meant to address WealthTV’s concern that TWC could launch its free HD VOD service without ever launching WealthTV on a linear basis.⁴³ WealthTV rejected this proposal because it still did not guarantee a linear launch in even one system.⁴⁴ TWC contends that it offered WealthTV a hunting license that was similar to the deals it has offered to dozens of other programmers, including some of its affiliated programmers, and that WealthTV has accepted a hunting license from other MVPDs that have no ownership interest in

³⁸ See *id.* at ¶¶ 12-15, 38-53, 69. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits from Charles Herring, WealthTV’s President, and Robert Herring, Sr., WealthTV’s Chairman and Chief Executive Officer. See *id.*, Exhibits 2 and 3.

On March 11, 2008, TWC filed a Motion to Strike WealthTV’s Reply, alleging that WealthTV’s Reply contained “new matters” in violation of the Commission rules. See *Time Warner Cable Inc., Motion to Strike*, File No. CSR-7709-P (March 11, 2008) (“TWC Motion to Strike”); see also 47 C.F.R. § 76.1302(e) (stating that a reply “shall be responsive to matters contained in the answer and shall not contain new matters”). On March 17, 2008, WealthTV filed a Motion seeking leave to file an Opposition and Response to TWC’s Motion to Strike. See *Herring Broadcasting, Inc. d/b/a WealthTV, Motion in Response to TWC Motion to Strike*, File No. CSR-7709-P (March 17, 2008) (“WealthTV Motion in Response to TWC Motion to Strike”). In its Motion, WealthTV argues that TWC’s Motion to Strike is an additional pleading that is not permitted by the Commission’s rules. See *WealthTV Motion In Response to TWC Motion to Strike* at 1; see also *Second Report and Order*, 9 FCC Rcd at 2652 (“Given the statute’s explicit direction to the Commission to handle program carriage complaints expeditiously, additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff.”). We grant WealthTV’s Motion and consider its Opposition and Response herein. We agree with WealthTV that its Reply does not raise “new matters.” See *WealthTV Motion in Response to TWC Motion to Strike* at 2-3. Rather, the information contained in WealthTV’s Reply is directly responsive to matters contained in TWC’s Answer, such as the number of subscribers needed to make a network attractive to advertisers, the similarity between WealthTV and MOJO, and the offers made by TWC during carriage negotiations prior to the filing of WealthTV’s Complaint. Although we agree with WealthTV that TWC’s Motion to Strike is an impermissible additional pleading, we nonetheless consider the arguments made in TWC’s Motion to Strike in the interest of a complete record.

³⁹ A “hunting license” refers to an agreement that specifies basic carriage terms and gives the programmer the right to seek carriage by individual cable systems owned by a cable MSO, as opposed to a nationwide carriage agreement which provides the programming service with carriage on all systems owned by the MSO. See *WealthTV Complaint Against TWC* at ¶ 44; *TWC Answer* at 12 n.19; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶ 7.

⁴⁰ See *WealthTV Complaint Against TWC* at ¶ 52; *Herring Broadcasting, Inc. d/b/a WealthTV, Reply to TWC*, File No. CSR-7709-P (filed February 25, 2008), at 11 (“WealthTV Reply to TWC”); see also *TWC Answer* at 49 (¶ 52).

⁴¹ See *WealthTV Reply to TWC* at 11; see also *TWC Answer* at 31, 49 (¶ 52).

⁴² See *TWC Answer* at 13-14, 31; *TWC Motion to Strike* at 11-12; see also *WealthTV Reply to TWC* at 11.

⁴³ See *TWC Answer* at 14; *TWC Motion to Strike* at 12.

⁴⁴ See *WealthTV Reply to TWC* at 11.

MOJO, such as Charter.⁴⁵ As WealthTV explains, however, its agreement with Charter guarantees a linear launch in a set number of systems, whereas TWC refused to commit to linear carriage in even one system.⁴⁶ Moreover, WealthTV states that TWC has launched MOJO on a nationwide basis while it has offered WealthTV only a hunting license, thereby demonstrating TWC's discriminatory treatment.⁴⁷ WealthTV also states that a hunting license with TWC is meaningless given the reluctance of TWC's corporate programming group to agree to carriage of WealthTV even if individual systems desire to carry the network.⁴⁸ In its Motion to Strike, TWC states that, after the filing of the WealthTV complaint, it acceded to WealthTV's demands and proposed a hunting license coupled with a firm commitment for linear carriage of WealthTV on TWC's San Antonio system.⁴⁹ In its Reply, WealthTV admits that discussions between TWC and WealthTV have continued after the filing of the Complaint, but states that it cannot address these discussions because the Commission's rules require a Reply to be responsive to matters contained in the Answer and not contain new matters.⁵⁰

b. Similarly Situated

12. As discussed below, WealthTV has provided the following evidence that MOJO is "substantially similar to WealthTV" with respect to programming, target demographic (affluent males aged 25 to 49), target audience, look and feel, targeted programming theme, and target advertisers.⁵¹

13. *Similar programming.* WealthTV provides examples of similar programming that both WealthTV and MOJO offer, regarding topics such as wine, automobiles, sports interviews, food, and electronics.⁵² For example, in June 2004, WealthTV launched *Taste! The Beverage Show*, which focuses on educating viewers about wine and spirits; in April 2007, MOJO launched *Uncorked*, which focuses on the same subject matter.⁵³ In June 2004, WealthTV launched *Wealth on Wheels*, which focuses on the latest trends in automotive technology; in August 2007, MOJO launched *Test Drive*, which focuses on the same subject matter.⁵⁴ In June 2004, WealthTV launched *Charlie Jones, Live to Tape*, which features interviews of sports figures; MOJO shows *Timeless*, which also features interviews of sports figures.⁵⁵ In June 2004, WealthTV launched *Taste of Life*, which educates viewers about behind the scenes experiences with travel, spirits, and food; in June 2006, MOJO launched *After Hours*, which focuses on a behind the scenes look at Los Angeles restaurants.⁵⁶ In April 2005, WealthTV launched *Innov8*, which educates viewers about new "gadgets and gizmos"; in December 2006, MOJO launched *Geared Up*, which focuses on high-end electronics and technology.⁵⁷ WealthTV also provides an affidavit from Jedd

⁴⁵ See TWC Answer at 2, 4-5, 13, 27-28, 30; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 8, 16; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶ 12; TWC Motion to Strike at 11.

⁴⁶ See WealthTV Reply to TWC at 13.

⁴⁷ See *id.* at 12.

⁴⁸ See *id.*

⁴⁹ See TWC Motion to Strike at 13.

⁵⁰ See WealthTV Reply to TWC at 13 n.11.

⁵¹ See WealthTV Complaint Against TWC at ¶¶ 22, 28-36; see also WealthTV Reply to TWC at 13-15.

⁵² See WealthTV Complaint Against TWC at ¶ 29.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

Palmer, a consultant with more than twenty-five years of experience in the cable industry, who reviewed the programming schedules of MOJO and WealthTV and concludes that “the overwhelming majority of the programming on both networks is the same, or very, very similar, in subject, type, feel, look and target audience.”⁵⁸

14. *Similar target demographics.* WealthTV provides evidence that WealthTV and MOJO both are focused on the same target demographic -- affluent males aged 25 to 49. WealthTV provides the results of a survey demonstrating that the demographics of WealthTV's viewers are affluent males aged 25 to 49.⁵⁹ The results of the survey indicate that 71 percent of WealthTV's audience is male and 55 percent have incomes greater than \$75,000.⁶⁰ TWC provides similar results for MOJO -- 72 percent of its audience is male and 61 percent have incomes greater than \$75,000.⁶¹ WealthTV also provides an excerpt from a 2004 presentation where WealthTV described its programming as geared towards males 25 to 49.⁶² WealthTV notes that the CEO of iN DEMAND has stated that MOJO is for “men making more than \$100,000 per year.”⁶³ MOJO has also used the term “active affluents” to describe its target audience.⁶⁴ In his declaration, Jedd Palmer concludes that WealthTV targets the same audience as MOJO based on his review of marketing materials, press releases, and the networks' schedules and programming.⁶⁵ Descriptions of WealthTV and MOJO's programming found on their respective websites further suggests the two networks offer similar programming.⁶⁶

15. *Similar focus on a targeted audience rather than on general entertainment.* WealthTV explains that iN DEMAND announced the launch of MOJO in March 2007, almost three years after the launch of WealthTV.⁶⁷ WealthTV notes that, upon the launch of MOJO, TWC agreed to offer the

⁵⁸ See WealthTV Reply to TWC, Exhibit 4, Declaration of Jedd Palmer, at ¶¶ 7-10. TWC argues that the Commission cannot rely on the information provided in the Palmer Declaration because it fails to identify the programming reviewed or provide any analysis to support the conclusions. See TWC Motion to Strike at 9. We conclude that the Palmer Declaration adequately sets forth the basis for its conclusions. See WealthTV Reply to TWC, Exhibit 4, Declaration of Jedd Palmer, at ¶¶ 7-10.

⁵⁹ See WealthTV Reply to TWC, Exhibit 3, Declaration of Mark Kersey. TWC argues that the Commission cannot rely on the survey results provided in the Kersey Declaration because it fails to provide the methodology, sample size, and other factors needed to test the validity of the conclusions. See TWC Motion to Strike at 8-9. We find that the Kersey Declaration adequately sets forth the basis for its conclusions. See WealthTV Reply to TWC, Exhibit 3, Declaration of Mark Kersey, at ¶ 3.

⁶⁰ See WealthTV Reply to TWC, Exhibit 3, Declaration of Mark Kersey.

⁶¹ See TWC Answer, Exhibit 9, Declaration of Stacie Gray, at ¶ 5.

⁶² See WealthTV Complaint Against TWC at ¶ 30 and Exhibit 12.

⁶³ See *id.* at ¶¶ 30, 35 and Exhibit 11.

⁶⁴ See *id.* at ¶ 34.

⁶⁵ See WealthTV Reply to TWC, Exhibit 4, Declaration of Jedd Palmer, ¶ 8.

⁶⁶ Compare <http://www.wealthtv.net/programming.html> (stating that WealthTV provides “fresh and compelling landmark exclusive programming in high definition. From programs on private jets and exotic first-class travel to the intellectual discussion of money and philanthropy, WealthTV showcases a wide range of programming designed to have a broad appeal”) with <http://www.mojohd.com/about/> (describing the MOJO network as “the new 100% hi-def channel [that] is tailored to fit your interests from exceptional food to extreme locales, from high tech toys to high stake antics, from Wall Street to easy street and the best of sports, music, movies and more. It's 180° from ordinary and 100% high definition, because life is how you see it”).

⁶⁷ See WealthTV Complaint Against TWC at ¶ 22.

channel across all of its systems carrying HD.⁶⁸ While TWC claims that the service now known as MOJO was originally launched in 2003 under the name INHD, before the launch of WealthTV,⁶⁹ WealthTV provides evidence that MOJO did not result from merely a name change⁷⁰ and that MOJO is a targeted programming service whereas INHD was a general entertainment service.⁷¹ WealthTV notes that the CEO of iN DEMAND stated that INHD could not survive as “general entertainment programming,” thus INHD was converted into a targeted programming service with similar programming to WealthTV.⁷² In his declaration, Jedd Palmer concludes that “MOJO is not a general entertainment service, but rather a highly targeted niche programming service.”⁷³

16. *Similar target advertisers.* WealthTV explains that it targets the same advertisers as MOJO.⁷⁴ WealthTV explains that both WealthTV and MOJO feature programming on wine and spirits and both networks have targeted the same advertising agency for Grey Goose Vodka.⁷⁵

17. TWC disputes that WealthTV and MOJO are similar programming services or that they have similar target demographics.⁷⁶ TWC appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

c. Differential Treatment

18. WealthTV argues that TWC has treated WealthTV differently than MOJO by carrying MOJO on its systems but refusing to carry WealthTV on those same systems. While TWC claims that it recently offered WealthTV a hunting license coupled with a firm commitment for linear carriage of WealthTV on TWC’s San Antonio system,⁷⁷ the salient issue for our analysis is that TWC has launched its affiliated MOJO network on a nationwide basis but it has refused to carry WealthTV on the same terms.

⁶⁸ See *id.* at ¶ 25.

⁶⁹ See TWC Answer at 22-25; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶¶ 5-7, 14; *id.* at Exhibit 9, Declaration of Stacie Gray, at ¶¶ 3, 6, 8.

⁷⁰ See WealthTV Reply to TWC at 15.

⁷¹ See *id.* at 15; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 7.

⁷² See WealthTV Complaint Against TWC at ¶ 32.

⁷³ See WealthTV Reply to TWC at 15; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 7.

⁷⁴ See WealthTV Complaint Against TWC at ¶ 36.

⁷⁵ See *id.*

⁷⁶ For example, TWC contends that MOJO’s orientation is exclusively males aged 18 to 49, whereas WealthTV’s website describes its programming as appealing to a broad audience. See TWC Answer at 3, 18-24; *id.* at Exhibit 3, Declaration of Michael Egan, at ¶¶ 7-11; *id.* at Exhibit 9, Declaration of Stacie Gray, at ¶¶ 3, 7-8; *id.* at Exhibit 10 (comparing programs identified in WealthTV’s Complaint); *id.* at Exhibit 11 (chart providing categories of programming shown on WealthTV and MOJO); *id.* at Exhibits 12-15 (providing programming schedules for WealthTV and MOJO for sample weeks in July 2007 and January 2008); TWC Motion to Strike at 8-11.

⁷⁷ See TWC Motion to Strike at 13.

d. Harm to Ability to Compete

19. As required by the program carriage statute and our rules, WealthTV has provided evidence that TWC's refusal to carry WealthTV restrains its ability to compete fairly.⁷⁸ WealthTV provides evidence that advertisers are not interested in placing advertisements on programming services that are available to fewer than 20 million households.⁷⁹ Absent carriage on one or both of the largest cable MSOs, such as TWC or Comcast, a programmer's ability to attract advertisers is impeded and its long-term financial viability is limited.⁸⁰ In addition, WealthTV provides evidence that TWC has "quasi monopolies" in key markets, such as New York and Los Angeles, that are essential to WealthTV's long-term viability.⁸¹ WealthTV also notes that many MVPDs refuse to carry a programming service that has been denied carriage by TWC.⁸² WealthTV explains further that TWC's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.⁸³ TWC argues that WealthTV could meet a 20 million subscriber benchmark through carriage agreements with other large MVPDs, including MVPDs with no affiliation with MOJO, such as DIRECTV and DISH Network, but that WealthTV has failed to reach carriage agreements with these MVPDs as well.⁸⁴ We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces.

e. Alleged Business and Editorial Justifications for TWC's Refusal to Carry WealthTV

20. TWC offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, TWC claims that its minority stake in MOJO does not provide a sufficient basis to influence its decision regarding carriage of WealthTV.⁸⁵ A determination whether the program carriage rules have been violated does not turn on whether or not TWC has a minority stake in the affiliated programmer, but rather it focuses on the factors we have identified above. Indeed, TWC admits that its interest in MOJO satisfies the attribution threshold, thus the program carriage rules apply to its conduct regarding carriage of MOJO.⁸⁶

21. Second, TWC claims that the video marketplace is competitive and that no MVPD can afford to keep "a programming service with attractive pricing and content off its systems based on

⁷⁸ See WealthTV Complaint Against TWC at ¶ 1; WealthTV Reply to TWC at 7-8, 17-20; *id.* at Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶¶ 2-5; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 11; *see also* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

⁷⁹ See WealthTV Complaint Against TWC at ¶ 62; WealthTV Reply to TWC, Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶ 3.

⁸⁰ See WealthTV Complaint Against TWC at ¶ 62; WealthTV Reply to TWC, Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶¶ 2-3.

⁸¹ See WealthTV Complaint Against TWC at ¶ 10; WealthTV Reply to TWC, Exhibit 3, Supplemental Affidavit of Charles Herring, at ¶ 5; *id.* at Exhibit 4, Affidavit of Jedd Palmer, at ¶ 11.

⁸² See WealthTV Reply to TWC at 19.

⁸³ See *id.*

⁸⁴ See TWC Answer at 5, 34; TWC Motion to Strike at 6 n.15.

⁸⁵ See TWC Answer at 17; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 20, 22; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶ 15.

⁸⁶ See WealthTV Reply to TWC at 7; *see also* TWC Answer at 9 n.13.

ownership if doing so would cost it subscribers.”⁸⁷ We reject this claim because it would effectively require a program carriage complainant to demonstrate that an MVPD’s failure to carry its service will cause subscribers to switch to other MVPDs that do carry the service.⁸⁸ This is not a requirement of the program carriage statute or our rules. In addition, because TWC carries an affiliated programming service, MOJO, that provides programming that is substantially similar to WealthTV, there is even less reason for TWC’s subscribers to switch to a competitor that carries WealthTV.⁸⁹

22. Third, TWC states that its decision to carry a channel depends on capacity constraints; the proven track record of success of the channel; the experience of the channel’s management team; the subscriber interest in the channel; input from TWC’s division management; and the terms offered by the channel.⁹⁰ TWC argues that WealthTV has no proven audience demand and is led by individuals with no experience in creating a national cable network.⁹¹ WealthTV, on its behalf, has provided evidence demonstrating that it is an established channel with experienced management⁹² and proven consumer appeal, as demonstrated by: (i) its linear carriage on 75 MVPDs to date;⁹³ (ii) a sampling of e-mails from viewers reflecting their support for the channel;⁹⁴ (iii) the interest in the channel expressed by representatives of individual TWC systems;⁹⁵ and (iv) the decision of TWC’s San Antonio system to launch WealthTV’s HD VOD service in March 2007.⁹⁶

23. Fourth, TWC states that it made the same business decision as many other MVPDs, including Direct Broadcast Satellite (“DBS”) operators DIRECTV and DISH Network, that WealthTV did not warrant carriage given the terms it was demanding.⁹⁷ WealthTV explains, however, that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either.⁹⁸

f. Conclusion

24. We conclude that WealthTV has established a *prima facie* showing that TWC has discriminated against WealthTV in violation of the program carriage rules.

2. WealthTV v. BHN

25. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). BHN

⁸⁷ See TWC Answer at 17; see also *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 14, 18, 21; *id.* at Exhibit 8, Declaration of Michael Egan, at ¶ 15; TWC Motion to Strike at 15-16.

⁸⁸ See WealthTV Reply to TWC at 16.

⁸⁹ See *id.* at 17.

⁹⁰ See TWC Answer at 16-17; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶¶ 3-5, 12-14.

⁹¹ See TWC Answer at 17 n.32, 29; *id.* at Exhibit 1, Declaration of Andrew I. Rosenberg, at ¶ 16.

⁹² See WealthTV Reply to TWC, Exhibit 4, Affidavit of Jedd Palmer, at ¶ 12.

⁹³ See WealthTV Complaint Against TWC at ¶ 16.

⁹⁴ See *id.*, Exhibit 20.

⁹⁵ See *id.* at ¶ 17 and Exhibits 5-6.

⁹⁶ See *id.* at ¶ 20 and Exhibits 7-9.

⁹⁷ See TWC Answer at 18, 28-29.

⁹⁸ See WealthTV Reply to TWC at 20.

is an MVPD and the sixth largest cable operator in the nation as measured by number of subscribers.⁹⁹ BHN is a subsidiary of Time Warner Entertainment – Advance/Newhouse Partnership, a general partnership whose interests are held by subsidiaries of TWC and by Advance/Newhouse.¹⁰⁰ As of March 2008, BHN owned, managed, or controlled cable systems that serve 2,312,000 basic video subscribers in various regions, including Indianapolis, Central Florida (Orlando area), Daytona Beach area, Tampa Bay area, Birmingham-Hoover area, west suburban Detroit, and Bakersfield.¹⁰¹ BHN is affiliated with MOJO, a video programming vendor.¹⁰² According to BHN, MOJO's orientation is "exclusively male" and its principal programming consists of sports, movies, music concerts, and reality series.¹⁰³ On May 15, 2007, WealthTV provided BHN with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing BHN of its intent to file a program carriage complaint.¹⁰⁴ As discussed further below, on March 13, 2008, WealthTV filed its complaint, alleging that BHN violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.¹⁰⁵

a. Background

26. WealthTV states that it has been seeking carriage on BHN systems since the summer of 2004.¹⁰⁶ WealthTV describes its visits with BHN representatives in leading markets and claims that representatives of several BHN systems, including those in the Tampa Bay market, expressed an interest in carrying WealthTV, especially because Verizon FIOS TV offered WealthTV in both standard digital and HD formats in Tampa Bay.¹⁰⁷ WealthTV claims that Anne Stith, formerly BHN's Director of Product Marketing for the Tampa Division, told WealthTV's President in July 2006 that BHN would like to launch WealthTV as soon as WealthTV completed a deal with TWC.¹⁰⁸ WealthTV also notes that it was making its service available for free through 2008.¹⁰⁹ BHN and Ms. Stith, however, state that Ms. Stith had no authority to make programming commitments on behalf of BHN and that most programmers understood that BHN was covered by the programming agreements negotiated by TWC.¹¹⁰ Moreover,

⁹⁹ See BHN Answer at 33.

¹⁰⁰ See *id.*, Exhibit 1, Declaration of Steve Miron, at ¶ 2.

¹⁰¹ See WealthTV Complaint Against BHN at ¶ 11; BHN Answer at 33-34; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 4.

¹⁰² BHN is a wholly owned subsidiary of the TWE-A/N partnership and does not have a direct ownership stake in MOJO. See BHN Answer at 18. Due to the structure of the TWE-A/N partnership, BHN claims that its actual economic interest in MOJO is about 5%. See *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 3.

¹⁰³ See BHN Answer at 24, 25 n.61, 38; *id.* at Exhibit 6, Declaration of Stacie Gray, at ¶¶ 3, 6.

¹⁰⁴ See WealthTV Complaint Against BHN, Exhibit 1.

¹⁰⁵ See *id.* at ¶¶ 46-47.

¹⁰⁶ See *id.* at ¶ 12. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits or declarations from Charles Herring, WealthTV's President; Robert Herring, Sr., WealthTV's Chairman and Chief Executive Officer; Jedd Palmer, principal of Jedd Palmer Consulting; and Mark Kersey, President of Kersey Research Strategies. See *id.*, Exhibits 2, 3, 7, 11, and 13.

¹⁰⁷ See *id.* at ¶¶ 12-15; Herring Broadcasting, Inc. d/b/a WealthTV, Reply to BHN, File No. CSR-7822-P (filed May 5, 2008), at 13, 16-17 ("WealthTV Reply to BHN"); *id.* at Exhibit 2, Supplemental Affidavit of Charles Herring, at ¶ 2.

¹⁰⁸ See WealthTV Complaint Against BHN at ¶ 13; WealthTV Reply to BHN, Exhibit 2, Supplemental Affidavit of Charles Herring, at ¶ 2.

¹⁰⁹ See WealthTV Reply to BHN at 16.

¹¹⁰ See BHN Answer at 13 n.16; *id.* at Exhibit 2, Declaration of Anne Stith, at ¶ 2.

Ms. Stith states that her inquiries of WealthTV were purely for purposes of research and that she never made statements indicating that BHN would be interested in carrying WealthTV.¹¹¹ When WealthTV's Vice President of Affiliate Relations, John Scaro, contacted BHN's President, Steve Miron, Mr. Miron informed Mr. Scaro that BHN is covered by the programming agreements that TWC negotiates with national networks and that further direct negotiations with BHN would not be an efficient use of time.¹¹² Based on this, WealthTV concludes that BHN was prepared to carry WealthTV but for the absence of a carriage agreement with TWC.¹¹³ WealthTV states that BHN thus completely refused to negotiate with WealthTV.¹¹⁴ WealthTV states the BHN is required to comply with the program carriage rules and cannot use its reliance on TWC to negotiate programming agreements as a defense.¹¹⁵

b. Similarly Situated

27. WealthTV provides similar evidence submitted in connection with its complaint against TWC purporting to demonstrate that WealthTV and MOJO are similarly situated.¹¹⁶ BHN notes some general dissimilarities between specific programming on WealthTV and MOJO.¹¹⁷ BHN appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

c. Differential Treatment

28. WealthTV argues that BHN has treated WealthTV differently by carrying MOJO on its systems but refusing to carry WealthTV on those same systems.

¹¹¹ See BHN Answer at 13-15; *id.* at Exhibit 2, Declaration of Anne Stith, at ¶¶ 5-7.

¹¹² See WealthTV Complaint Against BHN at ¶ 15; WealthTV Reply to BHN at 14; BHN Answer at 15; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 12. BHN states that while it is covered by programming contracts that TWC negotiates for national networks, it consults with TWC on programming needs and often meets with programmers. See BHN Answer at 14 n.17; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 7. BHN notes that the WealthTV Complaint is not supported by an affidavit from Mr. Scaro. See BHN Answer at 12-13. WealthTV explains that Mr. Scaro no longer works for WealthTV and that all contacts discussed in its pleadings, including those involving Mr. Scaro, have been verified through affidavits of Charles Herring and Robert Herring. See WealthTV Reply to BHN at 21 n.19.

¹¹³ See WealthTV Reply to BHN at 5.

¹¹⁴ See WealthTV Complaint Against BHN at ¶¶ 2, 15.

¹¹⁵ See WealthTV Reply to BHN at 6, 23-24.

¹¹⁶ See *supra* ¶¶ 12-16; see also WealthTV Complaint Against BHN at ¶¶ 17, 23-32; *id.* at Exhibit 7, Affidavit of Jedd Palmer, at ¶¶ 8-10 (discussing similarity of WealthTV and MOJO); *id.* at Exhibit 11, Declaration of Mark Kersey (providing survey results demonstrating the demographics of WealthTV's viewers); WealthTV Reply to BHN at 9, 14-15.

¹¹⁷ For example, BHN states that MOJO's orientation is exclusively males aged 18 to 49, whereas WealthTV's website describes its programming as appealing to a broad audience. See BHN Answer at 4, 20-26; *id.* at Exhibit 6, Declaration of Stacie Gray, at ¶¶ 3, 7-9; *id.* at Exhibit 7 (comparing programs identified in WealthTV complaint); *id.* at Exhibit 8 (chart providing categories of programming shown on WealthTV and MOJO); *id.* at Exhibits 9-12 (providing programming schedules for WealthTV and MOJO for sample weeks in July 2007 and January 2008).

d. Harm to Ability to Compete

29. As required by the program carriage statute and our rules, WealthTV has provided evidence that BHN's refusal to carry WealthTV restrains its ability to compete fairly.¹¹⁸ WealthTV notes that BHN's decision to carry MOJO but to deny carriage to WealthTV provides MOJO with a first mover advantage with respect to the viewers and advertisers each network targets.¹¹⁹ WealthTV also explains that an independent channel must be available to at least 20 million subscribers in order to attract national advertisers and to achieve financial viability.¹²⁰ WealthTV states that the inability to obtain carriage on BHN systems makes it more difficult for independent programmers to reach this level of subscribership.¹²¹ WealthTV also alleges that obtaining carriage in major markets where BHN owns cable systems, such as Tampa and Orlando, is essential for attracting advertisers.¹²² According to WealthTV, many MVPDs refuse to carry a programming service that has been denied carriage by TWC and BHN.¹²³ In addition, WealthTV states that BHN's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.¹²⁴

30. In response, BHN argues that carriage on its systems is not necessary in order to reach the 20 million subscriber benchmark.¹²⁵ The program carriage rules, however, apply to all MVPDs, regardless of their subscriber base.¹²⁶ BHN claims that WealthTV could meet this benchmark through carriage agreements with other MVPDs, including MVPDs with no affiliation with MOJO, such as DIRECTV and DISH Network, but that WealthTV has failed to reach carriage agreements with these MVPDs as well.¹²⁷ We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces. While BHN asserts that the 20 million subscriber benchmark cannot apply to an HD network such as WealthTV because there are fewer than 20 million HD customers nationwide,¹²⁸ WealthTV responds that its HD feed is also available as a downconverted standard definition ("SD") feed that can be viewed by all subscribers.¹²⁹ While BHN notes that WealthTV has been operational for four years despite the lack of a carriage agreement with BHN,¹³⁰ we

¹¹⁸ See WealthTV Complaint Against BHN at ¶ 2; *id.* at Exhibit 7, Affidavit of Jedd Palmer, at ¶ 11; *id.* at Exhibit 13, Supplemental Affidavit of Charles Herring, at ¶¶ 2-5; WealthTV Reply to BHN at 10, 19-23; *see also* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹¹⁹ See WealthTV Complaint Against BHN at ¶ 2; WealthTV Reply to BHN at 10.

¹²⁰ See WealthTV Complaint Against BHN at ¶ 39; *id.* at Exhibit 13, Supplemental Affidavit of Charles Herring, at ¶¶ 2-3.

¹²¹ See WealthTV Complaint Against BHN at ¶¶ 2, 39.

¹²² See *id.* at ¶¶ 11, 38.

¹²³ See WealthTV Reply to BHN at 10, 21.

¹²⁴ See *id.* at 21.

¹²⁵ See BHN Answer at 6, 30.

¹²⁶ See WealthTV Reply to BHN at 4-5.

¹²⁷ See BHN Answer at 6, 18, 31.

¹²⁸ See *id.* at 29-30.

¹²⁹ See WealthTV Reply to BHN at 28.

¹³⁰ See BHN Answer at 31.

agree with WealthTV that the more pertinent consideration is its ability to compete over the long term absent a carriage agreement with BHN.¹³¹

e. Alleged Business and Editorial Justifications for BHN's Refusal to Carry WealthTV

31. BHN offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, BHN claims that its five percent economic interest in MOJO does not provide a sufficient basis to influence its decision regarding carriage of WealthTV.¹³² BHN admits, however, that its interest in MOJO satisfies the attribution threshold, thus the program carriage rules apply to its conduct regarding carriage of MOJO.¹³³

32. Second, BHN claims that the video marketplace is competitive and that "customers will take their business elsewhere if BHN fails to offer them desirable services at a fair price."¹³⁴ We reject this claim because it would effectively require a program carriage complainant to demonstrate that an MVPD's failure to carry the service will cause subscribers to switch to other MVPDs that do carry the service.¹³⁵ In addition, because BHN carries its affiliated programming service, MOJO, that provides programming that is substantially similar to WealthTV, there is even less reason for BHN's subscribers to switch to a competitor that carries WealthTV.¹³⁶

33. Third, BHN claims that its negotiations reflect "sound business and editorial judgment."¹³⁷ Specifically, BHN states that its decision to carry a channel depends on capacity constraints; whether the channel is carried by competitors; the experience of the channel's management team; the overall product mix of the BHN system; subscriber demand for the channel; input from BHN's division management; and the terms offered by the channel.¹³⁸ BHN contends that WealthTV has no proven consumer demand and is managed by individuals with no experience in launching successful networks.¹³⁹ WealthTV, for its part, has provided evidence demonstrating that it is an established channel with experienced management¹⁴⁰ and proven consumer appeal, as demonstrated by: (i) its linear carriage on 75 MVPDs to date;¹⁴¹ (ii) a sampling of e-mails from viewers reflecting their support for the channel;¹⁴² and (iii) the interest in the channel expressed by representatives of individual BHN systems.¹⁴³

¹³¹ See WealthTV Reply to BHN at 28.

¹³² See BHN Answer at 18-19, 20; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 3.

¹³³ See WealthTV Reply to BHN at 9-10; *see also* BHN Answer at 18-19 (admitting that BHN's interest in iN DEMAND satisfies the attribution threshold).

¹³⁴ See BHN Answer at 19; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 11.

¹³⁵ See WealthTV Reply to BHN at 18.

¹³⁶ See *id.* at 17-18.

¹³⁷ See BHN Answer at 5; *see also id.* 3-4, 19.

¹³⁸ See *id.* at 20; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 8.

¹³⁹ See BHN Answer at 4, 14, 16-17, 20 n.35, 21; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶¶ 9-10; *id.* at Exhibit 2, Declaration of Anne Stith, at ¶ 8.

¹⁴⁰ See WealthTV Complaint Against BHN, Exhibit 4, Affidavit of Jedd Palmer, at ¶ 12.

¹⁴¹ See WealthTV Complaint Against BHN at ¶ 16.

¹⁴² See WealthTV Complaint Against BHN, Exhibit 6.

¹⁴³ See WealthTV Complaint Against BHN at ¶¶ 13-15; WealthTV Reply to BHN at 13; *id.* at Exhibit 2, Supplemental Affidavit of Charles Herring, at ¶ 2.

WealthTV also provides the results of an independent survey which reports that WealthTV's HD VOD product ranked fourth out of twenty HD services.¹⁴⁴

34. Fourth, BHN contends that virtually all of the MVPDs that do not carry WealthTV are not affiliated with MOJO, again demonstrating that decisions regarding carriage of WealthTV are not based on affiliation.¹⁴⁵ For example, BHN notes that DBS operators, DIRECTV and DISH Network, do not carry WealthTV.¹⁴⁶ WealthTV explains that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either.¹⁴⁷ Moreover, WealthTV notes that Verizon, BHN's wireline competitor in Tampa, carries WealthTV but not MOJO.¹⁴⁸ In any event, we agree with WealthTV that the salient fact is that each owner of the cable-affiliated MOJO network has refused to carry WealthTV, and a discrimination claim requires the Commission to assess why these cable operators have refused to carry WealthTV but have decided to carry MOJO.¹⁴⁹

f. Conclusion

35. We conclude that WealthTV has established a *prima facie* that BHN has discriminated against WealthTV in violation of the program carriage rules.

3. WealthTV v. Cox

36. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV established a *prima facie* showing of discrimination under Section 76.1301(c). Cox is an MVPD and the third largest cable operator in the nation.¹⁵⁰ Cox provides cable services to over six million customers in numerous regions across the United States, including Southern California, New England, Arizona, Las Vegas, Oklahoma, Kansas, Hampton Roads, and Central Florida.¹⁵¹ Cox is affiliated with MOJO, a video programming vendor.¹⁵² According to Cox, MOJO's orientation is "exclusively male" and its principal programming consists of sports, movies, music concerts, and reality series.¹⁵³ On May 7, 2007, WealthTV provided Cox with a pre-filing notice pursuant to Section

¹⁴⁴ See WealthTV Reply to BHN at 18-19; *id.* at Exhibit 1. While BHN provides the results of a July 2007 customer survey in which WealthTV was ranked next-to-last among HD networks in terms of subscriber interest (*see* BHN Answer, Exhibit 5; *see also* BHN Answer at 4, 16-17, 21; *id.* at Exhibit 1, Declaration of Steve Miron, at ¶ 10), WealthTV notes that this survey is irrelevant because it was conducted after BHN ceased discussions with WealthTV, thereby providing no probative value as to BHN's decision making process in refusing to carry WealthTV. *See* WealthTV Reply to BHN at 18.

¹⁴⁵ *See* BHN Answer at 18.

¹⁴⁶ *See id.*

¹⁴⁷ *See* WealthTV Reply to BHN at 22.

¹⁴⁸ *See id.* WealthTV claims that MOJO is only made available to MVPDs that do not compete with the owners of MOJO (BHN, Comcast, Cox, and TWC). *See id.* at 22-23. IN DEMAND, the owner of MOJO, states that MOJO is available to any MVPD and notes that MOJO is currently carried by competitors such as RCN, Knology, Atlantic Telephone Cable, and Grande Communications. *See* Letter from Michael S. Berman, iN DEMAND L.L.C., to Ms. Marlene H. Dortch, FCC, File No. CSR-7822-P (June 12, 2008).

¹⁴⁹ *See* WealthTV Reply to BHN at 5.

¹⁵⁰ *See* WealthTV Complaint Against Cox at ¶¶ 3, 12; Cox Communications, Inc., Answer, File No. CSR-7829-P (May 5, 2008), at 43 (¶ 3), 44 (¶ 12) ("Cox Answer").

¹⁵¹ *See* WealthTV Complaint Against Cox at ¶ 12; Cox Answer at 44 (¶ 12).

¹⁵² Cox has a 15.6% interest in iN DEMAND and MOJO. *See* WealthTV Complaint Against Cox at ¶ 1; Cox Answer at 43 (¶ 1).

¹⁵³ *See* Cox Answer at 29-30; *id.* at Exhibit 2, Declaration of Stacie Gray, at ¶¶ 3, 6.

76.1302(b) of the Commission's rules informing Cox of its intent to file a program carriage complaint.¹⁵⁴ As discussed further below, on March 27, 2008, WealthTV filed its complaint, alleging that Cox violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.¹⁵⁵

a. Background

37. WealthTV states that it has been seeking carriage on Cox systems since the summer of 2004, but that Cox has refused to negotiate in good faith.¹⁵⁶ WealthTV discusses its visits with representatives of individual Cox systems in leading markets during 2004 and 2005 and claims that some of these systems expressed a strong desire to carry WealthTV.¹⁵⁷ Cox states that its programming negotiations are conducted at the corporate level and provides declarations from representatives of individual Cox systems stating that they informed WealthTV that all carriage decisions are made by Cox's corporate programming department.¹⁵⁸ Cox states that it informed WealthTV at a May 2005 meeting that the interest expressed by a few individual systems was insufficient to justify carriage of WealthTV and that it was denying carriage to WealthTV.¹⁵⁹ WealthTV states that it considered Cox's comments to be a form of bargaining and that Cox did not state that a final decision had been made to deny carriage to WealthTV.¹⁶⁰

¹⁵⁴ See WealthTV Complaint Against Cox, Exhibit 1.

¹⁵⁵ See WealthTV Complaint Against Cox at ¶¶ 48-49.

¹⁵⁶ See *id.* at ¶ 13. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits or declarations from Charles Herring, WealthTV's President; Robert Herring, Sr., WealthTV's Chairman and Chief Executive Officer; Jedd Palmer, principal of Jedd Palmer Consulting; and Mark Kersey, President of Kersey Research Strategies. See *id.*, Exhibits 2, 3, 6, 10, and 12.

¹⁵⁷ See *id.* at ¶¶ 13-15. WealthTV states that Mark Cameron of Cox-New England in July 2004 stated that he was interested in carrying WealthTV and offered to assist in obtaining corporate approval. See *id.* at ¶ 13; Herring Broadcasting, Inc. d/b/a WealthTV, Reply to Cox, File No. CSR-7829-P (filed May 27, 2008) ("WealthTV Reply to Cox") at Exhibit 3, Declaration of Charles Herring, at ¶ 4. WealthTV claims that in a subsequent meeting held in May 2005, Mr. Cameron confirmed that he would launch WealthTV once a corporate agreement was concluded. See *id.*, Exhibit 3, Declaration of Charles Herring, at ¶ 5. Cox notes that Mr. Cameron is now deceased. See Cox Answer at 14 n.35. In addition, WealthTV claims that representatives from Cox-Wichita confirmed that they were responsible for programming choices for their system and that they offered to carry WealthTV. See WealthTV Complaint Against Cox at ¶¶ 13-14; WealthTV Reply to Cox at Exhibit 3, Declaration of Charles Herring, at ¶¶ 7-11. According to WealthTV, in May 2005, the General Manager of Cox-Wichita called Cox's Senior Vice President of Programming to ask that an agreement with WealthTV be concluded. See WealthTV Complaint Against Cox at ¶ 15.

¹⁵⁸ See Cox Answer at Exhibit 1, Declaration of Robert C. Wilson, at ¶¶ 1-2. For example, two of Mr. Cameron's former employees claim that WealthTV was informed that programming decisions were made by Cox's corporate programming group. See Cox Answer at 14-15; *id.* at Exhibit 5, Declaration of Mike Patrie, at ¶ 2; *id.* at Exhibit 6, Declaration of Joyce Arcand, at ¶ 2. They also state that Mr. Cameron previously expressed to them that he had no intention of following up with WealthTV regarding carriage. See Cox Answer at Exhibit 5, Declaration of Mike Patrie, at ¶ 2; *id.* at Exhibit 6, Declaration of Joyce Arcand, at ¶ 2. Cox provides an affidavit from one of the Cox-Wichita representatives denying that he offered to launch WealthTV and stating that he informed WealthTV's representatives that a carriage agreement could not be concluded without corporate approval. See Cox Answer at 15 n.36, 44-45 (¶ 13); *id.* at Exhibit 3, Declaration of Tony Matthews, at ¶¶ 2-3.

¹⁵⁹ See Cox Answer at 6-7, 10-11, 19; *id.* at Exhibit 1, Declaration of Robert C. Wilson, at ¶ 8.

¹⁶⁰ See WealthTV Reply to Cox at 3; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2, 12, 15.

b. Procedural Issues

38. Cox contends that the WealthTV complaint is barred by the program carriage statute of limitations because the complaint does not allege any act by Cox occurring within one year of the Complaint or the pre-filing notice.¹⁶¹ Rather, according to Cox, the last formal contact between WealthTV and Cox alleged in the complaint occurred no later than a June 7, 2005 letter; thus, Cox claims that the statute of limitations required WealthTV to file its complaint no later than June 7, 2006.¹⁶² We reject Cox's claim for the following reasons. First, WealthTV states that Cox never expressed a final decision to deny carriage to WealthTV and provides evidence that communications between Cox and WealthTV continued after June 2005.¹⁶³ Second, WealthTV states that it was not until the launch of MOJO in March 2007 and the failure of subsequent carriage discussions when it became obvious to WealthTV that Cox intended to favor its affiliated MOJO service.¹⁶⁴ Third, the plain language of the Commission's rules provides that the statute of limitations is satisfied if the program carriage complaint is filed within one year of the pre-filing notice, which WealthTV has done in this case.¹⁶⁵

c. Similarly Situated

39. WealthTV provides similar evidence submitted in connection with its complaint against TWC purporting to demonstrate that WealthTV and MOJO are similarly situated.¹⁶⁶ Cox notes some general dissimilarities between specific programming on WealthTV and MOJO.¹⁶⁷ Cox appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

d. Differential Treatment

40. WealthTV argues that Cox has treated WealthTV differently by carrying MOJO on its systems but refusing to carry WealthTV on those same systems.

¹⁶¹ See Cox Answer at 3, 5-6.

¹⁶² See *id.* at 7-8, 11.

¹⁶³ See WealthTV Reply to Cox at 3; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2, 12, 15-16; *id.* at Exhibits 4-7 (providing emails exchanged between WealthTV and Cox after June 2005). To further support its claim that the Complaint was filed in accordance with the statute of limitations, WealthTV explains that it was not until May 2006, one year prior to the pre-filing notice, when Cox refused to carry the multicast stream of a Las Vegas CBS affiliate that proposed to broadcast WealthTV programming. See WealthTV Reply to Cox at 4; *see also* WealthTV Complaint Against Cox at ¶ 18. Cox argues, however, that this incident did not involve direct communication between Cox and WealthTV. See Cox Answer at 6 n.4; *id.* at Exhibit 11, Declaration of Leo Brennan, at ¶ 4. WealthTV, however, claims that Leo Brennan of Cox-Las Vegas informed WealthTV of this decision in mid-May 2006. See WealthTV Reply to Cox at 4; *id.* at Exhibit 8 (e-mail from Charles Herring, WealthTV, to Leo Brennan, Cox-Las Vegas).

¹⁶⁴ See WealthTV Reply to Cox at 3-4; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2, 16.

¹⁶⁵ See 47 C.F.R. § 76.1302(f)(3); WealthTV Reply to Cox at 3-4.

¹⁶⁶ See *supra* ¶¶ 12-16; *see also* WealthTV Complaint Against Cox at ¶¶ 1, 2, 24, 25-34; *id.* at Exhibit 6, Affidavit of Jedd Palmer, at ¶¶ 8-10 (discussing similarity of WealthTV and MOJO); *id.* at Exhibit 10, Declaration of Mark Kersey (providing survey results demonstrating the demographics of WealthTV's viewers); WealthTV Reply to Cox at 8-9, 17-18.

¹⁶⁷ For example, Cox states that MOJO's orientation is exclusively males aged 18 to 49, whereas WealthTV's website describes its programming as appealing to a broad audience. See Cox Answer at 2-3, 23-30, 44 (¶ 9), 48-50 (¶¶ 25-34); *id.* at Exhibit 2, Declaration of Stacie Gray, at ¶¶ 3, 7-10; *id.* at Exhibits 9-10 (providing programming schedules for WealthTV and MOJO for a week in April 2008).

e. Harm to Ability to Compete

41. As required by the program carriage statute and our rules, WealthTV has provided evidence that Cox's refusal to carry WealthTV restrains its ability to compete fairly.¹⁶⁸ WealthTV explains that Cox's decision to carry MOJO but to deny carriage to WealthTV provides MOJO with a first mover advantage with respect to the viewers and advertisers each network targets.¹⁶⁹ WealthTV also submits that an independent channel must be available to at least 20 million subscribers in order to attract national advertisers and to achieve financial viability.¹⁷⁰ WealthTV states that the inability to obtain carriage on Cox systems makes it more difficult for independent programmers to reach this level of subscribership.¹⁷¹ In addition, WealthTV explains that obtaining carriage in major markets where Cox owns or operates systems, such as Central Florida, New England, Phoenix, and San Diego, is essential for attracting advertisers.¹⁷² According to WealthTV, many MVPDs refuse to carry a programming service that has been denied carriage by Cox.¹⁷³ In addition, Cox's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.¹⁷⁴

42. In response, Cox does not dispute that 20 million subscribers are needed for a channel to achieve long-term viability,¹⁷⁵ but states that it serves approximately six million MVPD households, thereby making carriage on its systems not necessary in order to reach the 20 million subscriber benchmark.¹⁷⁶ The program carriage rules, however, apply to all MVPDs, regardless of their subscriber base.¹⁷⁷ Cox also claims that WealthTV could meet this benchmark through carriage agreements with other MVPDs, including MVPDs with no affiliation with MOJO, such as DIRECTV and DISH Network, but that WealthTV has failed to reach carriage agreements with these MVPDs as well.¹⁷⁸ We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces. Cox also asserts that the 20 million subscriber benchmark cannot apply to an HD network such as WealthTV because there are fewer than 20 million HD customers nationwide.¹⁷⁹ WealthTV explains, however, that its HD feed is also available as a downconverted SD feed that can be viewed by all subscribers.¹⁸⁰ While Cox notes that WealthTV has obtained carriage on a number of MVPDs despite

¹⁶⁸ See WealthTV Complaint Against Cox at ¶¶ 2, 40-41; *id.* at Exhibit 12, Supplemental Affidavit of Charles Herring, at ¶¶ 2-5; *id.* at Exhibit 6, Affidavit of Jedd Palmer, at ¶ 11; WealthTV Reply to Cox at 9, 19-20, 22-23; *see also* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹⁶⁹ See WealthTV Complaint Against Cox at ¶ 2.

¹⁷⁰ See *id.* at ¶ 41; *id.* at Exhibit 12, Supplemental Affidavit of Charles Herring, at ¶¶ 2-3; WealthTV Reply to Cox at 20.

¹⁷¹ See WealthTV Complaint Against Cox at ¶¶ 2, 41; WealthTV Reply to Cox at 19.

¹⁷² See WealthTV Complaint Against Cox at ¶¶ 12, 40.

¹⁷³ See WealthTV Reply to Cox at 9, 19-20; *see also* WealthTV Complaint Against Cox at Exhibit 12, Supplemental Affidavit of Charles Herring, at ¶ 4.

¹⁷⁴ See WealthTV Reply to Cox at 19-20.

¹⁷⁵ See Cox Answer at 34 n.118.

¹⁷⁶ See *id.* at 34.

¹⁷⁷ See WealthTV Reply to Cox at iii.

¹⁷⁸ See Cox Answer at 34-35.

¹⁷⁹ See *id.* at 33-34.

the lack of a carriage agreement with Cox,¹⁸¹ we agree with WealthTV that the more pertinent consideration is its ability to compete over the long term absent a carriage agreement with Cox.¹⁸²

f. Alleged Business and Editorial Justifications for Cox's Refusal to Carry WealthTV

43. Cox offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, Cox claims that its minority interest in MOJO does not provide a sufficient basis for Cox to decline to carry WealthTV.¹⁸³ Cox admits, however, that its interest in MOJO satisfies the attribution threshold, thus the program carriage rules apply to its conduct regarding carriage of MOJO.¹⁸⁴

44. Second, Cox claims that it declined to carry WealthTV based on "sound business considerations and reasonable editorial judgment."¹⁸⁵ Specifically, Cox states that its decision to carry a channel depends on the following criteria: likely viewer appeal; the quality of the programming; whether the channel has a proven track record of attracting viewers or is associated with an established brand; the likelihood of the channel's success considering its management team and business plan; bandwidth management; proposed terms of carriage; the local needs of Cox's cable systems; and whether the channel has a regional appeal that might be attractive to certain systems. Cox claims that WealthTV does not justify carriage based on these criteria.¹⁸⁶ WealthTV argues that it satisfies Cox's selection criteria.¹⁸⁷ For example, WealthTV asserts that it is an established channel with experienced management;¹⁸⁸ offered very favorable terms for carriage;¹⁸⁹ and that Cox's alleged concern regarding bandwidth constraints from carrying an HD channel are not a valid concern because WealthTV was offering SD digital and VOD products in addition to HD.¹⁹⁰ WealthTV also provides evidence that it has proven viewer appeal, as demonstrated by: (i) its linear carriage on 75 MVPDs to date;¹⁹¹ (ii) a sampling of e-mails from viewers reflecting their support for the channel;¹⁹² (iii) the interest in the channel expressed by representatives of various Cox systems;¹⁹³ (iv) the interest expressed by Cox-San Diego and a Cox programming network in

(Continued from previous page) _____

¹⁸⁰ See WealthTV Reply to Cox at 22-23.

¹⁸¹ See Cox Answer at 31.

¹⁸² See WealthTV Reply to Cox at 28.

¹⁸³ See Cox Answer at 22.

¹⁸⁴ See WealthTV Reply to Cox at 9; see also Cox Answer at 43 (¶ 1) (admitting that Cox's interest in iN DEMAND is 15.6 percent, thereby making MOJO an affiliated programming service).

¹⁸⁵ See Cox Answer at 14; see also *id.* at 2, 14-20.

¹⁸⁶ See *id.* at 16-20; *id.* at Exhibit 1, Declaration of Robert C. Wilson, at ¶¶ 3-8.

¹⁸⁷ See WealthTV Reply to Cox at 12-14.

¹⁸⁸ See *id.* at 13; see also WealthTV Complaint Against Cox at Exhibit 6, Affidavit of Jedd Palmer, at ¶ 12.

¹⁸⁹ See WealthTV Reply to Cox at 13-14.

¹⁹⁰ See *id.* at 14, 23.

¹⁹¹ See WealthTV Complaint Against Cox at ¶ 10; WealthTV Reply to Cox at 13.

¹⁹² See WealthTV Complaint Against Cox at Exhibit 5.

¹⁹³ See WealthTV Complaint Against Cox at ¶¶ 13-15; WealthTV Reply to Cox at 13; *id.* at Exhibit 3, Declaration of Charles Herring (providing chart indicating support for WealthTV expressed by individual Cox systems).

San Diego (4SD – High Definition) in carrying WealthTV-produced content;¹⁹⁴ and (v) the interest expressed by a CBS affiliate in Las Vegas in carrying WealthTV as a multicast channel, which the General Manager of Cox-Las Vegas refused to carry because of the potential for negative customer reaction if the CBS affiliate were to drop the WealthTV programming.¹⁹⁵

45. Third, Cox contends that most of the MVPDs that do not carry WealthTV are not affiliated with MOJO, thus demonstrating that decisions to refrain from carrying WealthTV are not based on affiliation.¹⁹⁶ For example, Cox notes that DBS operators, DIRECTV and DISH Network, do not carry WealthTV.¹⁹⁷ WealthTV explains, however, that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either.¹⁹⁸ In any event, we agree with WealthTV that the salient fact is that each owner of the cable-affiliated MOJO network has refused to carry WealthTV, and a discrimination claim requires the Commission to assess why these cable operators have decided to refuse carriage to WealthTV.¹⁹⁹

g. Conclusion

46. We conclude that WealthTV has established a *prima facie* showing that Cox has discriminated against WealthTV in violation of the program carriage rules.

4. WealthTV v. Comcast

47. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). Comcast is an MVPD and the largest cable operator in the nation as measured by number of subscribers.²⁰⁰ Comcast serves over 24 million basic video subscribers in thirty-nine states and the District of Columbia.²⁰¹ Comcast operates the largest cable systems in Philadelphia, Chicago, Boston, San Francisco, Washington, D.C., and Houston.²⁰² Comcast is affiliated with MOJO, a video

¹⁹⁴ See WealthTV Complaint Against Cox at ¶ 17; WealthTV Reply to Cox at Exhibit 3, Declaration of Charles Herring, at ¶¶ 17-18. Cox states that it decided not to carry the WealthTV programming because it has no local or regional appeal for San Diego viewers. See Cox Answer at 18, 46 (¶ 17); *id.* at Exhibit 4, Declaration of William K. Geppert, at ¶ 3; *id.* at Exhibit 8, Declaration of Dennis Morgigno, at ¶¶ 3-4. WealthTV claims that the parties never reached an agreement because WealthTV was unwilling to agree to Cox's demand that its programming be branded under the Cox San Diego name. See WealthTV Reply to Cox at Exhibit 3, Declaration of Charles Herring, at ¶¶ 17-18.

¹⁹⁵ See WealthTV Complaint Against Cox at ¶ 18. Cox states that it was unwilling to carry WealthTV as a multicast stream because of the terms of the parties' retransmission consent agreement. See Cox Answer at 6 n.4; *id.* at Exhibit 11, Declaration of Leo Brennan, at ¶ 3.

¹⁹⁶ See Cox Answer at 2, 21.

¹⁹⁷ See *id.* at 21, 34.

¹⁹⁸ See WealthTV Reply to Cox at 21. WealthTV claims that MOJO is only made available to MVPDs that do not compete with the owners of MOJO (BHN, Comcast, Cox, and TWC). See *id.* IN DEMAND, the owner of MOJO, states that MOJO is available to any MVPD and notes that MOJO is currently carried by competitors such as RCN, Knology, Atlantic Telephone Cable, and Grande Communications. See Letter from Michael S. Berman, iN DEMAND L.L.C., to Ms. Marlene H. Dortch, FCC, File No. CSR-7829-P (June 12, 2008).

¹⁹⁹ See WealthTV Reply to Cox at iii.

²⁰⁰ See WealthTV Complaint Against Comcast at ¶ 11; Comcast Answer to WealthTV at 31 (¶ 11).

²⁰¹ See WealthTV Complaint Against Comcast at ¶ 11; Comcast Answer to WealthTV at 31 (¶ 11).

²⁰² See WealthTV Complaint Against Comcast at ¶ 11; Comcast Answer to WealthTV at 31 (¶ 11).

programming vendor.²⁰³ According to Comcast, MOJO is aimed at 18-to-49-year-old males and its principal programming consists of sports, movies, and concerts.²⁰⁴ On May 3, 2007, WealthTV provided Comcast with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing Comcast of its intent to file a program carriage complaint.²⁰⁵ As discussed further below, on April 21, 2008, WealthTV filed its complaint, alleging that Comcast violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.²⁰⁶

a. Background

48. WealthTV states that it has been seeking carriage on Comcast systems since early to mid-2004.²⁰⁷ WealthTV discusses its visits with Comcast representatives in leading markets and claims that systems in Comcast's Atlantic Division, San Francisco, Washington DC/Virginia, Chicago, Washington state, and Florida all expressed interest in carrying WealthTV.²⁰⁸ According to WealthTV, in the summer of 2004, Comcast's corporate programming group acknowledged the interest among Comcast systems in carrying WealthTV but Comcast refused to engage in meaningful negotiations.²⁰⁹ WealthTV alleges that Alan Dannenbaum, Comcast's Corporate Senior Vice President of Programming, stated in the second half of 2004 that a draft carriage agreement would be forthcoming but blamed "scarce resources" for the failure to produce a draft.²¹⁰ Comcast states that neither its corporate management nor any individual Comcast system expressed an interest in carrying WealthTV.²¹¹

²⁰³ Comcast has a 54.1% interest in iN DEMAND and MOJO. *See* Comcast Answer to WealthTV at 30 (¶ 1).

²⁰⁴ *See id.* at 3 (¶ 6), 18 (¶ 36), 19 (¶ 38), 21 (¶ 42); *id.* at Exhibit 6, Declaration of Stacie Gray, at ¶¶ 4, 9-10.

²⁰⁵ *See* WealthTV Complaint Against Comcast, Exhibit 1.

²⁰⁶ *See* WealthTV Complaint Against Comcast at ¶¶ 44-45.

²⁰⁷ *See id.* at ¶¶ 6, 12, 33; Herring Broadcasting, Inc. d/b/a WealthTV, Reply to Comcast, File No. CSR-7907-P (filed June 9, 2008), at 15-16 ("WealthTV Reply to Comcast"); *id.* at Exhibit 3, Declaration of Charles Herring, at ¶ 16. WealthTV supports the statements made in its Complaint with documentary evidence as well as sworn affidavits or declarations from Charles Herring, WealthTV's President; Robert Herring, Sr., WealthTV's Chairman and Chief Executive Officer; Jedd Palmer, principal of Jedd Palmer Consulting; and Mark Kersey, President of Kersey Research Strategies. *See* WealthTV Complaint Against Comcast at Exhibits 2, 3, 6, 10, and 12.

On June 30, 2008, Comcast filed a Motion to Dismiss WealthTV's Complaint. *See* Comcast Corporation, Motion to Dismiss, File No. CSR-7907-P (June 30, 2008) ("Comcast Motion to Dismiss"). On July 7, 2008, WealthTV filed a Motion seeking leave to file an Opposition to Comcast's Motion to Dismiss. *See* Herring Broadcasting, Inc. d/b/a WealthTV, Motion, File No. CSR-7907-P (July 7, 2008) ("WealthTV Opposition to Comcast Motion to Dismiss"). In its Motion, WealthTV argues that Comcast's Motion to Dismiss is an additional pleading that is not permitted by the Commission's rules. *See* WealthTV Opposition to Comcast Motion to Dismiss at ¶ 1; *see also Second Report and Order*, 9 FCC Rcd at 2652. We grant WealthTV's Motion and consider its Opposition to Comcast's Motion to Dismiss herein. Although we agree with WealthTV that Comcast's Motion to Dismiss is an impermissible additional pleading, we nonetheless consider the arguments made in Comcast's Motion to Dismiss in the interest of a complete record.

²⁰⁸ *See* WealthTV Complaint Against Comcast at ¶¶ 12, 15.

²⁰⁹ *See id.* at ¶ 12.

²¹⁰ *See id.* at ¶ 13 and Exhibit 4.

²¹¹ *See* Comcast Answer to WealthTV at 6-7 (¶ 14), 14 (¶ 28); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 16; *id.* at Exhibit 3, Declaration of Alan Dannenbaum, at ¶¶ 4-6.

49. In August 2006, WealthTV representatives, including WealthTV's President, Charles Herring, met with Mr. Dannenbaum.²¹² According to WealthTV, Mr. Dannenbaum stated that "Comcast will not allow another MTV to be made on Comcast's back without owning it."²¹³ WealthTV states that it understood this to mean that Comcast would not allow a non-affiliated network to become successful without owning it.²¹⁴ WealthTV states that this is direct evidence of discrimination in Comcast's carriage decisions.²¹⁵ Comcast provides a declaration from Mr. Dannenbaum in which he denies making this statement.²¹⁶

50. Comcast states that it made two offers to carry WealthTV in April 2008, after WealthTV sent its pre-filing notice but prior to the filing of the Complaint.²¹⁷ WealthTV counters that Comcast never made a firm offer for carriage during these discussions and that none of the proposals was remotely comparable to the terms and conditions offered to MOJO.²¹⁸

b. Similarly Situated

51. WealthTV provides similar evidence submitted in connection with its complaint against TWC purporting to demonstrate that WealthTV and MOJO are similarly situated.²¹⁹ Comcast notes some

²¹² See WealthTV Complaint Against Comcast at ¶ 14.

²¹³ See *id.*; see also WealthTV Reply to Comcast at 17; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2-4, 20; *id.* at Exhibit 6, Declaration of John Ghorzi, at ¶¶ 1-3.

²¹⁴ See WealthTV Complaint Against Comcast at ¶ 14; see WealthTV Reply to Comcast at 17; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 2-4; *id.* at Exhibit 6, Declaration of John Ghorzi, at ¶¶ 1-3.

²¹⁵ See WealthTV Reply to Comcast at 17.

²¹⁶ See Comcast Answer to WealthTV at 16 (¶ 32); *id.* at Exhibit 3, Declaration of Alan Dannenbaum, at ¶ 9.

²¹⁷ See *id.* at 1-2 (¶¶ 2-3); 5-9 (¶¶ 11-19); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶¶ 6-10; Comcast Motion to Dismiss at 1-2; Comcast explains that its first carriage offer was made on April 14, 2008 when Mr. Bond proposed a hunting license which would enable WealthTV to seek carriage directly from individual Comcast systems. See Comcast Answer to WealthTV at 1-2 (¶ 2); 6 (¶ 13); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 6; Comcast Motion to Dismiss at 1-2. WealthTV states that the hunting license proposed by Comcast was not an offer for carriage but merely an invitation to talk to individual Comcast systems. See WealthTV Reply to Comcast at 5, 9. In addition, WealthTV explains that it has never agreed to a hunting license with other MVPDs without a commitment for scheduled launches over a period of time. See WealthTV Reply to Comcast at 14 n.12. Comcast states that its second carriage offer was made on April 17, 2008 when Mr. Bond proposed that, in addition to providing WealthTV with a hunting license, Comcast would pay to launch WealthTV on the digital basic tier on a system in Chicago for a guaranteed period of time and would also carry WealthTV in Comcast's VOD service. See Comcast Answer to WealthTV at 1-2 (¶ 2), 7-8 (¶ 16); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 8; Comcast Motion to Dismiss at 2-4. Comcast explains that its offer would provide WealthTV with an opportunity to demonstrate whether there is consumer interest in the channel. See Comcast Answer to WealthTV at 7-8 (¶ 16); *id.* at Exhibit 2, Declaration of Madison Bond, at ¶ 8. WealthTV states that Comcast's desire to test the appeal of WealthTV is unwarranted because WealthTV has been operating for over three years and has thousands of subscribers on other MVPDs in Chicago. See WealthTV Reply to Comcast at 15 n.13. WealthTV states that Comcast never offered specific terms and that the discussions with Mr. Bond never constituted an offer for carriage. See *id.* at 16; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶ 18.

²¹⁸ See WealthTV Reply to Comcast at 9-10, 12-13; *id.* at Exhibit 3, Declaration of Charles Herring, at ¶¶ 13, 18, 20; WealthTV Opposition to Comcast Motion to Dismiss at ¶¶ 2-3, 6.

²¹⁹ See *supra* ¶¶ 12-16; see also WealthTV Complaint Against Comcast at ¶¶ 1, 2, 22, 23-32; *id.* at Exhibit 8, Affidavit of Jedd Palmer, at ¶¶ 8-10 (discussing similarity of WealthTV and MOJO); *id.* at Exhibit 12, Declaration of Mark Kersey (providing survey results demonstrating the demographics of WealthTV's viewers); WealthTV Reply to Comcast at 5, 17-19.