

REDACTED, PUBLIC VERSION

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
TCR Sports Broadcasting Holding, L.L.P.)	MB Docket No. 08-214
d/b/a Mid-Atlantic Sports Network,)	
)	
Complainant)	
)	File No. CSR-8001-P
v.)	
Comcast Corporation,)	
)	
Defendant)	

To: Marlene H. Dortch, Secretary
Attn: Hon. Richard L. Sippel
Chief Administrative Law Judge

**MASN'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

June 26, 2009

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PROPOSED FINDINGS OF FACT

I. BACKGROUND

A. The Parties and Relevant Persons

1. TCR Sports Broadcasting Holdings, L.L.P. (“TCR”) conducts business as the Mid-Atlantic Sports Network (“MASN”).¹ MASN is an independent Regional Sports Network (“RSN”).

2. Comcast Corporation is a vertically integrated multi-channel video program distributor (“MVPD”), and the largest MVPD in the United States.² Comcast has an ownership interest in approximately 20 programming networks, including RSNs.³

3. James Cuddihy is the Executive Vice President of MASN.⁴ Prior to working at MASN, Mr. Cuddihy worked for Comcast for many years.⁵ He testified as a witness in this proceeding.⁶

4. Mark Wyche is a consultant for MASN.⁷ Mr. Wyche has more than 15 years of experience in developing, launching, and marketing national and regional sports network.⁸

¹ See MASN Ex. 235, ¶ 1 n.1 (Cuddihy Written Test.).

² See Memorandum Opinion and Order, *Applications for Consent to the Agreement and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc; Adelphia Communications Corp. to Comcast Corp.; Comcast Corp. to Time Warner Inc.; Time Warner Inc. to Comcast Corp.*, 21 FCC Rcd 8203, ¶ 7 (2006) (“*Adelphia Order*”).

³ See *Adelphia Order* ¶ 8 & nn.31-32 (“Comcast owns attributable interests in nine national video programming networks” and “eight regional sports networks”) (submitted to the Tribunal as a Judicial Notice document); MASN Ex. 134 (Comcast presentation touting ownership in 10 national networks (E!, Golf Channel, VERSUS, G4, Style, TV One, AZN, Sprout, FEARNet, Exercise TV) and 9 RSNs (Philadelphia, Chicago, DC/Baltimore, Sacramento, SportsNet NY, the mtn, CSS, Fox Sports New England (subsequently re-branded as CSN-NE), and Fox Sports Bay Area (subsequently re-branded as CSN-West 1 and CSN-West 2)); MASN Ex. 137.

⁴ See MASN Ex. 235, ¶ 1 (Cuddihy Written Test.).

⁵ See MASN Ex. 235, ¶ 2 (Cuddihy Written Test.).

⁶ See MASN Ex. 235 (Cuddihy Written Test.).

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Mr. Wyche has negotiated over 100 carriage agreements,⁹ and is an expert regarding the valuation and demand of sports programming rights. He testified as a witness in this proceeding.¹⁰

5. David Gluck is a consultant for MASN.¹¹ Mr. Gluck has experience in negotiating more than 100 carriage agreements.¹² He testified as a witness in this proceeding.¹³

6. Dr. Hal Singer is an economist with expertise in competitive harm, valuation, and damages. He testified as witness in this proceeding.¹⁴

7. Brian Roberts is the Chairman and Chief Executive Officer (“CEO”) of Comcast Corporation.¹⁵ Mr. Roberts is the most senior executive of Comcast. Comcast Corporation controls the other companies in Comcast’s corporate structure.¹⁶

⁷ See MASN Ex. 236, ¶ 2 (Wyche Written Test.).

⁸ See MASN Ex. 236, ¶ 2 (Wyche Written Test.).

⁹ Tr. at 5867 (“I have negotiated over 100 different subscription television carriage agreements with various professional teams and leagues.”) (Wyche Test.).

¹⁰ See MASN Ex. 236 (Wyche Written Test.).

¹¹ See MASN Ex. 237, ¶ 3 (Gluck Written Test.).

¹² See Tr. at 6043 (“Q: And roughly, how many agreements like that have you negotiated during the course of your roughly 19-year career? A: It’s really hard to say but scores. Q: More than 100? A: Probably.”) (Gluck Test.).

¹³ See MASN Ex. 237 (Gluck Written Test.).

¹⁴ See MASN Ex. 238 (Singer Written Test.).

¹⁵ See MASN Ex. 22.

¹⁶ See MASN Ex. 22 (“Under [Mr. Roberts’] leadership, Comcast has grown into a Fortune 100 company with \$34.3 billion in revenues, 24.2 million customers and 100,000 employees. Comcast’s content networks and investments include E! Entertainment Television, Style Network, Golf Channel, VERSUS, G4, PBS KIDS Sprout, TV One, and ten sports networks operated by Comcast Sports Group and Comcast Interactive Media, which develops and operates Comcast’s Internet business, including Comcast.net. The Company also has a majority interest in Comcast-Spectator, whose major holdings include the Philadelphia Flyers NHL hockey team, the Philadelphia 76ers NBA basketball team and two large multipurpose arenas in Philadelphia.”).

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8. David Cohen is the Executive Vice President of Comcast Corporation.¹⁷

Mr. Cohen is one of the most senior executives of Comcast. Mr. Cohen reports directly (and only) to Mr. Roberts.¹⁸

9. Stephen (Steve) Burke is the Chief Operating Officer of Comcast Corporation and the President of Comcast Cable Communications (“Comcast Cable”).¹⁹ Mr. Burke is one of the most senior executives of Comcast. Comcast Cable accounts for approximately 95 percent of Comcast Corporation’s revenues.²⁰

10. Madison (Matt) Bond is the Executive Vice President of Content Acquisition for Comcast Cable.²¹ Mr. Bond is one of the most senior executives of Comcast, and was responsible for all of Comcast’s carriage decisions regarding MASN.²² Without Mr. Bond’s approval, an individual cable system could not launch a programming network, including MASN.²³ He testified as a witness in this proceeding.²⁴

11. Jeff Shell is the President of Comcast Programming Group.²⁵ In this position, Mr. Shell is the head of Comcast’s RSNs.²⁶ Mr. Shell is one of the most senior executives of

¹⁷ See MASN Ex. 21.

¹⁸ Tr. at 6872 (“Q: David Cohen reports directly to the chairman of Comcast, correct? A: Yes.”) (Bond Test.).

¹⁹ See MASN Ex. 23.

²⁰ See Tr. at 7063 (Orszag Test.).

²¹ See MASN Ex. 20.

²² See Tr. at 6890 (“Q: You are the final deal maker, correct? A: Yes.”) (Bond Test.).

²³ See Tr. at 6941-42 (“Q: The systems cannot launch without Comcast corporate approval, correct? A: Yes.”) (Bond Test.).

²⁴ See Comcast Ex. 1 (Bond Written Test.).

²⁵ See MASN Ex. 19.

²⁶ Tr. at 6823 (“Q: [Mr. Shell’s] group manages Comcast’s affiliated RSNs. Correct? A: Yes.”) (Bond Test.).

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Comcast. Comcast Programming Group comprises approximately 5 percent of Comcast Corporation's business.²⁷

12. Michael Ortman is the Vice President of Programming for the Eastern Division of Comcast Cable.²⁸ The Eastern Division contains most of the cable systems in dispute in this case. Mr. Ortman testified as a witness in this proceeding.²⁹

13. Larry Gerbrandt is a media consultant. He testified as a witness in this proceeding.³⁰

14. Jonathan Orszag is an economist. He testified as a witness in this proceeding.³¹

B. MASN and Comcast's Affiliated RSNs

15. MASN's primary programming involves the Baltimore Orioles and Washington Nationals, which are both Major League Baseball ("MLB") teams.³²

16. MASN's geographic footprint includes the entire states of Virginia, Maryland, Delaware; the District of Columbia; certain parts of southern Pennsylvania and eastern West Virginia; and a substantial part of North Carolina.³³ This footprint is identical to the television territory of the Orioles. The Nationals also share the same television territory as the Orioles.³⁴

²⁷ See Tr. at 7063 (Orszag Test.).

²⁸ See Comcast Ex. 2, ¶ 1 (Ortman Written Test.).

²⁹ See Comcast Ex. 2 (Ortman Written Test.).

³⁰ See Comcast Ex. 3 (Gerbrandt Written Test.).

³¹ See Comcast Ex. 4 (Orszag Written Test.).

³² See Comcast Ex. 1, ¶ 4 ("MASN is an RSN principally offering [MLB] games of the Baltimore Orioles and Washington Nationals.") (Bond Written Test.).

³³ See MASN Ex. 237, ¶ 3 (Gluck Written Test.); see MASN Ex. 239 (map of MASN's territory).

³⁴ See MASN Ex. 236, ¶ 5 (Wyche Written Test.).

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17. Comcast owns a number of RSNs, including Comcast SportsNet – Mid-Atlantic (“CSN-MA”) and Comcast SportsNet – Philadelphia (“CSN-Philly”). CSN-MA’s primary programming involves the Washington Wizards, a National Basketball Association (“NBA”) team, and the Washington Capitals, a National Hockey League (“NHL”) team.³⁵ CSN-Philly’s primary programming involves the Philadelphia Phillies, a MLB team, the Philadelphia Flyers, a NHL team (which Comcast owns), and the Philadelphia 76ers, a NBA team (which Comcast owns).³⁶

18. Comcast serves more subscribers in MASN’s geographic footprint than any other MVPD.³⁷ MASN’s geographic footprint overlaps with the geographic footprints of both CSN-MA and CSN-Philly.³⁸ Over MASN’s geographic footprint, Comcast has approximately [REDACTED] subscribers.³⁹

³⁵ See Comcast Ex. 2, ¶ 4 (Ortman Written Test).

³⁶ See Answer of Comcast Corporation at 47, ¶ 64 (filed July 31, 2008) (“Comcast Answer”) (admitting “that CSN-Philadelphia telecasts the games of major professional sports teams, including the Philadelphia Phillies baseball team”); *id.* at 48, ¶ 74 (admitting “that CSN-Philadelphia has the rights to televise certain Philadelphia Flyers (NHL) and Philadelphia 76ers (NBA) games”); *see also* MASN Ex. 22 (Comcast “has a majority ownership in Comcast-Spectator, whose major holdings include the Philadelphia Flyers NHL hockey team, the Philadelphia 76ers NBA basketball team.”).

³⁷ See Comcast Ex. 85, at 1 (MASN internal chart projecting subscriber numbers).

³⁸ See MASN Ex. 70 (attachment to Comcast’s expert report showing cable systems in the territories of MASN, CSN-MA, and CSN-Philly).

³⁹ See, e.g., Comcast Ex. 85, at 1 (MASN internal chart projecting subscriber numbers).

II. COMCAST DISCRIMINATED AGAINST MASN ON THE BASIS OF AFFILIATION

A. Comcast Affords Its Affiliated RSNs Significantly More Carriage Than It Affords to MASN

19. For nearly two years, as set forth below, Comcast refused to carry MASN anywhere.⁴⁰ That situation changed shortly after the Federal Communications Commission (“FCC” or “Commission”) issued two orders in July 2006. Comcast thereafter began, in phased increments, to carry MASN to certain of its subscribers subsequent to negotiations between Comcast and MASN in August 2006.

20. Across MASN’s geographic footprint, there is a significant disparity between the number of Comcast subscribers who receive Comcast’s affiliated RSNs as compared to the number who receive MASN. Virtually 100 percent of Comcast subscribers receive a Comcast-affiliated RSN, specifically, CSN-MA, CSN-Philly or both.⁴¹ On the other hand, only about 87 percent of these subscribers receive MASN.⁴²

21. The areas Comcast has foreclosed to MASN (collectively the “Foreclosed Areas”) include, but are not limited to, large numbers of Comcast subscribers in three regions: the Harrisburg, Roanoke-Lynchburg and Tri-Cities Designated Marketing Areas (“DMAs”). In total, Comcast does not provide MASN to approximately [REDACTED] subscribers within MASN’s

⁴⁰ See MASN Ex. 235, ¶ 5 (Cuddihy Written Test.).

⁴¹ See MASN Ex. 70 (Comcast prepared list of subscribers); Tr. at 6503-04 (“Q: Thank you. So am I correct in stating that from this MASN Exhibit No. 70 very close to 100 percent of all Comcast systems carry CSN Philly or CSN MA? A: One or the other. Q: Yes. A: Yes. Q: Very close to 100 percent? A: Yes.”) (Ortman Test.).

⁴² See Tr. at 6504 (“Not quite 100 percent, but very close to 100 percent. And am I correct that one could count up the number of systems that do not carry MASN and likely achieve a percentage of approximately 87 percent? A: It’s my understanding, yes.”) (Ortman Test.).

footprint in the Foreclosed Areas⁴³ – even though Comcast does provide every single one of those subscribers with a Comcast affiliated RSN.

22. The number of subscribers Comcast has foreclosed to MASN is greater than the combined number of Comcast subscribers in the cities of Baltimore, Maryland and Washington, D.C.⁴⁴

B. Comcast Greatly Valued the Programming Rights for the Nationals, but Refused to Carry the Nationals after it Lost Those Rights to MASN

23. Comcast has an affirmative strategy to acquire RSN programming. Mr. Roberts, the CEO of Comcast Corporation, stated that RSN programming, like MASN's, is “the most compelling local programming there is.”⁴⁵ Internal documents confirm Comcast's view that RSN programming is “‘must-have’ programming, cost-considerations aside.”⁴⁶ Comcast's views are consistent with the FCC's findings that “the programming provided by RSNs is unique” and “is particularly desirable and cannot be duplicated.”⁴⁷

24. In 2004, MLB Commissioner Allen H. (Bud) Selig announced that the Montreal Expos franchise would be relocated to Washington, D.C. That team was renamed as the Washington Nationals. The Nationals began playing baseball in Washington, D.C., at the beginning of the 2005 MLB season.⁴⁸

⁴³ See Comcast Ex. 4, ¶ 44 (“the [REDACTED] Comcast subscribers on the systems at issue represent about 13 percent of Comcast subscribers in MASN's territory”) (Orszag Written Test.); see also Tr. at 7074 (“Q: [Comcast's foreclosure] equates to [REDACTED] subscribers, true? A: That is correct.”) (Orszag Test.); MASN Ex. 70 (Comcast prepared list of subscribers).

⁴⁴ See MASN Ex. 70 (Comcast prepared list of subscribers).

⁴⁵ MASN Ex. 136, at 2.

⁴⁶ MASN Ex. 136, at 2.

⁴⁷ *Adelphia Order* ¶ 189.

⁴⁸ See MASN Ex. 235, ¶ 4 (Cuddihy Written Test.).

25. Comcast competed vigorously for the rights to telecast the Nationals.⁴⁹ [REDACTED]

[REDACTED]
[REDACTED]⁰ Comcast viewed this programming to be sufficiently valuable to justify a [REDACTED]

[REDACTED]⁵¹

26. When Commissioner Selig ultimately assigned these rights to MASN, Comcast vigorously tried to undo that decision. On April 6, 2006, Stephen Burke, the President of Comcast Cable, wrote a letter to Mr. Selig alleging that MASN was paying a “below-market rights fee to the Nationals (a rights fee lower than that which [Comcast was] willing to pay).”⁵² Mr. Burke “propose[d] a resolution” that he pledged would “allow[] the games of the Nationals *to be seen across the Nationals’ territory* immediately.”⁵³ The next day, on April 7, 2006, Mr. Cohen, the Executive Vice President for Comcast Corporation, testified before Congress that MASN was paying the Nationals “well below what we believe the market rate is.”⁵⁴ Mr. Cohen also referred to the decision to assign the Nationals rights to MASN as “original sin,” and disparaged MASN as “for nearly 8,000 hours a year . . . offer[ing] nothing but a dark screen.”⁵⁵

⁴⁹ See Tr. at 6741 (“We clearly were interested in seeking the [Nationals] rights.”) (Bond Test.).

⁵⁰ See MASN Ex. 91, at 1 [REDACTED]

⁵¹ See MASN Ex. 91, at 4.

⁵² MASN Ex. 2, at 2.

⁵³ MASN Ex. 2, at 2 (emphasis added).

⁵⁴ MASN Ex. 3, at 3.

⁵⁵ MASN Ex. 3, at 1-2 (internal quotation marks omitted).

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27. Comcast refused to carry MASN anywhere for nearly two full baseball seasons – even in Washington, D.C. Comcast did not carry MASN for the entire 2005 inaugural season for the Nationals, and did not carry MASN for most of the 2006 season.⁵⁶

28. Having vigorously sought to obtain the rights to the Nationals, complained that MASN was paying too little for Nationals games, projected creating a stand-alone RSN just to telecast Nationals games, and promised to telecast those games “across the Nationals territory,” it is evident that Comcast would have telecast Nationals games across its footprint (including the Foreclosed Areas) from the beginning of the 2005 MLB season if Comcast had been able to obtain those rights for itself. It also is evident that Comcast refused to carry MASN at all for nearly two years because MASN had obtained the rights that Comcast desired to own for itself.

C. Comcast Greatly Valued the Programming Rights for the Orioles, But Refused To Carry Orioles Programming in Certain Areas After it Lost Those Rights to MASN

29. Before 2007, Comcast had the contractual rights to produce and exhibit Orioles games on pay television. Comcast telecast those games throughout the Orioles television territory though CSN-MA.⁵⁷ Those rights terminated when the 10-year contract that began in 1996 expired at the end of the 2006 MLB season. As early as 2002, however, Comcast was aware that the Orioles might not renew this contract when it expired in 2006.⁵⁸

⁵⁶ See MASN Ex. 235, ¶ 5 (Cuddihy Written Test.) (“Despite aggressively seeking the rights to both the Orioles and the Nationals, which it lost to MASN, Comcast refused to carry MASN for nearly two full MLB seasons.”).

⁵⁷ See MASN Ex. 235, ¶¶ 3, 10-13 (Cuddihy Written Test.).

⁵⁸ See MASN Ex. 231 (Orioles February 19, 2002 Press Release titled “Orioles to Establish Broadcasts Television Network” and stating “[t]he Orioles are proud to be part of the groundswell of regional sports networks owned by a Major League team”).

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30. Comcast fought vigorously to retain the rights to telecast Orioles games.⁵⁹ On April 21, 2005, Comcast filed a lawsuit against MASN and the Orioles seeking to maintain those rights.⁶⁰ That same day, Comcast also sent letters to every MVPD in MASN’s footprint warning that entering into an affiliation agreement with MASN could “evidence a serious and material breach of Comcast SportsNet’s contractual rights.”⁶¹ Notably, Comcast sent these letters to MVPDs operating in the Foreclosed Areas where, during this litigation, Comcast has alleged an insufficient demand for MASN.⁶² In September 2005, a court dismissed Comcast’s lawsuit.

31. Additional internal documents confirm that Comcast recognized the critical importance of Orioles programming in the Foreclosed Areas. [REDACTED]

[REDACTED]

[REDACTED]⁶³ [REDACTED]

[REDACTED]

[REDACTED]⁶⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁵

⁵⁹ See Tr. at 6740 (“Q: Is it true that Comcast wanted to keep the Orioles with Comcast Sports Net Mid-Atlantic? A: Yes.”) (Bond Test.).

⁶⁰ See MASN Ex. 237, ¶ 13 (Gluck Written Test.).

⁶¹ E.g., MASN Exs. 31-60, at 1.

⁶² E.g., MASN Ex. 41 (Letter to Blue Ridge Cable Technologies, Inc.); MASN Ex. 44 (Letter to Cox Communications); MASN Ex. 48 (Letter to Giles Craig Communications).

⁶³ MASN Ex. 99, at 1.

⁶⁴ By the date of this forecast, Comcast was in an advanced stage of purchasing these Adelphia systems. In fact, the Commission approved that acquisition two months later.

⁶⁵ See MASN Ex. 99, at 20-23.

32. Frustrated by its inability to procure Orioles programming rights, in the summer of 2006 a senior Comcast executive wrote that [REDACTED]

[REDACTED]⁶⁶ Another senior Comcast executive appealed directly to Mr. Burke, stating that it was [REDACTED]

[REDACTED]⁶⁷ Mr. Burke himself replied: [REDACTED]⁸

33. Having vigorously sought to retain the rights to Orioles programming (including by filing a lawsuit), written letters to other MVPDs asserting a continued right to Orioles programming, and [REDACTED]
[REDACTED], it is evident that Comcast would have telecast Orioles games across its geographic footprint (including the Foreclosed Areas) if Comcast had been able to retain those rights for its own affiliated RSN, CSN-MA.

D. MASN's Carriage Agreements With Other Independent MVPDs Evidences the Strong Demand for MASN in the Foreclosed Areas

34. MASN has telecast Nationals games since the beginning of the 2005 MLB season. MASN has telecast both Nationals and Orioles games since the beginning of the 2007 MLB season.⁶⁹ Consistent with industry standards, MASN charges MVPDs a certain license fee per subscriber per month. MASN has divided its geographic footprint into six regions, and offers different license fees among these regions.⁷⁰

⁶⁶ MASN Ex. 107, at 1.

⁶⁷ MASN Ex. 107, at 1.

⁶⁸ MASN Ex. 107, at 1.

⁶⁹ See Tr. at 6032 (“We had exclusive rights to televise the Orioles and the Nationals. But when we first launched in ’05, when first MASN launched in ’05, we only had the Nationals for the first two years.”) (Wyche Test.).

⁷⁰ E.g., MASN Ex. 238, ¶ 52, Table 1 (Singer Written Test.).

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35. Beginning by at least March 2005, MASN attempted to obtain carriage from Comcast.⁷¹ MASN sent a proposed term sheet to Comcast. Comcast's lead negotiator during carriage discussions with MASN was Mr. Bond.⁷² On April 14, 2005, MASN representatives travelled to Philadelphia to meet with Mr. Bond and other Comcast officials about carriage, but no agreement was reached.⁷³

36. In May 2005, MASN reached an agreement with DirecTV to carry MASN across MASN's geographic footprint.⁷⁴ That agreement came after two months of negotiations.⁷⁵ DirecTV vigorously negotiated the terms of this agreement with respect to every region within MASN's footprint.⁷⁶ During these negotiations, DirecTV made clear that it would not carry MASN in regions where the demand was too low to justify the price charged by MASN.⁷⁷

37. In the fall of 2005, and continuing thereafter, MASN reached carriage agreements with the other major MVPDs within MASN's footprint, including DISH, Charter, Cox, and Verizon.⁷⁸ MASN currently has carriage agreements with more than 20 MVPDs throughout its footprint.⁷⁹ Comcast is the only major MVPD in the Foreclosed Areas that does not carry MASN. Comcast has refused to carry MASN in the Foreclosed Areas despite being offered carriage on the same prices, terms, and conditions under which other MVPDs carry MASN in the Foreclosed Areas. Those standard terms require carriage on one of the two most highly

⁷¹ See MASN Ex. 237, ¶ 11 (Gluck Written Test.).

⁷² See Tr. at 6732-33 (Bond Test.).

⁷³ See MASN Ex. 237, ¶ 12 (Gluck Written Test.).

⁷⁴ See MASN Ex. 237, ¶ 4 (Gluck Written Test.).

⁷⁵ See Tr. at 6045 (Gluck Test.).

⁷⁶ Tr. at 6047-48 (Gluck Test.).

⁷⁷ See MASN Ex. 237, ¶ 6 (Gluck Written Test.).

⁷⁸ See MASN Ex. 237, ¶ 4 (Gluck Written Test.).

⁷⁹ See MASN Ex. 237, ¶ 4 (Gluck Written Test.).

penetrated tiers of service, or any level of service that reaches at least [REDACTED] percent of the subscribers within a system.

E. Comcast Has Significant Incentives To Protect and Favor its Affiliated RSNs by Discriminating against Their Competitor, MASN

38. Comcast's business is approximately 95 percent distribution and only 5 percent programming.⁸⁰ [REDACTED]

[REDACTED]⁸¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸²

39. Comcast recognizes the sizeable economic benefits of vertically integrating its downstream distribution channels with upstream programming content. Internal documents discussing "Comcast Regional Sports Networks" state that Comcast's does not [REDACTED]

[REDACTED]

[REDACTED]³ [REDACTED]

[REDACTED]

[REDACTED]⁸⁴

40. Internal Comcast documents establish that Comcast determined by at least 2006 that [REDACTED]

⁸⁰ See Tr. at 7063 (Orszag Test.).

⁸¹ See Tr. at 7064-65 (Orszag Test.).

⁸² MASN Ex. 134, at 11.

⁸³ MASN Ex. 134, at 12.

⁸⁴ MASN Ex. 134, at 12.

[REDACTED]⁸⁵ In order for Comcast's strategy to succeed, however, [REDACTED]

[REDACTED]⁸⁶ Unaffiliated RSNs, therefore, must be marginalized, lest they become threats to Comcast RSNs? [REDACTED]

41. Comcast is well aware of how it can leverage its programming assets to aid its distribution business. Comcast denies its major competitors, DirecTV and DISH, the ability to carry CSN-Philly in Philadelphia.⁸⁷ [REDACTED]

[REDACTED]⁸ This denial has allowed Comcast Cable to increase its share of the market. An internal Comcast document lists as a [REDACTED]

[REDACTED]⁹

42. [REDACTED]

[REDACTED]⁹⁰ [REDACTED]

[REDACTED]⁹¹ [REDACTED]

⁸⁵ MASN Ex. 136, at 8.

⁸⁶ MASN Ex. 136, at 11.

⁸⁷ Tr. at 6856 (“Q: And, notwithstanding, that there’s demand for CSN Philly in Philadelphia, it is not made available to satellite providers. A: Yes.”) (Bond Test.).

⁸⁸ See MASN Ex. 135, at 68 [REDACTED]

⁸⁹ MASN Ex. 135, at 68.

⁹⁰ See MASN Ex. 135, at 68; see also Tr. at 7234 [REDACTED]

[REDACTED] (Orszag Test.).

⁹¹ Tr. at 7227 (“Q: That’s an example of Comcast SportsNet Philadelphia not doing what’s in the best interest of Comcast SportsNet Philadelphia, correct? A: Within the four corners of Comcast SportsNet Philadelphia, you are correct.”) (Orszag Test.).

[REDACTED]

[REDACTED]⁹²

43. Comcast's use of CSN-Philly confirms that its affiliated RSNs are not independent actors, but rather, an extension of Comcast's distribution arm that are used as necessary to further Comcast's overall interests.⁹³ Comcast's own witness testified that "I've cited the Philadelphia example as one that may raise competitive concerns."⁹⁴ Mr. Orszag admitted that Comcast's foreclosure "reduced the[] competitive appeal" of DirecTV and DISH, thereby reducing their "ability to compete vigorously because they don't have key programming."⁹⁵ When asked whether Comcast's foreclosure "helps Comcast [promote its] competitive position," Mr. Orszag responded: "Yes, why else would they have done it?"⁹⁶

44. Comcast competes with MASN for programming rights. Internal documents confirm that [REDACTED]

[REDACTED]⁹⁷ Prices generally rise when bidders enter the market.⁹⁸ With MASN's emergence, Comcast employees [REDACTED]

⁹² MASN Ex. 135, at 68; *see also* Tr. at 7227 ("I don't know if it's who at Comcast corporate or where it comes from, but Comcast as a company does not distribute the programming to Dish.") (Orszag Test.); Tr. at 7229 ("Q: And that's just Comcast doing what's best for Comcast, right? A: I assume that Comcast is being rational, yes.") (Orszag Test.).

⁹³ *See* Tr. at 7228 ("Q: And they're willing to lose that revenue for Comcast SportsNet Philly because Comcast Cable benefits, correct? A: Precisely.") (Orszag Test.).

⁹⁴ Tr. at 7239 (Orszag Test.).

⁹⁵ Tr. at 7222 (Orszag Test.).

⁹⁶ Tr. at 7222-23 (Orszag Test.).

⁹⁷ *See* Tr. at 7113 ("Q: Isn't it true that Comcast was unhappy that MASN was entering the market of programming rights? A: I haven't seen evidence to suggest that they're unhappy or happy. I would presume as competitors that most competitors don't like more competition.") (Orszag Test.).

⁹⁸ *See* Tr. at 7113 ("Q: Do prices generally go up when bidders enter the market? A: I'll accept the 'generally,' yes.") (Orszag Test.).

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45. MASN and CSN-MA are “close competitors” for programming content.¹⁰¹ They have competed for the rights to telecast pre-season games and ancillary programming of the Baltimore Ravens and Washington Redskins, both National Football League (“NFL”) teams, and D.C. United, which is a professional soccer team.¹⁰² MASN holds programming rights to Big East basketball, including Villanova and the University of Pittsburgh, that would be attractive to CSN-Philly. Moreover, Comcast shares programming between CSN-MA and CSN-Philly.¹⁰³ Comcast has the ability to dictate the manner in which certain rights are distributed among – or shared between – its programming arms.¹⁰⁴ In seeking the rights to the Nationals, Comcast made clear that it would broadcast those rights “across the Nationals’ territory” by “carry[ing] the games on Comcast SportsNet, CN8, or another available cable channel.”¹⁰⁵ Comcast did not

⁹⁹ MASN Ex. 115, at 2.

¹⁰⁰ MASN Ex. 115, at 2.

¹⁰¹ Tr. at 7112 (“I would agree that they are close competitors for programming content.”) (Orszag Test.).

¹⁰² See Tr. at 7112 (Orszag Test.).

¹⁰³ See Tr. at 7124-25 (“Q: And in fact, Comcast SportsNet Mid-Atlantic and Philadelphia share content today, don’t they? A: I believe they share some form of ESPN content.”) (Orszag Test.).

¹⁰⁴ See Tr. at 7124 (“Q: Okay, but if the programming rights contracts permitted it, Comcast could put it in whatever arm it wants to, correct? A: Between the two, yes, that is correct.”) (Orszag Test.).

¹⁰⁵ MASN Ex. 2, at 2.

specify a particular CSN channel, and included as an option yet another programming channel it owned, CN8. It is evident that Comcast can spread programming around its various content channels in order to obtain the distribution that it desires. [REDACTED]

[REDACTED]¹⁰⁶

46. Comcast also competes with MASN for viewers and advertisers. Comcast's affiliated RSNs target males 18 to 49 as its key demographic.¹⁰⁷ That is the same key demographic for MASN.¹⁰⁸ Across MASN's footprint, both MASN and Comcast (through CSN-MA and CSN-Philly) seek these viewers. Across MASN's footprint, advertisers seeking to reach this demographic can chose between MASN and Comcast (through CSN-MA and CSN-Philly).

47. Other Comcast documents confirm the fact that Comcast's RSNs compete with MASN. For example, [REDACTED]

[REDACTED]¹⁰⁹ Another internal document made the competition point expressly: [REDACTED]

¹⁰⁶ See MASN Ex. 139, at 2 [REDACTED]

¹⁰⁷ See Tr. at 7133 ("Q: Isn't it true that Comcast SportsNet says its key demographic is males 18 to 49? A: I've seen documents to that effect, yes.") (Orszag Test.).

¹⁰⁸ See Tr. at 7134 ("Q: Isn't that the same key demographic for MASN, males 18 to 49? A: Yes.") (Orszag Test.).

¹⁰⁹ MASN Ex. 128 (emphasis added).

F. The FCC Issued Orders that Induced Comcast To Negotiate with MASN

48. In May 2005, Comcast and Time Warner Cable (“TWC”) applied for the Commission’s approval to acquire the cable assets of Adelphia and to swap certain assets between them.¹¹¹ On July 21, 2006, the Commission approved the transaction, but found that it would increase Comcast’s “incentive and ability” to discriminate against unaffiliated RSNs.¹¹² To remedy that concern, the Commission adopted a condition “allowing unaffiliated RSNs” – such as MASN – “to use commercial arbitration to resolve disputes regarding carriage on [Comcast’s] cable systems.”¹¹³ The Commission emphasized that the purpose of the remedy was to “alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes.”¹¹⁴ Under the *Adelphia Order*, RSNs had 30 days from the denial of carriage or “ten business days after release of th[e] Order” to file for arbitration.¹¹⁵

49. In June 2005, MASN filed a carriage complaint pursuant to the Cable Act and the Commission’s rules.¹¹⁶ MASN alleged that “Comcast has unreasonably restrained the ability of [MASN] to compete fairly by discriminating in video programming distribution on the basis of

¹¹⁰ MASN Ex. 122.

¹¹¹ See MASN Ex. 376.

¹¹² *Adelphia Order* ¶¶ 116, 189.

¹¹³ *Adelphia Order* ¶ 181; see also *id.* ¶ 190.

¹¹⁴ *Adelphia Order* ¶ 191.

¹¹⁵ *Adelphia Order* ¶ 190.

¹¹⁶ See Carriage Agreement Complaint, *TCR Sports Broadcasting Holdings, L.L.P. v. Comcast Corp.*, MB Docket No. 06-148, CSR-6911-N (FCC filed June 14, 2005) (“*Carriage Complaint*”) (submitted to the Tribunal as a Judicial Notice document).

affiliation or nonaffiliation of vendors.”¹¹⁷ Just days after the Commission had issued its *Adelphia Order*, the Media Bureau issued an Order on July 25, 2006, finding that MASN had established a *prima facie* case under the Cable Act’s and the Commission’s non-discrimination rules against Comcast.¹¹⁸ To address remaining factual issues, including those relating to remedy, the Media Bureau referred the matter to an administrative law judge (“ALJ”). The Order then gave MASN 10 days – until August 4, 2006 – to decide whether to accept this ALJ referral or, alternatively, to pursue the arbitration remedy provided under the *Adelphia Order*.¹¹⁹

50. On July 25, 2006, MASN sent another proposed term sheet to Comcast.¹²⁰ This term sheet contained the same terms and conditions on which other MVPDs had agreed to carry MASN. The term sheet made clear that MASN was seeking carriage throughout its geographic territory, by providing a geographic map of MASN’s television territory and indicating that Comcast was to launch MASN on “all Comcast systems” within that territory. Attached to the term sheet was a blank “List of Systems” page for Comcast to fill in the names of each of its systems within MASN’s territory.¹²¹

G. Before Beginning Negotiations with MASN, Comcast Devised a Plan To Protect its Affiliated RSNs By “Carving Off” MASN’s Subscribers

51. Internal documents show that Comcast began to formulate its position on carriage of MASN no later than July 25, 2006. That plan was concocted at the top levels of the company,

¹¹⁷ *Carriage Complaint* at 1.

¹¹⁸ See Memorandum Opinion and Hearing Designation Order, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989, ¶¶ 11-12 (2006) (“*MASN Order*”) (submitted to the Tribunal as a Judicial Notice document).

¹¹⁹ See *MASN Order* ¶ 13. The order provided no mechanism for any party to seek a continuance of that time deadline other than through the normal process of obtaining a stay.

¹²⁰ See MASN Ex. 237, ¶ 17 (Gluck Written Test.).

¹²¹ See MASN Ex. 237, ¶¶ 15-17 (Gluck Written Test.).

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and was orchestrated by Mr. Cohen, an Executive Vice President who reports only to Mr. Roberts, Comcast's CEO. Email correspondence on July 25, 2006, reflects [REDACTED]

[REDACTED]

[REDACTED]¹²² [REDACTED]

[REDACTED]

52. [REDACTED]

[REDACTED]

[REDACTED]²³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁴ [REDACTED]

[REDACTED]

[REDACTED]

53. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²⁵ [REDACTED]¹²⁶ as well as

¹²² MASN Ex. 102.

¹²³ See MASN Ex. 103.

¹²⁴ See MASN Ex. 3, at 1.

¹²⁵ MASN Ex. 103, at 1.

¹²⁶ See MASN Ex. 103, at 2-3.

[REDACTED]

[REDACTED]¹²⁷

54. [REDACTED]

[REDACTED]

[REDACTED] A non-vertically integrated cable company would never engage in this conduct. In fact, one of Comcast’s most senior officers, Mr. Cohen, expressly requested this very specific information about the relative sizes of the RSNs. It is evident – not only from the email itself but from Mr. Cohen’s prior public disparagement of MASN¹²⁸ and Comcast’s concern with the competitive threat posed by MASN – that he did so based on his desire to limit the size of MASN to protect Comcast’s affiliated RSN.

55. In response, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

56. It is significant that [REDACTED]

[REDACTED]

[REDACTED]¹²⁹ [REDACTED]

[REDACTED]

¹²⁷ See MASN Ex. 103, at 4-9.

¹²⁸ See MASN Ex. 3, at 1-6.

¹²⁹ See Tr. at 6834 (“JUDGE SIPPEL: But . . . you don’t get a lot of memos from [REDACTED] going to you, do you? THE WITNESS: I don’t. That’s correct. JUDGE SIPPEL: Well, why wouldn’t this have some significance to you then, if this is coming from [REDACTED] and he wants you to have a copy of it?”) (Bond Test.).

[REDACTED]

[REDACTED] ¹³⁰ [REDACTED]

Q: David Cohen reports directly to the chairman of Comcast, correct?

A: Yes.

Q: The chairman of Comcast and CEO is Mr. Brian Roberts; correct?

A: Yes.

* * *

Q: [REDACTED]

A: [REDACTED]

Q: [REDACTED]

A: [REDACTED] ¹³¹

57. Internal documents show that upon receiving the [REDACTED], Mr. Bond took action the very next day – even though it was a Saturday. On July 29, 2006, Mr. Bond directed his subordinates – for the first time – to determine “what systems on the periphery [of MASN’s footprint] we can carve off.” ¹³² Mr. Bond also expressly asked – again for the first time – “What are the total subs that we would be giving them?”¹³³

58. It is clear that Mr. Bond asked these questions because of the [REDACTED] that he had received the day before. It is likewise evident that Mr. Bond was motivated by

¹³⁰ See Tr. at 6874 (“Q: And you testified in your deposition that you did not recall receiving this document? A: Yes, that’s correct. Q: In the intervening time since your deposition, and having an opportunity to reflect on this document, has your memory been refreshed as to receiving this information? A: No, I don’t recall it.”) (Bond Test.).

¹³¹ Tr. at 6872-73 (Bond Test.).

¹³² MASN Ex. 104, at 1.

¹³³ MASN Ex. 104, at 1.

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Comcast's desire to limit the size of MASN, as reflected in the [REDACTED] so that MASN would pose less of a competitive threat to Comcast's affiliated RSNs. Notably, Mr. Bond did not even mention a valid business reason for denying any subscribers to MASN during this time frame, much less define an objective methodology for determining which subscribers should be "carve[d] off." In none of the emails exchanged by Comcast's senior executives at this time were the subjects of demand for MASN, MASN's costs, or Comcast's bandwidth constraints discussed. It therefore is evident that Mr. Bond was simply searching for ways to "carve off" subscribers for MASN without incurring obvious suspicion – hence his specific focus on "the periphery" of MASN's footprint. Indeed, Mr. Bond at no time discussed with MASN of any of the Foreclosed Areas in 2006.¹³⁴

59. The issues of where to "carve off" subscribers and how to limit "the total subs that [Comcast] would be giving [MASN]" were so pressing that Comcast employees worked over the weekend to address them. Mr. Bond had finalized assembling Comcast's proposal on Monday, July 31, 2006.¹³⁵ But Mr. Bond then delayed presenting Comcast's proposal to MASN for two business days.¹³⁶ On Wednesday, August 2, 2006 – only two days before MASN's 10-day window to file an arbitration demand expired – Mr. Bond signaled to MASN Comcast's

¹³⁴ See, e.g., Tr. at 6914 ("Q: Mr. Bond, in your direct testimony you state that MASN's representatives knew or should have known that the unlaunched areas were not being launched, correct? A: Yes. Q: But you never discussed those areas with them, did you? A: I don't recall that I discussed, specifically discussing unlaunched areas with the MASN representatives when I did this, no.") (Bond Test.).

¹³⁵ See Tr. at 6902 ("Q: You finalized your proposal later that day [July 31st], correct? A: Yes.") (Bond Test.).

¹³⁶ See Tr. at 6903 ("Q: You didn't call David Gluck until the end of the day two days later on August the 2nd, correct? A: I think that is right.") (Bond Test.).

interest in negotiating a carriage agreement and scheduled a call with MASN representatives for the next day, August 3rd.¹³⁷

60. Having worked over the weekend to prepare its position, but then delaying two business days before beginning negotiations with MASN, it is evident that Comcast deliberately delayed in order to secure a tactical advantage in these carriage negotiations. Comcast began these negotiations just two days before the 10-day period afforded to MASN under the FCC's *Adelphia Order* and *MASN Order* was due to expire. It is evident that Comcast believed that this compressed timeline would offer Comcast an advantage during its negotiations with MASN.

H. Comcast Negotiated a Carriage Agreement with MASN By Making a Series of Representations upon Which MASN Reasonably Relied

61. Two MASN representatives, Messrs. Gluck and Wyche, testified regarding the carriage negotiations with Comcast in August 2006.¹³⁸ This Tribunal observed them testify in person and found them to be highly credible. Comcast provided no witness or other evidence to dispute their recollections of these events. Mr. Bond was the only Comcast witness who participated in these negotiations, and he did not dispute *any* of Mr. Gluck's or Mr. Wyche's recollections about these carriage negotiations. Rather, Mr. Bond repeatedly testified that he did not recall any of the specifics of those negotiations.¹³⁹

62. On August 3, 2006, representatives for Comcast and MASN held multiple telephone conversations to discuss a carriage agreement.¹⁴⁰ MASN's offer was reflected in the term sheet that it had sent to Comcast on July 25, 2006, requesting carriage on "all Comcast systems" within MASN's footprint. Mr. Bond was the lead negotiator for Comcast. During one

¹³⁷ See MASN Ex. 237, ¶ 18 (Gluck Written Test.).

¹³⁸ See generally Tr. at 5860-6039 (Wyche Test.); Tr. at 6041-47 (Gluck Test.).

¹³⁹ See generally Tr. at 6730-983 (Bond Test.).

¹⁴⁰ See MASN Ex. 237, ¶ 19 (Gluck Written Test.).

of the calls on August 3rd, Mr. Bond responded to that offer with a counteroffer (“Counteroffer”).¹⁴¹ The Counteroffer contained three key parts. *First*, Mr. Bond said that Comcast would quickly launch MASN on most of its cable systems – those that served approximately 1.6 million subscribers – by September 1, 2006. *Second*, Mr. Bond next stated that Comcast “had approximately 750,000 *remaining* subscribers throughout [MASN’s] territory.”¹⁴² He proposed to launch MASN on systems reaching about 600,000 of these subscribers by April 1, 2007.

63. *Third*, Mr. Bond stated that Comcast could not launch systems servicing approximately 150,000 subscribers. He stated that these systems were located in Roanoke/Lynchburg and other parts of Virginia, and that they were part of the former Adelphia cable systems that Comcast was then acquiring (“Adelphia Exclusion”). Mr. Bond represented that these cable systems were low-bandwidth and did not have sufficient capacity to carry MASN.¹⁴³ Another negotiator for Comcast later said of these cable systems: “We don’t even know what we have.”¹⁴⁴ When MASN asked Comcast to identify these systems, Comcast stated that it was unable to do so.¹⁴⁵

64. MASN believed that any foreclosure in the areas bounded by the Adelphia Exclusion would be temporary. MASN understood that Comcast had committed to rebuild the former Adelphia systems such that they would have sufficient capacity to carry MASN in the

¹⁴¹ See MASN Ex. 236, ¶ 34 (“During that call, I recall Mr. Bond making a multi-part proposal.”) (Wyche Written Test.).

¹⁴² Tr. 5875 (Wyche Test.) (emphasis added).

¹⁴³ See MASN Ex. 236, ¶ 35 (Wyche Written Test.).

¹⁴⁴ Tr. at 6079-80 (Gluck Test.).

¹⁴⁵ See Tr. at 6079-80 (Gluck Test.).

near future.¹⁴⁶ This belief was based on statements that Comcast had made to the FCC in the course of petitioning the FCC to approve the Adelphia transaction.¹⁴⁷

65. Based upon Comcast's representations, MASN agreed not to require the Adelphia Exclusion to be launched by a date certain. In accepting this compromise, however, MASN made clear to Comcast that "it's got to be everything else."¹⁴⁸ At no point during its negotiations with MASN did Comcast disagree, nor did Comcast mention excluding any other systems or subscribers.¹⁴⁹

66. During the carriage negotiations with MASN in August 2006, Comcast sought a 10 percent across-the-board reduction in MASN's license fees.¹⁵⁰ The parties ultimately agreed to a 5 percent across-the-board reduction.¹⁵¹ Because of its obligations to other MVPDs, this concession required MASN to reduce the license fees it charged to every other MVPD by this same amount.¹⁵² Except for the across-the-board rate reduction, Comcast never mentioned that

¹⁴⁶ See MASN Ex. 236, ¶ 35 (Wyche Written Test.); Tr. at 6059 ("I understood at the time that they had made some representations to the FCC that they would be ultimately upgrading all the systems that they would acquire from Adelphia and then they would be able to . . . [launch] MASN once those were upgraded.") (Gluck Test.).

¹⁴⁷ *Adelphia Order*, Statement of Chairman Martin ("Comcast and Time Warner have committed to make long-needed upgrades to those systems to enable the rapid and widespread deployment of advanced services to Adelphia subscribers."); see generally MASN Ex. 377 (describing Comcast's commitment to upgrade Adelphia systems).

¹⁴⁸ Tr. at 6141 (Gluck Test.).

¹⁴⁹ Tr. at 6062 (Comcast "had committed to launching everything other than those Adelphia systems constituting 150,000 subscribers") (Gluck Test.).

¹⁵⁰ Tr. at 6060 ("Comcast asked for [a] reduction of 10 percent across the board in every region.") (Gluck Test.).

¹⁵¹ Tr. at 6931-32 (Bond Test.).

¹⁵² Tr. at 6060 (Gluck Test.).

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the price for MASN was too high in any particular region or area.¹⁵³ Likewise, Comcast never suggested that demand for MASN was too low in any particular region to justify the price that MASN was charging.¹⁵⁴

67. On August 4, 2006, Comcast amended the Counteroffer. Of the 600,000 subscribers that Comcast had proposed to launch by April 1, 2007 (the second part of the Counteroffer), Comcast sought to delay for a year in launching 150,000.¹⁵⁵ In other words, Comcast would launch 450,000 of the 600,000 by April 1, 2007, and the other 150,000 by April 1, 2008. (This 150,000 figure is wholly unrelated to the 150,000 subscribers who were part of the Adelphia Exclusion.) MASN agreed to this delay.

68. At 1:31 p.m. on August 4, 2006, Andrew Rosenberg, a Comcast representative, sent MASN an email “attach[ing] a redline of your most recent term sheet that reflects the deal we’ve been discussing over the past two days as well as some other clean-up changes.”¹⁵⁶ For the first time, Comcast provided a completed List of Systems to replace the blank form in MASN’s proposed term sheet, and attached that completed list as “Schedule A” to the Agreement.

69. Among the dozens of redlined edits, Comcast had struck the language requiring carriage on “all” Comcast systems, and inserted language permitting Comcast to carry MASN on

¹⁵³ Tr. at 6060-61 (“Q: Okay, what about specific regions, did they ever say the price in a specific region was too high? A: No, we didn’t negotiate on specific regions that I recall.”) (Gluck Test.); *see also* Tr. at 6932-33 (acknowledging there was “no specific price negotiation” with respect to any of MASN’s zones or any of the Foreclosed Areas other than “a discount over the entire MASN territory”) (Bond Test.).

¹⁵⁴ Tr. at 6061 (“Q: – did Comcast ever mention low demand for MASN anywhere? A: No, there was no discussion of demand.”) (Gluck Test.).

¹⁵⁵ *See* MASN Ex. 237, ¶ 20 (Gluck Written Test.).

¹⁵⁶ Comcast Ex. 14, at 14-1; MASN Ex. 89, at 29.

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those systems not listed on Schedule A “in Comcast’s discretion.”¹⁵⁷ Mr. Gluck contacted Mr. Rosenberg to ask why. Mr. Rosenberg represented that these edits were intended to ensure that Comcast was not obligated to launch the former Adelphia systems, as the parties had discussed, but had the right to do so after they had been upgraded.¹⁵⁸ Mr. Rosenberg also explained that the “discretion” language would permit Comcast to launch MASN on any new systems that it might acquire during the 10-year term of the agreement.¹⁵⁹ MASN accepted these representations.¹⁶⁰ MASN further understood that Comcast’s discretion would be limited by its obligations under federal law and this Commission’s regulations, including Comcast’s obligations to not discriminate against MASN in favor of its affiliated RSNs.¹⁶¹

70. Everyone at MASN believed that Schedule A contained a complete list of Comcast systems within MASN’s footprint, except for the Adelphia Exclusion.¹⁶² Within three hours of receiving the redlined term sheet and Schedule A, MASN entered into a final carriage

¹⁵⁷ Comcast Ex. 14, at 14-2.

¹⁵⁸ Tr. at 6063 (“And so I called Andrew and I said, ‘What are we doing here, why did you make this change?’ He said, ‘I want to make sure it reflects that the Adelphia systems aren’t included in here, because it’s not all systems we’re launching.’”) (Gluck Test.).

¹⁵⁹ Tr. at 6064-65 (“The discretion issue had to do with, what Andrew said was, with respect to the Adelphia systems, number one, we hadn’t set a date certain for them to launch the Adelphia systems because they couldn’t tell us when they’d be upgraded” and because “[i]f Comcast acquired additional systems from other operators during the term [of the agreement], they could launch those.”) (Gluck Test.).

¹⁶⁰ Tr. at 6064-65 (“I took him at his word for that.”) (Gluck Test.).

¹⁶¹ Tr. at 6126 (“Well, what we said was that they would be at their discretion, but their discretion is not unfettered. They’re covered by whatever applicable FCC laws and other laws may apply.”) (Gluck Test.); *see also* Tr. at 6919 (“Q: And another limitation on Comcast’s discretion is federal regulatory law, correct? A: Yes.”) (Bond Test.).

¹⁶² Tr. at 6087 (“JUDGE SIPPEL: So I take it, you took Schedule A at face value. THE WITNESS: Yes, I did, everybody did at MASN.”) (Gluck Test.); *see also* MASN Ex. 237, ¶ 28 (“We had no knowledge that Comcast intended to exclude approximately ██████ Pennsylvania subscribers”), ¶ 30 (“incorrect” that “MASN knew Comcast had not launched, and was under no obligation to launch, MASN on the unlaunched Comcast systems”) (Gluck Written Test.).

agreement (“Carriage Agreement” or “Term Sheet”) with Comcast. Except for the incomplete list that Comcast prepared and attached as Schedule A, which is discussed in detail below, MASN had no complaints or disagreements with the Carriage Agreement.¹⁶³ A few days after the agreement was executed, Comcast asked MASN to amend a calculation error in the rate that favored MASN (i.e., would result in a higher payment to MASN by Comcast), and MASN immediately agreed.¹⁶⁴

I. Contrary to Its Representations to MASN During Negotiations, Comcast Secretly Excluded the Foreclosed Areas from Schedule A

71. Other than the Adelphia Exclusion, Comcast never provided MASN with any indication that it was excluding any of its cable systems within MASN’s footprint.¹⁶⁵

Specifically, Comcast at no time mentioned the Harrisburg or Tri-Cities DMAs for any reason, much less stated that it intended to exclude carriage of MASN in these regions.¹⁶⁶ Comcast did mention the Roanoke/Lynchburg region, but only in the specific context of the low-bandwidth Adelphia systems that, according to Comcast, did not have the capacity to carry MASN until they were upgraded.

¹⁶³ Tr. at 6136-37 (“Q: . . . If Comcast had given you . . . the list on Schedule A of systems that you thought you had agreed to, do you have any other complaint with any other part of that agreement? Any word being struck? Any line being added? Any other change? A: No.”) (Gluck Test.).

¹⁶⁴ Tr. at 6132 (Comcast “called me on Monday or Tuesday afterwards and said ‘Hey, we screwed [up] on the rates’”) (Gluck Test.); Tr. at 6133 (“Yes. It was the right thing to do and Alan called and said, ‘Can you change this’ and I said, ‘Of course.’”) (Gluck Test.).

¹⁶⁵ See MASN Ex. 237, ¶¶ 23-24, 27 (Gluck Written Test.).

¹⁶⁶ See MASN Ex. 237, ¶ 20 (“No mention was made during that conference call or at any other time prior to consummation of the August 4 agreement that any other Comcast systems [than the Adelphia Exclusion] would not launch MASN.”) (Gluck Written Test.); see also Tr. at 6914 (“I don’t recall that I discussed, specifically discussing unlaunched areas with the MASN representatives when I did this, no.”) (Bond Test.).

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72. If Comcast had requested excluding the Foreclosed Areas for lack of demand, MASN would have objected. MASN would not knowingly have entered into an agreement that did not include the Foreclosed Areas.¹⁶⁷

73. Comcast first provided Schedule A to MASN on August 4, 2006, just a few hours before MASN believed that an agreement had to be reached – with the statement that the draft term sheet “reflect[ed] the deal” the parties had “been discussing.”¹⁶⁸ Schedule A consisted of two full pages with the names of Comcast systems in MASN’s footprint.¹⁶⁹ The list also provided the number of estimated subscribers for each system and was separated by launch dates (i.e., systems that would launch on September 1, 2006, and those that would launch by April 1, 2007, or April 1, 2008).

74. Schedule A did not accurately reflect Comcast’s negotiations with MASN. *First*, Schedule A excluded numerous systems that were unrelated to the Adelphia Exclusion. These included Comcast systems with large numbers of subscribers in the Harrisburg and Tri-Cities DMAs. *Second*, Schedule A included several former Adelphia systems that the parties had agreed to exclude based on Comcast’s representations of low-bandwidth. These included former Adelphia systems in Culpeper, Fauquier Co., Emporia, and Harrisonburg, Virginia.¹⁷⁰

¹⁶⁷ Tr. at 6125 (“A: And I will tell you that had they told us they weren’t launching those we wouldn’t have gotten the deal done because we made it clear all along that it had to be all systems and they knew that. There would not have been a deal done. Q: So that would have been a deal breaker[?] A: Absolutely.”) (Gluck Test.).

¹⁶⁸ MASN Ex. 89, at 29.

¹⁶⁹ See MASN Ex. 89, at 40-41.

¹⁷⁰ See Comcast Ex. 2, ¶ 22 (listing recently acquired Adelphia systems included on Schedule A) (Ortman Written Test.).

J. There is No Reliable Evidence Indicating How Schedule A Was Prepared

75. Two people were centrally involved in the preparation of Schedule A:

Mr. Ortman and Jen Gaiski.¹⁷¹ Ms. Gaiski worked for Mr. Bond.¹⁷²

76. Mr. Ortman's initial recommendation was that Comcast should limit carriage of MASN to the Baltimore and Washington regions.¹⁷³ An internal Comcast document characterized his position as launching MASN elsewhere only upon receiving [REDACTED]

[REDACTED]¹⁷⁴ Mr. Bond rejected this proposal¹⁷⁵ because it was too restrictive to be acceptable to MASN.¹⁷⁶ Mr. Ortman could not recall how his original proposal ultimately morphed into Schedule A.¹⁷⁷

77. Mr. Ortman testified that Schedule A was prepared by the inclusion of systems in areas that met three specifications: (1) whether there was a legacy of carrying Orioles programming; (2) whether there was at least 550 MHz of bandwidth;¹⁷⁸ and (3) whether it was

¹⁷¹ See Tr. at 6580 ("I don't know that Matt was directly involved. I communicated with Jen Gaiski, and perhaps other members of her team.") (Ortman Test.); Tr. at 6650 ("I don't recall a specific conversation [with Mr. Bond]") (Ortman Test.).

¹⁷² See Tr. at 6479 ("Q: And Jen Gaiski works for Matt Bond? A: She does.") (Ortman Test.).

¹⁷³ See Tr. at 6649 ("I wanted included just Baltimore-Washington, everything else would have been excluded.") (Ortman Test.); Tr. at 6705 ("I had communicated with Jen Gaiski I would like to limit it to Baltimore and Washington.") (Ortman Test.).

¹⁷⁴ MASN Ex. 106, at 1 ("Ortman says he must have MASN in Zone 1 & 2. All other zones he would like a hunting license and will only launch [REDACTED]).

¹⁷⁵ See Tr. at 6812 ("But if you disagreed with Mr. Ortman's suggestion, you have the power to overrule him. Correct? A: Yes.") (Bond Test.).

¹⁷⁶ See Tr. at 6705 (Bond "said no, that's going to be too small. MASN won't accept that.") (Ortman Test.).

¹⁷⁷ See Tr. at 6706 ("The graduation over that period of two weeks I don't recall.") (Ortman Test.).

¹⁷⁸ See Tr. at 6596 ("JUDGE SIPPEL: Had to be a minimum of 550. Right? THE WITNESS: Correct.") (Ortman Test.).

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close to Washington, D.C. and Baltimore.¹⁷⁹ Mr. Ortman himself did not prepare Schedule A.¹⁸⁰ Upon reviewing Schedule A after it had been prepared, Mr. Ortman did not check to confirm that these criteria had been applied correctly.¹⁸¹ Even though a legacy of carriage would exist if local television stations had carried the Orioles,¹⁸² Mr. Ortman did not even try to verify these facts.¹⁸³ Instead, Mr. Ortman relied upon his personal knowledge from the 1990s.¹⁸⁴

78. Based on the first specifications that Mr. Ortman identified, Comcast improperly excluded systems that had a legacy of carriage. There was a legacy of carrying Orioles games in each of the Foreclosed Areas. Comcast itself carried the Orioles, when they were telecast by CSN-MA, in the Roanoke-Lynchburg and Tri-Cities DMAs through the end of 2006 (when Comcast lost these rights), and in the Harrisburg DMA until 2005.¹⁸⁵ Mr. Ortman admitted that, in reviewing Schedule A, he did not check to see whether any cable systems left off Schedule A

¹⁷⁹ See Tr. at 6596-97 (“JUDGE SIPPEL: Proximity to D.C. and/or Baltimore. Is that the idea? THE WITNESS: That’s the idea. Baltimore-Washington only”) (Ortman Test.).

¹⁸⁰ See Tr. at 6598 (“Q: So, is it your testimony that you did not prepare the actual list of systems on Schedule A? A: No, I reviewed Schedule A after they met my criteria to see if it was accurate.”) (Ortman Test.).

¹⁸¹ See Tr. at 6599 (“Q: – did you look to see whether there were systems that were carrying CSNMA that had been left off the list. Yes or no? A: No.”) (Ortman Test.).

¹⁸² See Tr. at 6599 (“Q: Mr. Ortman, one determination of legacy carriage would be whether local broadcast stations were carrying the Orioles. Correct? A: That would have been one.”) (Ortman Test.).

¹⁸³ See Tr. at 6601 (“Q: Okay. In July of 2006, did you look at any information to inform yourself about whether the Orioles were being carried on over-the-air broadcast stations in the areas where Comcast was not launching MASN? A: No, I didn’t, because as long as I had a hunting license, I didn’t need to.”) (Ortman Test.).

¹⁸⁴ See Tr. at 6602-03 (“Okay. Is it fair that in July of 2006, you drew upon 15-year old information about over-the-air broadcasts of Orioles games? A: That’s fair, yes. Among other things, yes.”) (Ortman Test.).

¹⁸⁵ See, e.g., MASN Ex. 235, ¶¶ 11-12 (Cuddihy Written Test.).

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were carrying CSN-MA.¹⁸⁶ Furthermore, Nielsen ratings confirm that television stations in the Harrisburg and Roanoke-Lynchburg DMAs broadcast the Orioles from 2002 through 2006.¹⁸⁷

79. Based on the second specification that Mr. Ortman identified, Comcast improperly excluded systems with sufficient bandwidth. Virtually every system in the Foreclosed Areas had at least 550 MHz of bandwidth.¹⁸⁸

80. Based on the third specification that Mr. Ortman identified, Comcast improperly excluded systems that were close in proximity to Baltimore and Washington, D.C.¹⁸⁹ Comcast included systems on Schedule A that are farther away from Baltimore and Washington, D.C. than numerous systems that were excluded. For example, Schedule A included the system in Emporia, Virginia,¹⁹⁰ which is approximately 190 miles from Baltimore,¹⁹¹ and Staunton, Virginia, which is approximately 160 miles away.¹⁹² But Schedule A excluded systems in the

¹⁸⁶ See Tr. at 6599 (“Q: . . . My question is, when you got the list of Schedule A – A: Right. Q: – did you look to see whether there were systems that were carrying CSNMA that had been left off the list. Yes or no? A: No.”) (Ortman Test.).

¹⁸⁷ E.g., MASN Ex. 80, at 20-21, 23-24 (2002); MASN Ex. 81, at 20-21, 23-24 (2003); MASN Ex. 82, at 21-22, 25-27 (2004); MASN Ex. 84, at 22-23, 26-27 (2005); MASN Ex. 86, at 23-24, 28-29 (2006). (There was no record evidence regarding Nielsen ratings for the Tri-Cities DMA.)

¹⁸⁸ See MASN Ex. 236, Ex. A (Unlaunched Comcast Systems Within MASN’s TV Territory Designated Market Area) (Wyche Written Test.); Supplemental Filing, Joint Submission: Unlaunched Comcast Systems Within MASN’s TV Territory by Designated Market Areas (filed June 24, 2004).

¹⁸⁹ See MASN Ex. 1 (evidencing that Comcast has launched MASN on some systems farther away than systems it has refused to carry MASN).

¹⁹⁰ See Comcast Ex. 5, at 13, Schedule A.

¹⁹¹ See Tr. at 6546 (“Q: The Emporia system is approximately 190 miles from Baltimore; correct? A: Yes.”) (Ortman Test.).

¹⁹² See Tr. at 6546 (“Q: And the Staunton system is approximately 160 miles from Baltimore; correct? A: I’ll accept that.”) (Ortman Test.).

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Harrisburg DMA which are only approximately 70 miles from Baltimore,¹⁹³ for example, and Cecilton/Galena, which is only about 40 miles from Baltimore.¹⁹⁴

81. There are substantial differences between the systems listed in Schedule A and the three specifications identified by Mr. Ortman. Accordingly, it is evident that the person who generated Schedule A did so based on other considerations. Mr. Ortman did not prepare Schedule A.¹⁹⁵ No record evidence shows when Schedule A was prepared.¹⁹⁶ Schedule A could have been prepared as early as July 31, 2006.¹⁹⁷ No emails or other documentary evidence show how Schedule A was prepared.¹⁹⁸ Despite Mr. Ortman's central involvement in this process – indeed, he was the only witness who testified about the preparation of Schedule A – Comcast did not produce during discovery a single document from Mr. Ortman from the relevant time period of July 21, 2006 to August 8, 2006.¹⁹⁹ Mr. Ortman also did not discuss Schedule A with any of

¹⁹³ See Tr. at 6548 (“Q: And the Harrisburg system is approximately 70 miles from Baltimore; correct? A: Correct. Q: And the Lebanon system is approximately 70 miles to Baltimore; correct? A: Right. Q: And the Hershey system is approximately 70 miles to Baltimore, correct? A: I’ll accept that.”) (Ortman Test.).

¹⁹⁴ See Tr. at 6547-48 (“Q: And one of those would be Cecilton/Galena, correct? A: Correct. Q: And that system is within 40 to 50 miles of Baltimore, correct? A: Yes.”) (Ortman Test.).

¹⁹⁵ See Tr. at 6598 (“Q: So, is it your testimony that you did not prepare the actual list of systems on Schedule A? A: No, I reviewed Schedule A after they met my criteria to see if it was accurate.”) (Ortman Test.).

¹⁹⁶ See Tr. at 6908 (“I don’t know when Schedule A was actually prepared.”) (Bond Test.).

¹⁹⁷ See Tr. at 6913 (“Q: It could have been prepared on July the 31st, correct? A: It could have been.”) (Bond Test.).

¹⁹⁸ See Tr. at 6578 (“I haven’t seen any documents”) (Ortman Test.).

¹⁹⁹ See Representations of Counsel for MASN and Comcast (April 23, 2009 Letter from Counsel for MASN (“we did not find in Comcast’s production any documents from Michael Ortman in the period from July 21, 2006 to August 8, 2006” and “we are surprised by the absence of such documents from Comcast’s production”); April 28, 2009 Letter from Counsel for Comcast (noting this absence)).

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Comcast's field employees,²⁰⁰ with Mr. Bond,²⁰¹ or with anyone from MASN; he only discussed it with Ms. Gaiski or members of her team.²⁰² This complete lack of documentation or competent knowledge about the creation of Schedule A shows that the process of creating it was not detailed or methodical.

82. During the discussions surrounding the preparation of Schedule A, Mr. Ortman never discussed excluding any systems in Harrisburg, Roanoke/Lynchburg, or Tri-Cities.²⁰³ Schedule A was prepared by determining the systems that should be included on the list, not systems that should be excluded from the list. Mr. Ortman did not even recall thinking about the systems that had been excluded from Schedule A until late 2006 or early 2007.²⁰⁴

²⁰⁰ See Tr. at 6580 (“Q: Okay. So, you didn’t talk to any of the marketing people in the field in creating Schedule A? A: I may have, sizing up interest, but I don’t recall.”) (Ortman Test.); Tr. at 6591 (“Q: You didn’t actually do a survey of your field folks before Schedule A was put together. Is that correct? A: I felt I had – no, it is correct, because I felt we had time until next April when I would be able to gauge better what the demand was going to be.”) (Ortman Test.).

²⁰¹ See Tr. at 6810 (“Q: And your testimony is that Mr. Ortman chose which Comcast systems would not be watching MASN? A: Yes. Q: You didn’t speak to him directly? A: Yes. Q: You didn’t – JUDGE SIPPEL: Yes or no, you did speak to him? THE WITNESS: Correct. I did not speak to him.”) (Bond Test.).

²⁰² See Tr. at 6580 (“Q: Okay. Did you communicate with anyone other than Jen Gaiski and her team over Schedule A? A: I don’t believe so.”) (Ortman Test.).

²⁰³ See Tr. at 6648 (“Q: Okay. So you never discussed Roanoke-Lynchburg, and whether it should be on Schedule A. A: Not that I recall, not specifically. . . . Q: And you never discussed the Tri-Cities area . . .? A: Again, I discussed what should be included, not excluded.”) (Ortman Test.).

²⁰⁴ See Tr. at 6652 (“Q: Before [late ’06 or early ’07], you don’t specifically remember thinking about what was not on Schedule A? A: No.”) (Ortman Test.).

K. Comcast Intentionally Misled MASN into Accepting Schedule A as Consistent with the Parties' Carriage Negotiations

83. Comcast transmitted Schedule A to MASN with a cover message indicating that it reflected “the deal we’ve been discussing over the past two days.”²⁰⁵

84. Even though Mr. Ortman was centrally involved in preparing Schedule A, he was not aware of Mr. Bond’s representations to MASN about the Adelphia Exclusion.²⁰⁶ Mr. Ortman was not aware that Comcast had represented that former Adelphia systems had to be excluded for the time being from the deal because of low-bandwidth.²⁰⁷ The representations that Mr. Bond and others made to Messrs. Gluck and Wyche about the supposedly low-bandwidth former Adelphia systems in Roanoke, Lynchburg, and other Virginia systems were false. Systems with 550 MHz or more of capacity could carry MASN without issue.²⁰⁸ Most of the former Adelphia systems in Roanoke/Lynchburg had been upgraded to 750 MHz by July 2006.²⁰⁹ In fact, Schedule A contained numerous former Adelphia systems.²¹⁰

²⁰⁵ Comcast Ex. 14, at 14-1.

²⁰⁶ See Tr. at 6612 (“Q: Are you aware that the MASN representatives said they were told by Comcast that the reason why those Roanoke-Lynchburg could not be launched was for lack of bandwidth? A: I’m not aware of that.”) (Ortman Test.).

²⁰⁷ See Tr. at 6616 (“I’ve said that there’s no connection between Adelphia and bandwidth in terms of exclusions, or inclusions.”) (Ortman Test.).

²⁰⁸ See Tr. at 6653 (“Q: Is it a fact that any system with greater than 550 megahertz would not create a capacity issue today? A: It shouldn’t. Greater than 550 should be – greater than 750 should be fine.”) (Ortman Test.); Tr. at 6654 (“Q: – a Comcast system with 550 megahertz would not have a bandwidth issue in carrying MASN? A: It would be a challenge, but it would not be an issue. It certainly could be accomplished, as it was in ’06.”) (Ortman Test.); see also Tr. at 6926 (“Q: You’re not an expert on bandwidth, are you? A: No. Q: Mr. Ortman is an expert on bandwidth, isn’t he? A: Yes, he knows a lot more about it than me. . . . Q: So he understands more precisely what each system’s bandwidth constraints are than you do, correct? A: Yes.”) (Bond Test.).

²⁰⁹ See Tr. at 6616 (“about two-thirds” of these systems had been upgraded to 750 MHz by July 2006) (Ortman Test.).

²¹⁰ See Comcast Ex. 2, ¶ 22 (Ortman Written Test.).

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85. Mr. Ortman was also unaware of Comcast's representations to the FCC that it would rebuild the Adelphia systems.²¹¹ Contrary to those representations, Mr. Ortman testified that Comcast had no plans to rebuild some of them.²¹²

86. MASN did not discover that Comcast had excluded systems from Schedule A (beyond the Adelphia Exclusion) until January 2007.²¹³ Like MASN, Comcast's lead negotiator, Mr. Bond, did not learn that Comcast had excluded systems in the Harrisburg and Tri-Cities DMAs until after many months the agreement had been executed.²¹⁴

87. Although he was unaware of the specific systems that were excluded from Schedule A, Mr. Bond knew that it reflected his directive to "carve off" certain areas of MASN's territory. Mr. Bond nonetheless intentionally withheld this information from MASN's representatives. Mr. Bond also misled the MASN representatives by making factually incorrect statements about the purportedly low-bandwidth Adelphia systems that MASN relied upon in agreeing to accept initially less than complete coverage in MASN's footprint.

88. Common industry practice requires that the MVPD provide an accurate list of its systems to the programmer and to fill in any schedule of launched systems in a carriage agreement (practices reflecting the superior information of the MVPD).²¹⁵ With decades of

²¹¹ See Tr. at 6625 ("A: Is it a fact that Comcast promised the FCC it would make a substantial investment to upgrade former Adelphia systems? A: I don't know. It wouldn't be my role.") (Ortman Test.).

²¹² See Tr. at 6636 ("Is it a fact that Comcast does not intend to rebuild some former Adelphia systems? A: We have no immediate plans to rebuild some systems.") (Ortman Test.).

²¹³ See MASN Ex. 237, ¶ 29 (Gluck Written Test.).

²¹⁴ See Tr. at 6915 ("I don't recall specifically thinking about Harrisburg when we were doing that agreement") (Bond Test.); Tr. at 6929 ("Q: In negotiating the deal with MASN, you did not think about whether the Tri-Cities would be included on the list of Schedule A? A: No, I didn't think.") (Bond Test.).

²¹⁵ See MASN Ex. 237, ¶¶ 10, 16 (Gluck Written Test.); MASN Ex. 236, ¶¶ 31-32 (Wyche Written Test.).

combined experience, during which they have negotiated hundreds of carriage agreements, Mr. Gluck and Mr. Wyche have never received an incomplete list of systems from an MVPD – until Comcast provided an incomplete list to MASN in August 2006.²¹⁶

89. Consistent with experience and industry practice, MASN accepted that the List of Systems Comcast provided reflected the “deal [they had] been discussing.”²¹⁷ MASN additionally reviewed the list with a rough benchmark measure of subscriber totals. Schedule A contained a total of 2,245,000 subscribers. Adding the 150,000 former Adelphia subscribers, the total of 2,395,000 subscribers compared favorably to MASN’s internal estimates that Comcast had approximately 2.3 to 2.4 million expanded basic subscribers within MASN’s geographic territory.²¹⁸ This furthered MASN’s belief that Comcast was including in its List of Systems all systems within MASN’s territory, except the former Adelphia systems encompassing approximately 150,000 subscribers in Roanoke, Lynchburg, and other Virginia areas that were specifically discussed during the August 2006 negotiations.

90. No publicly available information would have provided a reliable means to determine whether Comcast’s list of systems was accurate.²¹⁹ Comcast does not publicly report subscriber totals for its individual systems. Even if a particular system’s name corresponds to its actual geographic location, it remains unclear which geographies that system serves. After MASN discovered the exclusion of certain systems in January 2007, it nonetheless took many

²¹⁶ See MASN Ex. 237, ¶¶ 10, 16 (Gluck Written Test.); MASN Ex. 236, ¶¶ 31-32 (Wyche Written Test.).

²¹⁷ MASN Ex. 237, ¶¶ 26-28 (Gluck Written Test.); see MASN Ex. 236, ¶¶ 39-40 (Wyche Written Test.).

²¹⁸ See MASN Ex. 236, ¶ 40 (Wyche Written Test.); MASN Ex. 237, ¶ 26 (Gluck Written Test.).

²¹⁹ See MASN Ex. 236, ¶ 39 (Wyche Written Test.); see MASN Ex. 237, ¶¶ 31-32 (Gluck Written Test.).

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months of discussions with Comcast to assemble an accurate list of the Foreclosed Areas.²²⁰

Those extended attempts to compile an accurate list show that MASN could not reasonably have verified the accuracy of Schedule A in August 2006. Indeed, Mr. Bond admitted that it would have taken Comcast itself several days to come up with even an imperfect list of systems.²²¹

91. MASN reasonably relied upon the list of cable systems that Comcast prepared. Like MASN, Comcast's witness, Mr. Orszag, requested a list of its Comcast systems. Like MASN, Mr. Orszag relied upon this list for a very important matter – offering his testimony under oath.²²² Like MASN, Mr. Orszag reasonably relied upon Comcast to provide an accurate list of Comcast systems that he requested:

Q: Okay. And did you put the schedule of systems together yourself[?] Did you?

A: No, I did not.

Q: You didn't try to use public source materials to get this together[?]

A: No, I did not.

Q: You asked Comcast to put it together, right?

A: Yes, I did.

Q: And when you got it, you didn't try to check [it] against public source materials to see if they gave you accurate information, did you?

²²⁰ See MASN Ex. 236, ¶¶ 42-43 (Wyche Written Test.).

²²¹ See Tr. at 6970, 6972 (testifying that it would have taken Comcast a “few days” to prepare an “imperfect” list of systems and that it took a year to create a list with MASN) (Bond Test.).

²²² See Tr. at 7076-77 (“Q: . . . You relied upon this document in forming your opinion in this case, correct? A: Yes, I did. Q: And that's both the expert report that you prepared and your testimony today, correct? A: That is correct. Q: And you take your opinions very seriously, don't you, sir? A: Of course, I do. Q: You make it under oath? A: Of course. Q: And it's your reputation on the line? A: Of course.”) (Orszag Test.).

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A: No, I had no reason to think that what they provided me was incorrect because I asked for a complete listing of systems and I believe that they provided them to me.

Q: Right. You trusted Comcast to make sure it was accurate, right?

A: I believe that they provided me with accurate data, yes, and I trusted them to do so.²²³

L. Comcast Refuses MASN's Specific Requests for Carriage in the Foreclosed Areas and Claims Low Demand for the First Time

92. MASN first learned in early 2007 that Comcast had not launched MASN on certain systems in the Foreclosed Areas.²²⁴ Beginning at that time, and continuing thereafter, MASN requested that Comcast carry MASN in the Foreclosed Areas. In particular, representatives for MASN travelled to Philadelphia to meet with representatives for Comcast to discuss this request in April 2007.²²⁵ Comcast has refused, stating that it was under no obligation to do so because of the Carriage Agreement.²²⁶

93. Sometime long after the carriage negotiations in 2006, Comcast for the first time claimed that there was low demand for MASN in some of the Foreclosed Areas – portions of the Harrisburg DMA, and the entire Roanoke/Lynchburg and Tri-Cities DMAs.²²⁷

²²³ Tr. at 7077-78 (Orszag Test.).

²²⁴ See MASN Ex. 237, ¶ 29 (“MASN first learned in or around January 2007 that Comcast had not launched MASN on certain of its cable systems in MASN’s Territory.”) (Gluck Written Test.).

²²⁵ See Tr. at 6068 (“There was a meeting in April with a number of representatives from both parties.”) (Gluck Test.).

²²⁶ See Tr. at 6123-24 (“Q: If I could turn you to paragraph 30 of your direct testimony. You indicate that the reason Comcast gave for not launching MASN was because it was not required to do [so] in excluded markets. A: Yes. That’s what Alan Dannenbaum told me over the phone the first day. . . . Q: Did they say it was because of [the] 2006 agreement? A: Yes, I think that was the deal.”) (Gluck Test.); see also MASN Ex. 237, ¶ 30 (Gluck Written Test.).

²²⁷ See MASN Ex. 236, ¶ 11 (“in none of my prior negotiations in 2005 and 2006 did Comcast or its representatives ever mention allegedly low demand for MASN’s programming in the Harrisburg, Roanoke-Lynchburg, or Tri-Cities DMAs”) (Wyche Written Test.); Tr. at 6068

M. Comcast Affords Preferential Treatment to its Affiliated RSNs, and Has Discriminated Against MASN in Numerous Ways

94. Mr. Burke, the President of Comcast Cable, has admitted that Comcast's affiliated networks "get treated like siblings as opposed to like strangers."²²⁸ Mr. Burke likewise admitted that Comcast's own networks receive a "different level of scrutiny."²²⁹ Mr. Burke's statements are corroborated and amplified by the record evidence in this proceeding.

95. Numerous Comcast documents confirm that Comcast applies a more favorable standard for its affiliated RSNs than to independent RSNs like MASN. *First*, Comcast documents confirm that Comcast explicitly considers its ownership of its affiliated RSNs in making programming decisions.²³⁰ [REDACTED]

[REDACTED]

[REDACTED]²³¹ [REDACTED]

[REDACTED]²³² As the cost of programming will always be cheaper if

("Q: When was the first time you heard Comcast say to you that there was low demand in these regions were talking about, the Harrisburg, the Roanoke, Lynchburg and the Tri-Cities DMAs? A: You know, I'll be candid. I don't recall them ever saying that directly to me. So I don't ever recall it being said to me.") (Gluck Test.).

²²⁸ MASN Ex. 243, at 7-8; *see also* Tr. at 7089 (Orszag Test.).

²²⁹ MASN Ex. 243, at 8; *see also* Tr. at 7090 (Orszag Test.).

²³⁰ *See* MASN Ex. 92.

²³¹ MASN Ex. 92, at 1.

²³² *See* Tr. at 7148 ("Q: And it is your opinion, is it not, sir, that this [is] exactly the type of calculation Comcast should be making in deciding which program to carry? A: That is correct, but I don't know what other parts they have of this analysis here. I can't see all their assumptions.") (Orszag Test.).

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Comcast owns it,²³³ Comcast expressly admits that it would *always* favor its affiliated programming.²³⁴

96. *Second*, Comcast prepared a [REDACTED]

[REDACTED]
[REDACTED]³⁵ This document shows that Comcast would carry its affiliated RSNs even when independent MVPDs would not do so.²³⁶

97. *Third*, [REDACTED] Comcast refused to carry at all MASN before entering into the Carriage Agreement. Since then, Comcast has insisted that MASN be held strictly to the terms of that Agreement. Comcast has long carried its affiliated RSNs, [REDACTED]²³⁷ Comcast has not

[REDACTED]³⁸ Comcast could not even find an

[REDACTED]²³⁹ Likewise, Comcast [REDACTED]

²³³ See Tr. at 7148 (“Q: Isn’t it true that the cost of programming is always going to be cheaper if Comcast owns it? A: Yes.”) (Orszag Test.).

²³⁴ See Tr. at 7149 (“Q: So all other things being equal, Comcast should always favor their affiliate programming? A: That’s precisely why I don’t believe this is the right standard to look at like this. Q: Is the answer to my question, yes? A: I said yes.”) (Orszag Test.).

²³⁵ MASN Ex. 99, at 1.

²³⁶ See MASN Ex. 99, at 20-23.

²³⁷ See Tr. at 6773 (“So, Comcast carries an affiliated RSN even after the contract has expired. Correct? A: Yes.”) (Bond Test.).

²³⁸ See Tr. at 6824-25 (“Q: And yet, [REDACTED] (Bond Test.).

²³⁹ See Representations of Counsel for Comcast (April 28, 2009 Letter) ([REDACTED])

[REDACTED]²⁴⁰ No independent RSN receives remotely similar treatment. The longest period of time that [REDACTED]⁴¹

98. Transactions between affiliated entities are more difficult to police for anti-competitive concerns.²⁴² Even though it is particularly important to guard against anti-competitive behavior in places that are not publicly monitored,²⁴³ Comcast takes no measures to separate its distribution and programming arms. To the contrary, internal documents confirm that Comcast encourages a close relationship between these branches. Comcast invites its cable executives to attend the budget meetings of Comcast's RSNs.²⁴⁴

99. Comcast likewise has [REDACTED]

[REDACTED] Mr. Ortman admitted that "it would be troubling if a programmer's rate card were shared with a competitor."²⁴⁵ [REDACTED]

[REDACTED]²⁴⁶ Mr. Bond

²⁴⁰ See Tr. at 6772 [REDACTED]

[REDACTED] (Bond Test.).

²⁴¹ See Tr. at 6789 [REDACTED]

[REDACTED] (Bond Test.).

²⁴² See Tr. at 7238-39 ("Q: And the flip side is also true, correct, that transactions between affiliated firms are harder to police for anti-competitive content? A: Yes.") (Orszag Test.).

²⁴³ See Tr. at 7239 ("Q: You need to be especially careful to make sure that anti-competitive activity isn't going on in places where it can't be publicly monitored, correct? "A: Yes. That's why we want to look at the behavior of other MVPDs.") (Orszag Test.).

²⁴⁴ See MASN Ex. 136, at 14 [REDACTED]

²⁴⁵ Tr. at 6534 ("Q: In your deposition you said it would be troubling if a programmer's rate card were shared with a competitor; do you recall that? A: Yes. Q: And do you stand by it today? A: Yes.") (Ortman Test.).

²⁴⁶ See MASN Ex. 108 ([REDACTED])

testified that this was [REDACTED]²⁴⁷ [REDACTED]

[REDACTED]⁴⁸ [REDACTED]

[REDACTED]²⁴⁹

100. Almost immediately after it entered into the Carriage Agreement with MASN, Comcast increased the rates it charged to its subscribers by the full amount of MASN's license fees.²⁵⁰ It was highly unusual for Comcast to create a mid-year rate hike. Comcast also sent a letter to its subscribers blaming this rate hike on the cost of MASN.²⁵¹ Comcast had never before sent out a letter ascribing such a rate hike to a particular programmer, much less one of its affiliated RSNs.²⁵² Comcast also was the only MVPD to act in this manner. Although all MVPDs obtain MASN at the same rates charged to Comcast, no other MVPD raised its rates after carrying MASN, much less publicly disparage MASN as the cause of a rate increase. Nor did any other MVPD send a letter to subscribers describing the cost of MASN.

101. Comcast has alleged low demand for MASN in some of the Foreclosed Areas as the reason for its non-carriage. That is not a standard Comcast has ever applied to its affiliated

²⁴⁷ See Tr. at 6828 [REDACTED] (Bond Test.).

²⁴⁸ See MASN Ex. 128 ([REDACTED])

²⁴⁹ See Tr. at 6534 (“Q: And you wouldn’t give a CSN affiliated agreement to MASN, would you? A: No. Q: Because it would be confidential? A: Correct. I don’t have it, but also because it’s confidential; that’s correct.”) (Ortman Test.).

²⁵⁰ See Tr. at 6821 (“Q: You’re aware that Comcast sent out a notice to its subscribers in September 2006 of a rate increase. Correct? A: Yes.”) (Bond Test.).

²⁵¹ See Tr. at 6821 (“Q: And that notice blamed MASN for the rate increase. Correct? A: Yes.”) (Bond Test.); see also MASN Ex. 13 (“‘MASN’s programming is very expensive to distribute. It will cost literally hundreds of millions of dollars over the next decade,’ Comcast Executive Vice President David L. Cohen said in a written statement. ‘These are costs that will ultimately have to be borne by cable customers.’”).

²⁵² See Tr. at 6822 (“Q: In fact, you can’t think of any other example in which Comcast blamed a particular network for a rate increase. Correct? A: Yes.”) (Bond Test.).

RSNs. There is no evidence that Comcast has ever studied or analyzed the demand for its affiliated RSNs in making a carriage decision²⁵³ – [REDACTED]

[REDACTED]²⁵⁴ When CSN-MA lost Orioles programming, which was its most expensive and desirable product,²⁵⁵ Comcast did not reduce its license fees or send a letter to subscribers blaming CSN-MA for keeping its fees high despite having lost its most valuable programming.

102. Comcast carried Orioles games to its subscribers in the Roanoke-Lynchburg and Tri-Cities DMAs when they were telecast by CSN-MA.²⁵⁶ CSN-MA lost these rights following the 2006 MLB season. Comcast stopped carrying Orioles games to its subscribers in the Roanoke-Lynchburg and Tri-Cities DMAs only when MASN began telecasting them in 2007.

103. Comcast carried Orioles games to its subscribers in the Harrisburg DMA when they were telecast by CSN-MA until 2005. After Comcast learned that it would not be able to

²⁵³ See Tr. at 7355-56 (“Okay. Did you do any research or analysis into whether Comcast is treating MASN differently from Comcast owned RSNs? A: I did not. Q: Do you know what the demand is for Comcast SportsNet Mid-Atlantic in any region across its footprint? A: I do not. Q: Do you know what the demand is for Comcast SportsNet Philadelphia in any region across its footprint? A: I do not.”) (Gerbrandt Test.); Tr. at 7357 (“Q: Because Comcast never asked you to study the demand for those products, true? A: That is correct.”) (Gerbrandt Test.); see also Tr. at 6807-08 (acknowledging he is not aware of any demand studies of any type ever done for CSN-MA) (Bond Test.).

²⁵⁴ See MASN Ex. 99.

²⁵⁵ See, e.g., MASN Ex. 118, at 1-2 (Letter from MVPD to Comcast [REDACTED])

²⁵⁶ See Comcast Answer at 37, ¶ 13 (“CSN-MA has been carried on Comcast and certain former Adelphia systems in southwestern Virginia for some time and included telecasts of Orioles baseball games during the period that CSN-MA had the rights to those games”).

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renew its rights to the Orioles following the 2006 season, Comcast removed the Orioles from the Harrisburg system. At or about the same time, Comcast also dropped from the Harrisburg system the Fox SportsNet RSN that telecast games of the Pittsburgh Pirates. These programming moves left only the Philadelphia Phillies in that area, whose games were being telecast on Comcast's affiliated RSN, CSN-Philly. Even though MLB has assigned Harrisburg to be the shared territory of the Orioles, Nationals, Pirates, and Phillies, Comcast has decided to carry only the team telecast by its affiliated RSN.

104. RSNs often have conflicts with the professional sporting events that they telecast. When two or more events occur during the same time period, an RSN typically telecasts the conflicting event on an "overflow" channel.²⁵⁷ MASN requires a non-dedicated overflow channel to telecast games of the Nationals or the Orioles when both teams are playing at the same time.²⁵⁸ Comcast has consistently expressed concerns about MASN's overflow requirements, and has indicated that this is a reason for not carrying MASN in the Foreclosed Areas.²⁵⁹ Comcast has taken pains, however, to ensure that its affiliated RSN, CSN-MA, would have whatever overflow channels were necessary to telecast its conflicting events.²⁶⁰ And that is

²⁵⁷ Tr. at 5604 (Cuddihy Test.).

²⁵⁸ See Tr. at 5604 (MASN contracts "provide[] for operators to provide us with a part time expanded basic channel" for overflow games) (Cuddihy Test.).

²⁵⁹ See MASN Ex. 235, ¶ 35 (Cuddihy Written Test.).

²⁶⁰ See MASN Ex. 235, ¶ 34 ("Comcast readily made accommodations to ensure that all of CSN-MA's live sports programming could be telecast even if that meant interrupting programming on other channels to do so.") (Cuddihy Written Test.); see also Tr. at 6527-28 (Ortman Test.) ("Q: [W]hen [there was a conflict situation for CSN-MA] Comcast had to scramble to find another channel to put on the game correct? A: Yes, we did.").

despite the fact that Comcast had no knowledge about whether such overflow channels were required by a contract.²⁶¹

105. “Split feeds” permit a programming network to sell targeted geographic markets to advertisers. A Comcast executive, Mr. Ortman, freely permitted CSN-MA the ability to offer split feeds in the mid-2000 time period.²⁶² MASN requested split feeds in 2007.²⁶³ Contrary to the position he took with CSN-MA, Mr. Ortman refused to permit MASN to offer split feeds. Mr. Ortman argued that MASN’s contract did not permit split feeds.²⁶⁴ This was a different standard than the one he had applied to CSN-MA and indeed this difference was motivated by his desire to protect the economic interests of affiliated entities.²⁶⁵ Mr. Ortman never looked at the CSN-MA contract to see if it permitted split feeds.²⁶⁶ In fact, Mr. Ortman did not even know whether one existed.²⁶⁷ This was true even though Mr. Ortman admitted that contracts are “an

²⁶¹ See Tr. at 6528 (“Q: . . . You don’t know whether Comcast was required by contract to put that game, that conflict game, one another channel? A: That is correct; I do not.”) (Ortman Test.).

²⁶² See Tr. at 6516-17 (“Q: You embarked with CSN MA in doing split feeds in the mid-2000s or before, is that correct? A: Correct.”) (Ortman Test.).

²⁶³ See Tr. at 6517 (“Q: In 2007, you became aware of MASN want[ing] to do split feeds; correct? A: Correct.”) (Ortman Test.).

²⁶⁴ See Tr. at 6509 (“Q: They should be held strictly to the written contract? A: Unless some alternative arrangement is made, that is correct.”) (Ortman Test.).

²⁶⁵ See Tr. at 6525 (“You wanted to protect the profit stream of a Comcast affiliated entity; correct? A: Spotlight in that case? Q: Yes. A: Yes.”) (Ortman Test.).

²⁶⁶ See Tr. at 6517-18 (“Q: You never looked at the CSN-MA contract to determine whether it permitted CSN MA to do split feeds; is that correct? A: That’s correct.”) (Ortman Test.).

²⁶⁷ See Tr. at 6505 (“Q: Okay. You’ve never seen a written contract between Comcast and CSN MA, correct? A: I have not. I don’t see most contracts.”) (Ortman Test.); Tr. at 6509 (“Q: But you don’t know whether Comcast has a valid contract to hold CSN MA up to, do you? A: I don’t know.”) (Ortman Test.).

important component of a relationship” with programmers.²⁶⁸ In fact, [REDACTED]

[REDACTED]²⁶⁹

106. Comcast’s more favorable treatment of its affiliated RSNs is so prevalent and accepted within Comcast that its executives view it as unproblematic. Mr. Ortman testified as follows:

Q: You don’t think there is a double standard that you, Mr. Ortman, in charge of the eastern division, thinks MASN should be held to its written contract with Comcast, but you are not even aware of the existence of a written contract between Comcast and CSN MA?

A: I don’t think of it as a double standard. I think of it as two different sets of circumstances in dealing with both networks. But they both get treated the same.²⁷⁰

107. Comcast has not adopted any internal practices or procedures to address the problems of affiliation-based discrimination created by Comcast’s substantial vertical integration of distribution and programming. MASN’s lead negotiator – Mr. Bond – testified that he never received any training with respect to affiliation-based discrimination.²⁷¹ Mr. Ortman, who was tasked with “carv[ing] off” systems from MASN’s territory, “never received any training on Comcast’s obligations under the Adelp[hi]a Order.”²⁷² And, despite having received training and instruction regarding sexual harassment and workplace safety, Mr. Ortman has received no training with respect to affiliation-based discrimination.²⁷³

²⁶⁸ Tr. at 6509 (Ortman Test.).

²⁶⁹ See Tr. at 6772 (Bond Test.).

²⁷⁰ Tr. at 6514 (Ortman Test.).

²⁷¹ See Tr. at 6767 (“Q: Are you aware that MASN alleges that this is a discrimination case? A: Yes. Q: Is it true that you’ve had no training on discrimination on the basis of affiliation. A: Yes.”) (Bond Test.).

²⁷² See Tr. at 6688 (Ortman Test.).

²⁷³ See Tr. at 6688 (“Q: But you never had training on discrimination based on affiliation. Correct? A: No formal training, that’s correct.”) (Ortman Test.).

III. COMCAST'S DEFENSES TO DISCRIMINATION ARE UNFOUNDED AND PRETEXTUAL

A. Comcast Did Not Deny Carriage to MASN in the Foreclosed Areas Because of Low Demand

108. Comcast did not deny MASN carriage in the Foreclosed Areas because it perceived a lack of demand for MASN. If Comcast thought demand for MASN would be low in a particular area, it would have mentioned this concern during the negotiations for carriage in August 2006. Comcast also would have requested a lower price in any area where it perceived demand to be low. Comcast never even studied the demand for MASN prior to excluding MASN from the Foreclosed Areas.²⁷⁴ The fact that Comcast never even mentioned consumer demand or requested a lower price in any of the Foreclosed Areas during the carriage negotiations²⁷⁵ – even though it successfully demanded an across-the-board reduction of MASN's price – proves that it was not a consideration in denying MASN carriage in the Foreclosed Areas.

109. Internal documents show that Comcast believed there to be demand for MASN in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs. Just three months before the carriage negotiations in August 2006, [REDACTED]

²⁷⁴ See Tr. at 6808 (“Q: You did not commission any studies with respect to the demand for MASN in the period before August 2006. Correct? A: Yes.”) (Bond Test.); Tr. at 6809 (“Q: In the summer of 2006, you did not do any kind of assessment of demand for MASN in systems on the periphery of MASN's television territory. Correct? A: Yes.”) (Bond Test.).

²⁷⁵ See Tr. at 6933-34 (“Q: There was no specific price negotiation with respect to Harrisburg, correct? A: Right. Q: There was no specific price negotiation with respect to Roanoke-Lynchburg, correct? A: Yes. Q: There was no specific price negotiation with respect to Tri-Cities, correct? A: Yes. . . . Q: There was no discussion of demand in Harrisburg in July and August of 2006, correct? A: Yes. Q: There was no discussion of demand in the Roanoke-Lynchburg area in July-August, 2006, correct? A: Correct. Q: There was no discussion of demand in the Tri-Cities area in July-August of 2006, correct? A: Correct.”) (Bond Test.).

[REDACTED]

[REDACTED]

[REDACTED]²⁷⁶ [REDACTED]

[REDACTED]

This document entirely undermines Comcast’s assertion in this litigation that it believed there was insufficient demand for MASN in these regions.

110. In preparing Schedule A, which excluded the Foreclosed Areas, Comcast never analyzed or studied consumer demand for MASN.²⁷⁷ Consumer demand was not one of the three criteria Comcast used to create Schedule A. There is no evidence that Comcast even discussed consumer demand in deciding which systems to exclude from Schedule A.

111. Comcast first mentioned consumer demand as a reason for not carrying MASN in some of the Foreclosed Areas long after the carriage negotiations in 2006.²⁷⁸ Comcast has claimed low demand with respect to certain areas within the Harrisburg DMA and the entire Roanoke-Lynchburg and Tri-Cities DMAs. It is evident that Comcast would have raised this issue during the carriage negotiations in 2006 if it had been a genuine concern. Mr. Cuddihy testified that, when he worked at CSN-MA, the Orioles were viewed as CSN-MA’s most

²⁷⁶ See MASN Ex. 99, at 20-23.

²⁷⁷ See Tr. at 6550-51 (“Q: But you did no studies on consumer demand, did you, sir? A: Based on my experience. . . . Q: You did not [do a] demand study, correct? A: That’s correct.”) (Ortman Test.).

²⁷⁸ See MASN Ex. 236, ¶ 11 (“in none of my prior negotiations in 2005 and 2006 did Comcast or its representatives ever mention allegedly low demand for MASN’s programming in the Harrisburg, Roanoke-Lynchburg, or Tri-Cities DMAs.”) (Wyche Written Test.); Tr. at 6068 (“Q: When was the first time you heard Comcast say to you that there was low demand in these regions we’re talking about, the Harrisburg, the Roanoke, Lynchburg and the Tri-Cities DMAs? A: You know, I’ll be candid. I don’t recall them ever saying that directly to me. So I don’t ever recall it being said to me.”) (Gluck Test.).

valuable programming in every market.²⁷⁹ Other evidence confirms that Comcast's claim of low demand is pretextual.

B. The Decisions of Other MVPDs Confirm the Demand for MASN in Each of the Foreclosed Areas

112. The record evidence shows consumer demand for MASN in each of the Foreclosed Areas at the prices charged by MASN. This is shown by the carriage decisions of other MVPDs. In each of the Foreclosed Areas, Comcast's most significant competitors – DirecTV and DISH²⁸⁰ – carry MASN at the same prices, terms, and conditions that have been offered to Comcast. Verizon – an emerging competitor to Comcast²⁸¹ – also carries MASN in the Harrisburg and Roanoke-Lynchburg DMAs. These are arm's-length market transactions by Comcast's competitors that, unlike Comcast, have no affiliated RSNs to protect or otherwise benefit. There is no evidence that each of these MVPDs has incorrectly measured consumer demand for MASN in the Foreclosed Areas, or has agreed to pay too much for MASN in these areas. These arm's-length market decisions therefore provide powerful evidence that Comcast would carry MASN in the Foreclosed Areas if it did not have affiliated RSNs to protect.

113. The fact that Comcast's major competitors are carrying MASN, but Comcast is not, suggests that Comcast's refusal to carry MASN is motivated by broader anticompetitive ends. Comcast's lead negotiator acknowledged that Comcast suffers short-term harm when its

²⁷⁹ See MASN Ex. 235, ¶ 26 (Cuddihy Written Test.).

²⁸⁰ See Tr. at 7168 (“Q: Isn’t it true that DIRECTV and Dish are Comcast’s largest actual competitors? A: They are their largest direct competitors for subscribers, yes. Q: And that is true within the three regions we’re talking about today, correct? A: Yes, that is true.”) (Orszag Test.); see also Tr. at 6863 (“Q: And Comcast’s competitors include DirecTV and Dish. A: Yes.”) (Bond Test.); Tr. at 6479 (Ortman Test.).

²⁸¹ See Tr. at 6863-64 (“Q: And Comcast’s competitors also include the telephone companies, like Verizon FiOS. A: Yes.”) (Bond Test.); Tr. at 6479-80 (Ortman Test.).

competitors are carrying a network and it is not and that Comcast is at a competitive disadvantage not carrying Orioles and Nationals games.²⁸²

114. The carriage decisions of Comcast's major competitors are consistent with those of smaller MVPDs. Specifically, in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs, 77 percent, 81.5 percent, and 79.8 percent, respectively, of non-Comcast MVPD subscribers receive MASN.²⁸³ The fact that MVPDs (excluding Comcast) that serve approximately 80 percent of the subscribers in each of these regions carry MASN shows the strong demand for MASN in these regions.

115. There is no evidence to distinguish the decisions of these competitors from the ones Comcast would make if it did not have affiliated RSNs to protect. In particular, there is no evidence that DirecTV and DISH have different opportunity costs than Comcast.²⁸⁴ Comcast offered testimony on this issue only from Mr. Orszag, who admitted that he did not even try to quantify what these different costs might be.²⁸⁵ Notably, Mr. Orszag recently testified for Comcast in another proceeding that this Tribunal should distinguish the carriage decisions of DirecTV and DISH, but he never suggested that they should be distinguished because of supposed differences in opportunity costs. No other documentary or testimonial evidence suggests any difference in the opportunity costs of Comcast and its competitors. To the contrary,

²⁸² See Tr. at 6863-84 (Bond Test.).

²⁸³ See MASN Ex. 241 (demonstrative); MASN Ex. 238, ¶ 94, Table 8 (underlying data) (Singer Written Test.).

²⁸⁴ See Tr. at 7176 (“Q: We’re talking about very specific markets and systems, correct? A: That is correct. Q: And you don’t know what the difference is in the opportunity costs for the satellite guys and Comcast in those regions, do you? A: It’s a very difficult calculation to do and it’s not one that I’ve have been able to undertake. Q: So the answer is no, you don’t? A: I do not know, yes.”) (Orszag Test.).

²⁸⁵ See Tr. at 7177 (“It’s something I thought about doing. I just couldn’t figure out a way to try to do it. So the answer is – I mean the answer is I thought about doing it. I tried to develop a methodology to do it, but it’s not something I was able to undertake.”) (Orszag Test.).

Mr. Ortman testified that Comcast systems with at least 550 MHz of capacity could carry MASN without issue.²⁸⁶ Mr. Orszag did not even refer to documents regarding the capacity of systems in the Foreclosed Areas in offering his opinions.²⁸⁷

C. Other Objective Evidence Shows Strong Demand for MASN in the Foreclosed Areas

116. Nielsen ratings also show a strong demand for MASN in the Harrisburg and Roanoke-Lynchburg DMAs in the two years preceding the 2006 carriage negotiations between MASN and Comcast. (There is no record evidence of Nielsen ratings for the Tri-Cities DMA.) These ratings measure viewership in a DMA. Mr. Ortman admitted that a rating of [REDACTED] or higher would be very high.²⁸⁸ In the Harrisburg DMA, cable ratings for Orioles games were [REDACTED] in 2004 and [REDACTED] in 2005;²⁸⁹ they were even higher ([REDACTED] in 2004 and [REDACTED] in 2005) for broadcast stations.²⁹⁰ In the Roanoke-Lynchburg DMA, cable ratings for Orioles games were [REDACTED] in 2004 and [REDACTED] in 2005,²⁹¹ which also reflect a strong demand.²⁹²

117. These Orioles ratings understate the demand for MASN. This is because MASN also telecasts Nationals games, for which there was no evidence of Nielsen ratings. As set forth

²⁸⁶ See Tr. at 6596 (“JUDGE SIPPEL: Had to be a minimum of 550. Right? THE WITNESS: Correct.”) (Ortman Test.).

²⁸⁷ See Tr. at 7185 (“Q: In fact, you listed all the documents that you relied upon in forming your expert opinion, correct? A: That I relied upon, not considered. Q: Correct, you relied upon? A: Yes. Q: And you did not list any documents reflecting what the capacities would be for the systems at issue, true? A: That is true.”) (Orszag Test.).

²⁸⁸ See Tr. at 6559 (“Q: Okay. Now is it a fact[] that a rating of [REDACTED] or better would get your attention? A: It would get my attention. Q: And anything over a [REDACTED] would also get your attention? A: It certainly would.”) (Ortman Test.).

²⁸⁹ See MASN Ex. 82, at 78 (2004 ratings); MASN Ex. 84, at 77 (2005 ratings).

²⁹⁰ See MASN Ex. 82, at 32 (2004 ratings); MASN Ex. 84, at 31 (2005 ratings).

²⁹¹ See MASN Ex. 82, at 79 (2004 ratings); MASN Ex. 84, at 78 (2005 ratings).

²⁹² See Tr. at 5710 (“So if you are doing a point nine, any cable industry expert will tell you that that is a really good number.”) (Cuddihy Test.).

above, however, Comcast deemed the [REDACTED]

[REDACTED]⁹³ It is therefore evident that Comcast believed that Nationals games would substantially increase the demand for MASN.

118. MLB also has determined a demand for MASN in every Foreclosed Area by assigning these territories to the Orioles and Nationals.²⁹⁴ MLB has assigned the Orioles and Nationals exclusive rights to the Roanoke-Lynchburg and Tri-Cities DMAs.²⁹⁵ MLB has assigned the Orioles and the Nationals shared rights in the Harrisburg DMA with the Philadelphia Phillies and the Pittsburgh Pirates.²⁹⁶ It is evident that MLB did not assign these rights randomly, but upon consideration of the interests of the baseball fans in these regions.

119. The studies that Comcast prepared during this litigation also reflect a strong demand for MASN in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs. In two surveys, Comcast asked people to “rate [their] interest” in a number of MLB teams on a scale of 0-5, with 0 being “[n]ot at all [i]nterested” and 5 being “[v]ery interested.”²⁹⁷ Ratings of 4 and 5 were aggregated in a “Top 2 Box Summary”,²⁹⁸ ratings of 2 and 3 were aggregated in a “Middle Box Summary.”²⁹⁹ In all three DMAs, consumers rated their interest in the Orioles or Nationals (or both) among the five highest rated MLB teams. In the Top 2 Box Summary, the Orioles or Nationals were rated #2 and #4 in Roanoke-Lynchburg; #2 and #4 in Tri-Cities; and #3 and #5 in

²⁹³ See MASN Ex. 91, at 4.

²⁹⁴ See MASN Ex. 236, ¶ 4 (“It is my understanding that MLB allocates television territories (i.e., DMAs) to teams based on its determination about the team in which fans in that territory are most likely to show interest.”) (Wyche Written Test.).

²⁹⁵ See MASN Ex. 236, ¶ 6.

²⁹⁶ See MASN Ex. 236, ¶ 6.

²⁹⁷ Comcast Ex. 78, at 20-21, Table 18; Comcast Ex. 79, at 19-20, Table 16.

²⁹⁸ MASN Ex. 351 (demonstrative; citing source data).

²⁹⁹ MASN Ex. 352 (demonstrative; citing source data).

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Harrisburg.³⁰⁰ In the Middle Box Summary, the Orioles or Nationals were rated #1 in Harrisburg; #1 and #3 in Roanoke-Lynchburg; and #3 in Tri-Cities.³⁰¹ Taken together, the Top 2 and Middle Box Summaries show a strong demand for MASN in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs as reflected by both the high (4-5) and medium (2-3) interest ratings of consumers in these markets.

120. The individual ratings for the Orioles and the Nationals understate the demand for MASN. Because MASN telecasts games of both the Orioles and the Nationals, it is inadequate to consider each separately. The most appropriate measure of the demand for MASN therefore combines the interest in the Orioles and the Nationals. This measure properly aggregates individuals who expressed interest in one team but not the other, as all of these individuals would demand MASN. It also reflects the increased demand for MASN by individuals who expressed interest in both the Orioles and the Nationals; such an individual will demand MASN more than an individual who only likes one of these teams. In the Top 2 Box Summary, the combined ratings for the Orioles and Nationals rank #1 and #3 in Roanoke-Lynchburg; #2 and #3 in Tri-Cities; and #3 in Harrisburg.³⁰² The Middle Box Summary reflects even stronger demand for MASN: the combination of the Orioles and Nationals ranked #1 in every survey in all three DMAs.³⁰³

121. These objective measures of demand understate the current demand for MASN in the Foreclosed Areas. The interest of sports fans waxes and wanes upon their ability to follow a

³⁰⁰ See MASN Ex. 351 (demonstrative; citing source data).

³⁰¹ See MASN Ex. 352 (demonstrative; citing source data).

³⁰² See MASN Ex. 351.

³⁰³ See MASN Ex. 352.

team closely over the course of a season, including being able to watch them on television.³⁰⁴

Comcast's refusal to carry MASN to hundreds of thousands of subscribers in these markets has reduced fan interest in the Orioles and Nationals in the Foreclosed Areas and therefore artificially reduced demand for MASN.³⁰⁵

D. The Price Charged by MASN in the Foreclosed Areas is Consistent with Fair Market Demand in These Regions

122. The prices charged by MASN for carriage in the Foreclosed Areas are the same as the prices paid by every other MVPD that carries MASN in those areas, including Comcast's major competitors. This price is the same – [REDACTED] – in the three largest areas of foreclosure, Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs.³⁰⁶ This price is considerably less [REDACTED] than the prices charged for MASN in the Baltimore and Washington, D.C. areas.³⁰⁷ These arm's-length market transactions of competing MVPDs that carry MASN at these prices show that this is the appropriate price in these areas.³⁰⁸ There is no evidence that these other major MVPDs each were mistaken to pay these prices for MASN in light of the market demand in these regions. As Dr. Singer explained, "if the [REDACTED] was considered inappropriately high for MASN's programming in the contested areas, why in the world is everyone paying it?"³⁰⁹

³⁰⁴ See MASN Ex. 235, ¶ 25 (Cuddihy Written Test.).

³⁰⁵ Tr. at 7209 ("Q: And would you agree with me that seeing a game in a particular region tends to build fan loyalty? A: Seeing a fan? I'm sorry. Q: I'm sorry, seeing a game broadcast in a particular region tends to build fan loyalty in that – A: I'll agree that it tends to, yes. Q: And losing it, losing those eyeballs in a particular pocket risks losing those fans, true? A: Potentially, yes.") (Orszag Test.).

³⁰⁶ See MASN Ex. 238, ¶ 53, Table 2 (Singer Written Test.).

³⁰⁷ See MASN Ex. 238, ¶ 52 (Singer Written Test.).

³⁰⁸ See MASN Ex. 238, ¶ 53 (Singer Written Test.).

³⁰⁹ Tr. at 6420 (Singer Test.).

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123. This price – [REDACTED] – also compares favorably to the prices paid by Comcast to carry other RSNs. It is common in the industry to value a RSN by using a normalized metric that accounts for the number of professional baseball, basketball, and hockey games it telecasts on an annual basis.³¹⁰ This measure is called the per-subscriber per-major-pro-event rate (“PSPPE”). The PSPPE rate is calculated by dividing an RSN’s annual per-subscriber license fee by the total of live major professional sporting events that the RSN televises each year. Comcast’s internal documents confirm that it utilizes this metric.³¹¹ MASN’s PSPPE rate is lower than the rates of other RSNs that Comcast willingly carries in the Foreclosed Areas – including Comcast’s affiliated RSNs, which charge much more on a PSPPE basis than MASN.³¹² The PSPPE analysis confirms that MASN’s price in the Foreclosed Areas is reasonable.

124. Another economic analysis likewise confirms that MASN’s price in the Foreclosed Areas is appropriate. Dr. Singer performed a regression analysis to predict the price for MASN based on numerous explanatory variables (i.e., price, total professional games telecast, distance from venue, team performance).³¹³ This analysis showed that the price for MASN is somewhat lower than the price that Comcast voluntarily pays for comparable RSN programming across the nation.³¹⁴

³¹⁰ See MASN Ex. 236, ¶ 16 (Wyche Written Test.).

³¹¹ See MASN Ex. 138, at 6 (discussing “estimated pricing” method that involves “comparing the number of ‘in market pro-product equivalent’ games on the network to the price paid for pro games on other RSNs”).

³¹² See MASN Ex. 238, ¶¶ 57-61 (Singer Written Test.).

³¹³ See MASN Ex. 238, ¶¶ 63-79 (Singer Written Test.).

³¹⁴ See MASN Ex. 238, ¶ 79 (Singer Written Test.).

E. Comcast's Assertion of Low Demand Is Based on Irrelevant Evidence and Unreliable Methodology

125. Comcast's witness, Mr. Gerbrandt, testified about fan interest in the Orioles and the Nationals. But Mr. Gerbrandt did not review the survey ratings of interest in the Orioles and Nationals. Mr. Gerbrandt only reviewed one different question: "What Major League Baseball team do you tend to follow the most?"³¹⁵ This question was intended to measure fan interest.³¹⁶ But it does not capture people who want to watch more than one team on television.³¹⁷ This question also does not measure television viewership. An MVPD like Comcast is interested in whether people want to watch certain programming on television.³¹⁸ Mr. Gerbrandt testified, however, that he did not know of any correlation whatsoever between the responses he reviewed and the actual viewership of games on television.³¹⁹ Mr. Gerbrandt's analysis of this survey question therefore does not measure the demand for viewing MASN's television programming.

³¹⁵ Tr. at 7316 ("Q: You refer to several surveys that purport to measure fan interest. Correct? A: I'm referring to survey questions that asked a very specific question: 'What Major League Baseball team do you tend to follow the most?' So, my opinions are based on that unaided question, yes. Q: And you offer an interpretation of the results. Correct? A: I offer the results. What it shows is that there's very, very low fan interest . . .") (Gerbrandt Test.).

³¹⁶ See Tr. at 7316 (Gerbrandt Test.).

³¹⁷ See Tr. at 7344 ("Q: Mr. Gerbrandt, is it your opinion that people only want to watch on TV the team they follow the most. A: No.") (Gerbrandt Test.).

³¹⁸ See Tr. at 7351 ("Q: Isn't it true that they're trying to anticipate viewership in making a carriage decision? Do those words sound familiar, Mr. Gerbrandt? A: Yes. Q: They're your words, aren't they? A: They are. Q: So would you agree with yourself today that MVPDs like Comcast are trying to anticipate viewership in making a carriage decision? A: Yes.") (Gerbrandt Test.).

³¹⁹ See Tr. at 7353 ("Q: Now, you don't know how the fan interest that you measured correlates to actual viewership, correct? A: That is correct. . . . Q: You also don't know how the phone survey correlates to viewership, correct? A: That is correct.), 7355 ("Q: Mr. Gerbrandt, isn't it true that you have no idea how the fan interest that you measure in the online survey correlates to actual viewership? A: Correct.") (Gerbrandt Test.).

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Mr. Gerbrandt did not even consider asking a more appropriate question: Would you want to watch Orioles or Nationals games on television?³²⁰

126. Mr. Gerbrandt also reviewed data tabulating the sales of MLB merchandise. As with the survey question he reviewed, Mr. Gerbrandt did not know of any correlation between MLB sales and viewership.³²¹ Mr. Gerbrandt's analysis of these data therefore does not measure the demand for viewing MASN's television programming.

127. Mr. Gerbrandt's analysis based on tables of statistical data in his report was flawed.³²² Mr. Gerbrandt was unable to explain numerous parts of the survey results.³²³ He is not familiar with statistical methodology and repeatedly declined to answer such questions by stating "I'm not a statistician."³²⁴

128. Mr. Gerbrandt's methodology likewise was flawed. Instead of employing valid statistical methods, Mr. Gerbrandt drew conclusions from the statistical data after placing them in simple rank order.³²⁵ Critically, Mr. Gerbrandt did not determine whether any of his rank ordering results was statistically significant.³²⁶ Accordingly, his results could be attributed to

³²⁰ See Tr. at 7343 ("Isn't it true that you didn't even consider asking another question, 'Would you want to watch Orioles games on TV?' A: . . . I don't think so.") (Gerbrandt Test.).

³²¹ See Tr. at 7353 ("I don't know how the merchandise sales correlates to viewership, that's correct.") (Gerbrandt Test.).

³²² See Comcast Exs. 77, 78, 79.

³²³ See Tr. at 7327 ("Q: Is it true that when we spoke last month during your deposition, you couldn't interpret numerous parts of the studies that you relied upon? A: There was some – absolutely. . . .") (Gerbrandt Test.).

³²⁴ E.g., Tr. at 7320, 7325, 7362, 7365 (Gerbrandt Test.).

³²⁵ See Tr. at 7357 ("Q: You just looked at the rank orderings from the surveys that you ordered to be commissioned, right? A: That and the merchandise sales, correct.") (Gerbrandt Test.).

³²⁶ See Tr. at 7362 ("Q: Your deposition, we asked the following question, you gave the following answer; Question; 'Did you run any analyses to determine whether any of your findings were statistically significant'? Answer; 'I did not'. Do you recall being asked that

chance.³²⁷ In fact, there were several unexplained deviations in the rank ordering relied upon by Mr. Gerbrandt. For example, the Dodgers were ranked fourth in one survey, but did not appear in the Top 5 on the other two surveys; the Cubs were ranked second in one survey, fourth in another, and did not appear in the Top 5 on the third; and five teams were tied for second in one survey, but four of these teams did not appear in the Top 5 of another survey.³²⁸

129. Even if the results of Mr. Gerbrandt's rank ordering were correct, they do reflect a demand for MASN. MASN telecasts numerous games of the teams fans supposedly "follow the most" in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs. Even excluding all interest in the Orioles and the Nationals, fans in these regions would still see the teams that Mr. Gerbrandt claims they "follow the most" 40 to 60 times on MASN each year.³²⁹

F. Comcast's Claim that It Does Not Carry CSN-MA in the Roanoke-Lynchburg and Tri-Cities DMAs Because of ACC Programming is Not Supported by Objective Evidence

130. Comcast, as noted above, carried Orioles programming throughout the Roanoke-Lynchburg and Tri-Cities DMAs for years when those games were telecast by its affiliated RSN, CSN-MA. Comcast stopped carrying Orioles programming in these areas only after MASN acquired these rights – even though MASN telecasts approximately twice as many Orioles games per year (160) than CSN-MA did (80-90).³³⁰ In this litigation, Comcast has claimed that it

question and giving that answer? A: I do. Q: Do you stand by that testimony? A: I do.”) (Gerbrandt Test.).

³²⁷ See Tr. at 7360 (“Q: [It is important to determine statistical significance] because you need to make sure the results are not just a product of dumb luck, correct? A: That is correct.”) (Gerbrandt Test.).

³²⁸ See MASN Ex. 356 (demonstrative); Tr. at 7368-70 (Gerbrandt Test.).

³²⁹ Tr. at 7451 (“Q: So even if your analysis was correct and even if you analyzed the right question, fans would still see very popular teams on MASN about 40 to 60 times a year in every disputed market, correct? A: Correct.”) (Gerbrandt Test.).

³³⁰ See MASN Ex. 235, ¶ 13 (Cuddihy Written Test.).

carried CSN-MA in the Roanoke-Lynchburg and Tri-Cities DMAs because of the demand for its Atlantic Coast Conference (“ACC”) basketball programming, not its Orioles programming. This claim is unfounded and pretextual.

131. *First*, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]³³¹ Those [REDACTED] prove that Comcast believed Orioles programming was critical to those regions.

132. *Second*, there is no evidence that the ACC programming available on CSN-MA has driven a carriage decision in any region, much less the Roanoke-Lynchburg and Tri-Cities DMAs. Mr. Cuddihy, who negotiated the rights to carry ACC basketball when he worked for CSN-MA, testified that Comcast never believed that ACC programming would drive a carriage decision in any market.³³² Comcast did not identify a single MVPD that decided to carry CSN-MA because of its ACC basketball programming. Comcast did not provide any evidence of how much CSN-MA paid for its ACC basketball programming, or even the overall number of ACC basketball games it has telecast.³³³ Furthermore, despite having stated in his written testimony that ACC programming drove demand for carriage of Home Team Sports in southwestern

³³¹ See MASN Ex. 99, at 18-24.

³³² See Tr. at 5845 (“Q: When you were at CSNMA, did anyone regard those ACC basketball games as important for carri[age] decisions of CSNMA in Southwest Virginia? A: No, not at all. That never came up.”) (Cuddihy Test.); see MASN Ex. 235, ¶ 29 (“CSN-MA was skeptical of doing the deal it believed that it would lose money.”) (Cuddihy Written Test.).

³³³ See Tr. at 6569 (“Q: And you don’t know what CSN MA pays for ACC games today? A: No, I don’t.”) (Gerbrandt Test.); Tr. at 6572 (“Q: How many ACC conference games did CSN MA telecast in 2008-2009? A: I don’t know exactly.”) (Ortman Test.); see also Tr. at 7420 (“Q: Do you know how many games are actually shown on Comcast of ACC basketball? A: I do not.”) (Gerbrandt Test.).

Virginia (at the time Mr. Ortman worked for Home Team Sports), Mr. Ortman could not name a single MVPD that decided to carry Home Team Sports because of ACC programming.³³⁴

133. MASN introduced evidence that numerous other networks – including national networks like ABC, CBS and ESPN – carry the bulk of ACC basketball games.³³⁵ Another regional network, Raycom Sports, is the official network of ACC basketball.³³⁶ CSN-MA only has exclusive rights to telecast a small number of non-conference ACC basketball games,³³⁷ which are less valuable than conference games.³³⁸

134. ACC basketball games might involve numerous teams from Boston to Miami.³³⁹ Persons who express an interest in ACC basketball do not wish to watch every ACC basketball team.³⁴⁰ Of the eight ACC basketball games exclusively assigned to CSN-MA, five involve the

³³⁴ See Tr. at 6575 (Ortman Test.).

³³⁵ See MASN Ex. 354.

³³⁶ See Tr. at 7418 (“Q: Isn’t it true that Raycom is actually the official network of ACC basketball? A: I’ll accept – I believe that’s the case, yes.”) (Gerbrandt Test.).

³³⁷ See MASN Ex. 353, at 5-6 (2008-09 ACC basketball schedule); MASN Ex. 354, at 1 (listing ACC basketball television appearances in 2008-09).

³³⁸ See Tr. at 6571-72 (“Q: Okay, and would you agree that ACC conference games are the most important games? A: Most – they are more valuable than non-conference games, yes.”) (Ortman Test.).

³³⁹ See Tr. at 7427 (“And they go from Boston College, correct, in Massachusetts? A: Yes, it covers a wide region, yes. Q: It goes all the way down to Miami in Florida, correct? A: I believe so, yes.”) (Gerbrandt Test.).

³⁴⁰ See Tr. at 7432 (“Q: Is it your belief that if they say they like the ACC the most, they want to watch every single team that’s in the ACC? A: No.”) (Gerbrandt Test.).

University of Maryland.³⁴¹ There is no evidence that these games are desirable to fans in the Roanoke-Lynchburg or Tri-Cities DMAs.³⁴²

135. In the Roanoke-Lynchburg and Tri-Cities DMAs, moreover, surveys suggest an interest in four ACC basketball teams: Virginia Tech University, the University of Virginia, Duke University, and the University of North Carolina.³⁴³ But CSN-MA telecasts only a handful of games involving these teams.³⁴⁴ It is implausible to believe that these few games, spread out over a few months, have caused any MVPD to carry CSN-MA in the Roanoke-Lynchburg or Tri-Cities DMAs for the entire year.

G. Comcast’s Supposed Evidence of Non-Discrimination Is Unreliable

136. Comcast’s only witness regarding non-discrimination was an economist who, by his own admission, did not rely on any internal Comcast documents in forming his conclusions regarding discrimination.³⁴⁵ Mr. Orszag based his opinion on the following standard: “Thus, to establish an economic basis for its discrimination claims against Comcast, *MASN must demonstrate that Comcast’s decisions not to carry the network on the systems at issue cannot be plausibly reconciled with the demand (or lack thereof) for MASN by the systems subscribers, MASN’s license fees, and alternative uses of the available system capacity.*”³⁴⁶ Based on this standard, Mr. Orszag opined that it is perfectly “appropriate” that Comcast has acknowledged

³⁴¹ See MASN Ex. 353, at 5-6 (listing schedule); see also Tr. at 7444-45 (Gerbrandt Test.).

³⁴² See Tr. at 7445-46 (“And Maryland is not showing up on your surveys as one of the top four teams that people in Southwestern Virginia might be interested in[,] in the ACC, correct? A: That is correct.”) (Gerbrandt Test.).

³⁴³ See Tr. at 7432-32 (Gerbrandt Test.).

³⁴⁴ See MASN Ex. 353, at 5-6 (listing schedule).

³⁴⁵ See Tr. at 7249 (Orszag Test.).

³⁴⁶ MASN Ex. 4, ¶ 30 (Orszag Written Test.) (emphasis added); see also Tr. at 7140 (“I believe the statement is absolutely correct.”) (Orszag Test.).

that it applies “a different level of scrutiny” to unaffiliated as opposed to affiliated programming networks.³⁴⁷ Mr. Orszag further opined that Comcast’s desire to obtain the very programming that MASN acquired was irrelevant to his analysis.³⁴⁸

137. Instead, Mr. Orszag asserted that the “most direct and compelling evidence of the lack of discrimination can be seen in the carriage decisions” of other MVPDs.³⁴⁹ Mr. Orszag pointed to a number of *cable* MVPDs in the Harrisburg, Roanoke-Lynchburg and Tri-Cities DMAs that did not carry MASN as proof that Comcast was not discriminating.³⁵⁰ This analysis is misleading. [REDACTED]

[REDACTED]

[REDACTED] 51

138. These very small MVPDs do not compete with Comcast.³⁵² Nor do they resemble Comcast; Mr. Ortman testified that a “very small system” for Comcast would have a [REDACTED] [REDACTED]³⁵³ – which is larger than most of these MVPDs as a whole. The carriage decisions of these “very small” MVPDs are not a relevant comparator to the carriage decisions of

³⁴⁷ Tr. at 7090 (Orszag Test.).

³⁴⁸ Tr. at 7093 (“Q: . . . So the fact that Comcast wanted this programming in 2005 and 2006 is not relevant to you in determining whether Comcast discriminates today. Is that right? A: That is correct.”) (Orszag Test.).

³⁴⁹ Comcast Ex. 4, ¶ 34 (Orszag Written Test.).

³⁵⁰ See Comcast Ex. 4, ¶ 34 (Orszag Written Test.).

³⁵¹ See Comcast Ex. 4, at 17-18, Tables 1-3 (Orszag Written Test.).

³⁵² See Tr. at 6480 (“Q: But most of the cable operators in the MASN footprint are not competitors with Comcast; is that correct? A: Most are neighbors; some are overbuilders. Q: And if they are neighbors Comcast does not compete with those cable operators, correct? A: Correct.”) (Ortman Test.).

³⁵³ Tr. at 6496 (Ortman Test.).

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Comcast's major competitors, DirecTV and DISH. Mr. Orszag admitted that "some decisions [] sometimes count more than others"³⁵⁴ and "one wants to put more weight on the bigger ones."³⁵⁵

139. Comcast offered three specific examples of purportedly acting to benefit MASN in an attempt to refute a finding of discrimination. Comcast does not suggest that any discrete act which benefited MASN would prove that Comcast did not discriminate against MASN.³⁵⁶ In any event, the examples cited by Comcast show, at best, an incidental benefit to MASN. *First*, Comcast states that it launched MASN to approximately [REDACTED] subscribers earlier than the time required by the Carriage Agreement. Comcast did so, however, because it was unable to reach the number of subscribers it was required to launch without launching these subscribers as well.³⁵⁷ This is because Comcast launches MASN on cable systems, not to individual subscribers. Comcast could not have reached the number of subscribers required by the Carriage Agreement without splitting-up part of a system within a DMA, which would have been impracticable and undesirable for Comcast to do.³⁵⁸

³⁵⁴ Tr. at 7167 (Orszag Test.).

³⁵⁵ Tr. at 7162 (Orszag Test.).

³⁵⁶ See Tr. at 7152 ("Q: Is it your opinion that a boss does not discriminate against women if [he] treats some women in his office nicely? A: Not necessarily.") (Orszag Test.).

³⁵⁷ Tr. at 6666-67 ("Q: Okay. And, in fact, Comcast backed into the number in determining the launch. Correct? A: That's a way to put it, yes. Q: Okay. Because certain systems were simply too big to exclude? A: Exactly. Q: Okay. And that's why Comcast couldn't reasonably exclude that [REDACTED] from a number of systems that had to be launched in April of 2007. Correct? A: Correct.") (Ortman Test.).

³⁵⁸ See Tr. at 6664-65 ("A: . . . We had the right to withhold up to 150,000, and we only withheld about 100,000. So, therefore, MASN got [REDACTED] subscribers a year earlier than they might otherwise have gotten. You can call that a favor. It was a good business decision on our part. Q: Okay. But if you had withheld all 150,000, it would have split the Richmond DMA. Correct? A: That could have been one of the outcomes. *It was a shell game of what to withhold, and what to launch* in April of '07. Q: And you didn't want to send a confusing message to the Richmond DMA. Correct? A: That's correct.") (emphasis added) (Ortman Test.).

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140. *Second*, Comcast has argued that it deleted CSN-MA in three areas in order to make room for MASN. In each of these areas – Dover and New Castle, Delaware and Lancaster, Pennsylvania – CSN-MA had little to no professional programming to telecast after the termination of its licensing agreement to telecast Orioles games.³⁵⁹ It is surprising that Comcast carried CSN-MA in these regions and required its subscribers to pay CSN-MA’s substantial fees at all given this dearth of programming. For example, Comcast maintained CSN-MA on the New Castle system for approximately six months after CSN-MA had no professional programming to show to subscribers in that region. Games of the Washington Wizards and the Washington Flyers had been blacked out of that region, and CSN-MA lost the rights to the Orioles in September 2006.³⁶⁰ But Comcast did not remove CSN-MA from the New Castle system until March 2007. Comcast’s expert admitted that MASN would not have received such favorable treatment.³⁶¹ Especially because Comcast continues to carry CSN-Philly on all three systems,³⁶² its decision to permit MASN to be carried in these markets does not suggest any preferential treatment with respect to MASN.

141. *Third*, Comcast points to changes in its channel line-ups where it moved MASN to a more favorable position. But these changes were not unique to MASN. Comcast also

³⁵⁹ See Tr. at 7154 (“Q: Isn’t it true that there are significant blackouts for professional product in all three markets where Comcast drops CSNMA? A: Precisely.”) (Orszag Test.).

³⁶⁰ See Tr. at 6655-56 (“Q: Okay. In New Castle, after CSNMA lost the Orioles, those viewers couldn’t watch any professional sports product on CSNMA, because both of the remaining teams were blacked out. Correct? A: That’s correct.”) (Ortman Test.).

³⁶¹ See Tr. at 7157 (“Q: Is it your testimony that if MASN lost of all of its professional programming, Comcast would continue to pay MASN for six months? A: There’s a provision in the agreement, if my recollection is correct that actually govern[s] precisely that circumstance. Q: And isn’t that provision that the agreement stated that if MASN loses professional product, Comcast can terminate immediately? A: I believe that’s the case, yes.”) (Orszag Test.).

³⁶² See Tr. at 6656 (“Q: Okay. And in New Castle, Delaware, Comcast distributed CSN Philly. Correct? A: Yes, it did.”) (Ortman Test.).

moved its own affiliated RSNs to channel positions closer to other sports content.³⁶³ These changes were designed to benefit Comcast, by aggregating similar programming near each other on the channel line-ups to enhance the usability of its cable product.

IV. COMCAST'S DISCRIMINATORY CONDUCT HAS RESTRAINED MASN'S ABILITY TO COMPETE FAIRLY

142. The harm to MASN and to MASN's ability to compete fairly from Comcast's discriminatory conduct is significant, as measured in the particular Foreclosed Areas as well as across MASN's overall operations. Across MASN's footprint, Comcast's "carv[ing] off" of subscribers in the Foreclosed Areas has caused MASN to lose hundreds of thousands of subscribers and [REDACTED] in revenues. MASN will suffer lost license fees of approximately [REDACTED] over the course of the [REDACTED] Carriage Agreement.³⁶⁴ That amounts to approximately [REDACTED] a month of injury that Comcast is inflicting upon a competitor. This is a significant sum that has the effect of raising MASN's average costs.³⁶⁵

143. In addition to causing approximately [REDACTED] in lost license fees, Comcast's foreclosure of MASN has resulted in two categories of lost advertising revenues. *First*, MASN receives lower revenues from advertisers who currently do business with MASN. "Because advertising fees are denominated in terms of number of viewers reached, MASN realizes a loss

³⁶³ See Tr. at 6662 (testifying that MASN was moved into a similar channel range as other sports networks at the same time as "ESPN News" and "ESPN Classic") (Ortman Test.).

³⁶⁴ See Tr. at 6433 ("we get to [REDACTED] of lost licensing revenue every two years, and this is a 10-year contract") (Singer Test.).

³⁶⁵ See MASN Ex. 238, ¶ 37 ("Because Comcast's discriminatory conduct has eliminated MASN's ability to reach approximately [REDACTED] of Comcast's subscribers within MASN's service territory, there is no question that MASN has been forced to operate with higher average costs.") (footnote omitted) (Singer Written Test.).

in advertising revenues *from existing advertising clients* as a result of Comcast's exclusionary conduct in the contested areas."³⁶⁶

144. *Second*, MASN receives no revenues from advertisers that will not do business with MASN because of the "coverage gaps" that Comcast has created. Across its television footprint, MASN competes with Comcast's affiliated RSNs for advertisers that want to reach 18 to 49 year old male viewers.³⁶⁷ Comcast has harmed MASN's ability to do business with advertisers that wish to reach such viewers in the Foreclosed Areas. Notably, MASN's coverage gaps have caused it to lose business from two significant advertisers: [REDACTED]

[REDACTED]⁶⁸ It is evident that numerous other advertisers would be deterred from doing business with MASN based on its coverage gaps.

145. Comcast benefits from the coverage gaps it has created within MASN's footprint by receiving more advertising. For example, Comcast's refusal to carry MASN in Harrisburg increases the attractiveness of its affiliated RSN, CSN-Philly, and its MLB programming, and thereby increasing the value of the advertising rates that Comcast can charge.³⁶⁹ Likewise, Comcast's affiliated RSN in the Roanoke-Lynchburg and Tri-Cities DMAs, CSN-MA, becomes a more attractive vehicle for advertisers seeking to reach 18 to 49 year old male viewers because Comcast does not permit MASN to compete in those markets.

146. Comcast's foreclosure of MASN, and creation of coverage gaps within MASN's footprint, also substantially restrains MASN's ability to compete fairly for programming rights –

³⁶⁶ MASN Ex. 238, at 22, n.39 (Singer Written Test.).

³⁶⁷ See Tr. at 7133 ("Q: Isn't it true that Comcast SportsNet says its key demographic is males 18 to 49? A: I've seen documents to that effect, yes.") (Orszag Test.); Tr. at 7134 ("Q: Isn't that the same key demographic for MASN, males 18 to 49? A: Yes.") (Orszag Test.).

³⁶⁸ See MASN Ex. 235, ¶ 42 (Cuddihy Written Test.).

³⁶⁹ See MASN Ex. 235, ¶ 43 (Cuddihy Written Test.).

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which are crucial, as such rights are the lifeblood of an RSN. MASN and Comcast's affiliated RSNs compete vigorously for programming rights.³⁷⁰ Sports teams want to reach the largest possible number of the fans within its assigned territories.³⁷¹ An RSN with more coverage has an advantage over one with less.³⁷² MASN is significantly disadvantaged in competing with Comcast for programming rights if Comcast offers a sports team the ability to reach more fans than MASN can reach. For example, MASN competed against Comcast for the rights to the Washington Redskins, but lost these rights to Comcast. The Redskins specifically noted MASN's lack of coverage as a deficiency.³⁷³

147. In addition to the Washington Redskins, MASN has competed with Comcast for the rights to the D.C. United professional soccer team, the college and football and basketball games of the ACC and the Colonial Athletic Association ("CAA"), and the Baltimore Ravens professional football team.³⁷⁴ MASN's coverage gaps played a part in Comcast's ability to

³⁷⁰ See Tr. at 5618-19 ("If I'm going to negotiate with somebody, whether it's the Wizards or the Capitals or the Redskins in the ACC, and I have to tell them that I'm not in these areas and my competitor is . . . I'm going to be at a severe disadvantage.") (Cuddihy Test.).

³⁷¹ See Tr. at 5872 ("It's very important to understand that . . . when an RSN comes to a professional sports team and they want to televise their games, the teams' major objective here is not only to get the highest rights fee you can, but it also wants to be able to get its product distributed throughout its territory, the territory that the league has defined for it" and "[i]t's important for the team to get – be exposed throughout the territory so all of its fans can see it, and develop[] fan interest and so forth") (Wyche Test.).

³⁷² See Tr. at 7207 ("Q: Mr. Orszag, from a programming perspective, all things being equal, greater coverage is better, would you agree with that? A: Are you talking about regional programming? Q: Yes, sir. A: That should be true, yes.") (Orszag Test.).

³⁷³ See MASN Ex. 235, ¶ 39 ("MASN's limited penetration was cited as a problem during negotiations I undertook with the Washington Redskins in 2008 and 2009 for programming rights. Comcast ultimately won those rights.") (Cuddihy Written Test.).

³⁷⁴ See MASN Ex. 235, ¶ 38 (Cuddihy Written Test.).

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obtain the rights to the ACC, CAA and D.C. United.³⁷⁵ Because MASN will continue to compete with Comcast for programming rights,³⁷⁶ these coverage gaps will pose problems for MASN well into the future.

148. To compensate a sports team for coverage gaps, MASN must pay more money than Comcast does – because of the very coverage gaps that Comcast has created.³⁷⁷ As Dr. Singer explained: “[T]here is a way to fix it. You just write them a bigger check, but that is the very definition of impaired – and to compete fairly. Now I have to write you a check to compensate you. . . . They [Comcast] don’t have to write checks like that because they have coverage.”³⁷⁸ But by denying MASN [REDACTED] in license fees and advertising revenues, Comcast denies MASN revenues to bid more aggressively for programming rights.³⁷⁹

149. Internal documents show that Comcast was concerned about the MASN’s ability to bid competitively for programming rights. Comcast employees complained: [REDACTED]

³⁷⁵ See MASN Ex. 235, ¶ 38 (“These are significant rights that MASN missed out on at least in part because of MASN’s coverage gaps.”) (Cuddihy Written Test.).

³⁷⁶ See MASN Ex. 235, ¶ 40 (coverage gaps “will have a direct competitive impact on MASN’s ability to compete with CSN-MA for the rights to Washington Wizards games, Washington Capitals games, pre-season Washington Redskins games, and D.C. United Games when CSN-MA’s contracts with these professional sports franchises expire.”) (Cuddihy Written Test.); see also Tr. at 5619 (“If that programming was available, the Wizards and the Capitals, we would definitely seek to acquire that programming.”) (Cuddihy Test.).

³⁷⁷ See Tr. at 7209 (“You have to bid more to compensate the sports team for what you can’t give them [for coverage gaps], correct? A: All other things being equal, yes.”) (Orszag Test.).

³⁷⁸ Tr. at 6434-35 (Singer Test.).

³⁷⁹ See MASN Ex. 235, ¶ 38 (“Comcast’s denial of such a large stream of subscriber revenue harms MASN unfairly because, unlike national programming networks, RSNs must pay substantial license fees to get access to valuable sports programming” and “MASN can compete with other RSNs, including Comcast’s own CSN-MA and CSN-Philly, only if it can afford to pay the high price of acquiring the programming that consumers are demanding”) (Cuddihy Written Test.).

[REDACTED] and concluded, [REDACTED]

[REDACTED] It is evident that Comcast's desire to constrain MASN's ability to create [REDACTED]

[REDACTED] is motivation for Comcast to create and perpetuate coverage gaps in MASN's footprint, as well as to constrain MASN's revenues.

150. The unfairness of the injury that Comcast is inflicting upon MASN is even more apparent within each of the Foreclosed Areas. [REDACTED]

[REDACTED]³⁸⁰ Comcast's foreclosure of MASN within this region has impaired MASN's ability to compete fairly for subscribers and advertisers in the Harrisburg DMA. In light of Comcast's dominance of this market, MASN cannot fairly compete with other RSNs – including Comcast's affiliated RSNs – for viewership. MASN cannot even solicit advertisers in this DMA, or advertisers that wish to reach consumers in this DMA, given Comcast's refusal to carry MASN.³⁸¹

151. [REDACTED]

[REDACTED]³⁸² Comcast's foreclosure of MASN within this region has impaired MASN's ability to compete fairly for subscribers and advertisers in the Roanoke-Lynchburg DMA. In light of

³⁸⁰ See Comcast Ex. 4, at 17, Table 1 (Orszag Written Test.); MASN Ex. 238, at 58, Table 8 (Singer Written Test.).

³⁸¹ See MASN Ex. 235, ¶ 42 (“MASN's advertising sales staff does not even consider pursuing potentially valuable advertising deals with Pennsylvania tourism interests such as Hershey Park or Amish Country because of MASN's lack of penetration in and around Harrisburg. The same is true with respect to accounts for which Roanoke and Harrisburg are important.”) (Cuddihy Written Test.).

³⁸² See Comcast Ex. 4, at 18, Table 2 (Orszag Written Test.); MASN Ex. 238, at 58, Table 8 (Singer Written Test.).

Comcast's dominance of this market, MASN cannot fairly compete with other RSNs – including Comcast's affiliated RSNs – for viewership. MASN cannot even solicit advertisers in this DMA, or advertisers that wish to reach consumers in this DMA, given this lack of coverage.³⁸³

152. [REDACTED]

[REDACTED]³⁸⁴

Comcast's foreclosure of MASN within this region has impaired MASN's ability to compete fairly for subscribers and advertisers in the Tri-Cities DMA. In light of Comcast's dominance of this market, MASN cannot fairly compete with other RSNs – including Comcast's affiliated RSNs – for viewership. MASN cannot even solicit advertisers in this DMA, or advertisers that wish to reach consumers in this DMA, given this lack of coverage.³⁸⁵

³⁸³ See MASN Ex. 235, ¶ 42 (Cuddihy Written Test.).

³⁸⁴ See Comcast Ex. 4, at 18, Table 3 (Orszag Written Test.); MASN Ex. 238, at 58, Table 8 (Singer Written Test.).

³⁸⁵ See MASN Ex. 235, ¶ 42 (Cuddihy Written Test.).

PROPOSED CONCLUSIONS OF LAW

I. THE GOVERNING LEGAL FRAMEWORK

A. Congress Has Prohibited Discriminatory Treatment of Unaffiliated Networks by Vertically Integrated MVPDs

1. In the 1992 Cable Act, Congress considered whether to ban vertical integration – that is, the melding of a cable distribution company with a programming arm – outright. Instead, Congress required the FCC to adopt strict regulations governing the carriage practices of cable operators that choose to become vertically integrated. Section 616 of Communications Act states that “the Commission shall establish regulations governing program carriage agreements” including “provisions designed to prevent” vertically integrated cable companies from “discriminating in video programming distribution on the basis of affiliation or nonaffiliation.”³⁸⁶

2. Furthermore, although Congress did not ban vertical integration outright, Congress did conclude that cable companies’ acquisition of ownership interests in programming networks should be strongly discouraged, as it required the FCC to adopt regulations “prevent[ing] a cable operator . . . from requiring a financial interest in a program service as a condition for carriage.”³⁸⁷

3. Congress enacted these provisions based on its findings that vertical integration would create strong pressures for vertically integrated cable operators to discriminate on the basis of affiliation. As a Senate Report accompanying the Cable Act explained, “[y]ou don’t need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising

³⁸⁶ 47 U.S.C. § 536(a)(3).

³⁸⁷ *Id.* § 536(a)(1).

availabilities, and to the disadvantage of those services . . . in which he does not have an equity position.”³⁸⁸ Congress feared that vertically integrated cable companies would give preferential treatment to affiliated networks at the expense of unaffiliated networks.³⁸⁹

4. The FCC subsequently adopted rules implementing these requirements. The prohibition on discrimination provides:

No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.³⁹⁰

5. The FCC’s prohibition on demanding an equity interest states:

No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator’s/provider’s systems.³⁹¹

6. The program-carriage rules are hardly exceptional. In the 1992 Cable Act, Congress imposed numerous restrictions (other than the program-carriage rules) on the discretion of cable operators with respect to programming choices in order to advance competition and to promote a diversity of viewpoints.³⁹² The stated purposes of the Cable Act, in fact, are to “promote competition in cable communications” and to “assure that cable communications

³⁸⁸ S. Rep. No. 102-92, at 25-26 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158-59.

³⁸⁹ *See id.* at 25, 1992 U.S.C.C.A.N. at 1158 (“vertical integration gives cable operators the incentive and ability to favor their affiliated programming services” by, among other things, unreasonably refusing to carry unaffiliated programmers or “giv[ing] its affiliated programmer a more desirable channel position than another programmer”).

³⁹⁰ 47 C.F.R. § 76.1301(c).

³⁹¹ *Id.* § 76.1301(a).

³⁹² *See, e.g.*, 47 U.S.C. § 531 (allowing local franchising authorities to require carriage of public, educational, and governmental programming); *id.* § 532 (requiring cable companies to lease access to unaffiliated networks); *id.* § 534 (requiring cable companies to carry local broadcast stations).

provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”³⁹³

B. The *Adelphia Order*

7. The *Adelphia Order* provides an important factual and legal backdrop to this case. In the *Adelphia Order*, the FCC concluded that Comcast’s acquisition of Adelphia’s assets and its swap of assets with TWC would “consolidate” Comcast’s “regional footprints” in, among other places, “Pennsylvania” and parts of “Virginia.” That consolidation, in turn, would increase Comcast’s “incentive and ability” to discriminate against unaffiliated RSNs, such as MASN.³⁹⁴ The Commission also concluded that “the programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated.”³⁹⁵ Given the value of RSN programming, Comcast 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 Comcast . . . to obtain the valuable programming for its affiliated RSNs.”³⁹⁶

8. To remedy that concern, the FCC adopted a condition “allowing unaffiliated RSNs” – such as MASN – “to use commercial arbitration to resolve disputes regarding carriage on [Comcast’s] cable systems.”³⁹⁷ The FCC emphasized that the purpose of the remedy was to “alleviate the potential harms to viewers who are denied access to valuable RSN programming

³⁹³ *Id.* § 521.

³⁹⁴ *Adelphia Order* ¶¶ 116, 189.

³⁹⁵ *Id.* ¶ 189.

³⁹⁶ *Id.*

³⁹⁷ *Id.* ¶ 181; *see also* ¶ 190.

during protracted carriage disputes.”³⁹⁸ Under the *Adelphia Order*, RSNs had 30 days from the denial of carriage or “ten business days after release of th[e] Order” to file for arbitration.³⁹⁹

9. The Commission was statutorily charged with determining whether the transaction was in the “public interest.”⁴⁰⁰ To that end, Comcast committed to the FCC that the result of the transaction would be an upgrade to Adelphia’s antiquated cable systems. Both TWC and Comcast stated the transaction would lead to rapid upgrades and to the “accelerated deployment of advanced services.”⁴⁰¹ The FCC relied on those representations: as the then-Chairman explained, Comcast “committed to make long-needed upgrades to [Adelphia] systems to enable the rapid and widespread deployment of advanced services to Adelphia subscribers.”⁴⁰²

C. Binding Law Implements the Non-Discrimination Mandate through a Burden-Shifting Framework

10. The Media Bureau, acting on delegated authority, has implemented the non-discrimination requirement of the Cable Act and the FCC’s rules through a straightforward and familiar burden-shifting framework.⁴⁰³

³⁹⁸ *Id.* ¶ 191.

³⁹⁹ *Id.* ¶ 190.

⁴⁰⁰ *Id.* ¶ 4.

⁴⁰¹ *Id.* ¶ 3.

⁴⁰² *Id.* Statement of Chairman Martin; *see also id.* Dissenting Statement of Commissioner Copps (“Let me state upfront that the Applicants come to us with what I believe is a commitment to update and upgrade the failing Adelphia cable systems. I commend their intention to modernize these networks.”); *id.*, Statement of Commissioner Adelstein (noting that “Comcast and TWC have pledged to invest over \$1.6 billion to upgrade Adelphia’s network”); *supra* Proposed Findings of Fact (“PFOF”) ¶¶ 64-65.

⁴⁰³ *See* Order on Review, *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*, 23 FCC Rcd 15783, ¶¶ 21-25 (2008) (“*TWC Order*”) (submitted to the Tribunal as a Judicial Notice document).

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11. That burden-shifting framework is binding here. The Media Bureau has delegated authority to implement the program-carriage rules.⁴⁰⁴ An order issued under delegated authority, such as the *TWC Order*, has the same force and effect as an order issued by the full Commission unless and until the Commission grants a petition for review.⁴⁰⁵ This Tribunal is, of course, bound by orders of the Commission and its bureaus.⁴⁰⁶

12. Even were this Tribunal not bound to apply this burden-shifting framework as matter of precedent, this framework is well-grounded in FCC precedent. *First*, the Commission has endorsed this approach to resolve program-access disputes. A program-access dispute is indistinguishable from – indeed a mirror image of – the program carriage dispute at issue here. In that setting, a vertically integrated programming network is accused of discriminatorily denying programming to an unaffiliated MVPD.⁴⁰⁷ Once a plaintiff has set forth a *prima facie*

⁴⁰⁴ See 47 C.F.R. § 0.61 (the Media Bureau “acts for the Commission under delegated authority[] in,” among other things, all “matters pertaining to multichannel video programming distribution”); *id.* § 0.61(f)(7) (charging the Media Bureau with “[a]dminister[ing] and enforc[ing] rules and policies regarding . . . [p]rogram access and carriage”).

⁴⁰⁵ See 47 U.S.C. § 155(c)(3) (“Any order, decision, report, or action made or taken pursuant to” delegated authority “shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.”).

⁴⁰⁶ See 5 U.S.C. § 556(c) (all authority of an ALJ is “[s]ubject to published rules of the agency and within its powers”).

⁴⁰⁷ As the FCC has explained, “discrimination” under the program-access rules “exists when the same or essentially the same programming service is sold to competing distributors at different prices or pursuant to different terms or conditions. Such discrimination is prohibited if not justified” by one of the specific statutory bases “enumerated in the statute.” First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, ¶ 95 (1993) (“1993 Order”) (footnote omitted), *recon. granted on other grounds*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 1902 (1994). “Once a *prima facie* complaint has been determined, *the burden of proof is on the defendant* to establish that it did not violate the

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case of discrimination, the defendant must show that its conduct – its refusal to sell the programming – was motivated by a legitimate business reason; otherwise, the plaintiff prevails.⁴⁰⁸ There is no basis for a different approach here.

13. *Second*, there are strong policy reasons to apply a burden-shifting framework in cases such as these. Comcast is in the best position to explain its actions. The Second Circuit, in affirming the FCC’s burden-shifting framework in the case of economic discrimination by telephone companies, has pointed to “information asymmetry”: “all else being equal, the burden is better placed on the party with easier access to relevant information,” and a defendant “unquestionably has better access to facts showing that” differential treatment was “reasonable.”⁴⁰⁹ The Second Circuit also found support for this framework in the principle that “courts should avoid requiring a party to shoulder the more difficult task of proving a negative”: it is preferable that the party engaging in disparate treatment bear the burden of “prov[ing] the reasonableness” of that disparate treatment, not vice versa.⁴¹⁰ Finally, the Second Circuit held that the policies behind the Communications Act support such a framework: where Congress’s “concern . . . [is] to eliminate the use of monopolistic power to stifle competition,” it is

program access provisions of the Communications Act.” Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, ¶ 56 (1998) (second emphasis added); see *1993 Order* ¶ 116 (a refusal to sell programming that is not supported by “legitimate reasons” is unreasonable and unlawful); *id.* ¶ 77 (imposing “burden . . . on the defendant” after *prima facie* showing in exclusivity cases has been made); *id.* ¶ 105 (defendant programming vendors “assume the responsibility of justifying the legitimacy” of permissible factors “in order to maintain the pricing differentials between distributors”).

⁴⁰⁸ See Memorandum Opinion and Order, *Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, ¶¶ 14, 15 (CSB 1998); Memorandum Opinion and Order, *CellularVision of New York, L.P. v. SportsChannel Assocs.*, 10 FCC Rcd 9273, ¶ 23 (CSB 1995).

⁴⁰⁹ *National Communications Ass’n v. AT&T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001).

⁴¹⁰ *Id.* at 131.

“appropriate to shift the burden to [the defendant] to prove that it did not discriminate.”⁴¹¹ All of those concerns are present here.

14. *Third*, the FCC has utilized a burden-shifting framework in other cases of economic discrimination. For example, the FCC has used a burden-shifting framework in implementing 47 U.S.C. § 202.⁴¹² The FCC has more recently endorsed a similar burden-shifting framework in determining whether Comcast had adopted discriminatory network management practices in connection with its cable modem Internet access service.⁴¹³

D. Employment Discrimination Case Law Provides An Incomplete and Inapt Model for Understanding Economic, Affiliation-Based Discrimination

15. Comcast has argued in this litigation that the non-discrimination framework for program carriage should be applied in precisely the same manner as race or gender job discrimination. Although MASN readily prevails under that standard (as explained below), that framework provides a poor model for understanding affiliation-based discrimination.

16. Congress and the FCC have repeatedly found that vertically integrated cable companies have powerful economic incentives to favor the economic interests of their affiliated

⁴¹¹ *Id.*

⁴¹² See, e.g., Report and Order, *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, ¶ 291 n.782 (1997) (“once a complainant alleging a violation establishes that the services are like and that discrimination exists between them, the burden shifts to the defendant carrier to show that the discrimination is justified and, therefore, not unreasonable”); Memorandum Opinion and Order, *Beehive Tel., Inc. v. Bell Operating Cos.*, 10 FCC Rcd 10562, ¶ 27 (1995) (“Once a *prima facie* showing of like services and discrimination has been made, the defendant has the burden of establishing that the discrimination is justified and, therefore, not unreasonable.”), *adopted and reaffirmed on remand*, Memorandum Opinion and Order, *Beehive Tel., Inc. v. Bell Operating Cos.*, 12 FCC Rcd 17930 (1997) (attaching original order).

⁴¹³ See Memorandum Opinion and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, ¶ 43 (2008).

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programmers at the expense of unaffiliated programmers.⁴¹⁴ Indeed, the FCC specifically found that the Adelphia transaction created even more powerful incentives for Comcast in particular to engage in discrimination in Virginia and Pennsylvania.⁴¹⁵ Comcast’s own witness agreed that Comcast should favor its affiliated networks in making carriage decisions.⁴¹⁶

17. In cases of race- or gender-based discrimination, by contrast, there is typically no economic incentive to discriminate. Just the opposite: employers have a strong economic incentive to hire the most qualified applicant, regardless of race or gender. Discrimination is thus economically irrational. Strong evidence of intentional discrimination – whether direct or circumstantial – is necessary to overcome the baseline presumption that employers will act rationally to maximize their economic interests. Here, the economic incentives are reversed: Congress and this Commission have made repeated findings that vertically integrated cable companies – and Comcast in particular – face inherent and rational economic pressures to discriminate by favoring the economic interests of affiliated networks over those of similarly situated unaffiliated networks.

18. This proceeding bears that out. Comcast’s own economic expert has acknowledged that Comcast has overwhelming reasons to favor systematically the interests of its

⁴¹⁴ See, e.g., *TWC Order* ¶ 25 (“vertically-integrated MVPDs have a strong incentive” to discriminate to favor the interests of “affiliated RSNs”); S. Rep. No. 102-92, at 25, 1992 U.S.C.C.A.N. at 1158 (vertical integration, Congress has said, “gives cable operators the incentive and ability to favor their affiliated programming services” by, among other things, unreasonably “refus[ing] to carry other programmers”); see also *See Third Report and Order and Third Further Notice of Proposed Rule Making, Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064, ¶¶ 49, 50 (2007); *Report and Order and Notice of Proposed Rulemaking, Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, ¶ 5 (2007).

⁴¹⁵ See *Adelphia Order* ¶¶ 7, 116, 189.

⁴¹⁶ See Tr. at 7149 (“Q: So all other things being equal, Comcast should always favor their affiliate programming? A: That’s precisely why I don’t believe this is the right standard to look at like this. Q: Is the answer to my question, yes? A: I said yes.”) (Orszag Test.).

affiliated RSNs.⁴¹⁷ High-level Comcast executives have acknowledged that unaffiliated networks get held to different carriage standards than affiliated networks⁴¹⁸ – something of which Comcast’s expert wholeheartedly approves.⁴¹⁹ And the testimony here establishes that Comcast’s employees are so used to the double standards between affiliated and unaffiliated networks that they do not even notice them.⁴²⁰

19. It is reasonable to assume that Comcast is acting in its own best interests, and those interests can prompt affiliation-based discrimination.⁴²¹ In light of these of strong (and rational) incentives to discriminate in favor of affiliated networks, a vertically integrated cable company should be required to establish a legitimate, non-discriminatory reason for the differential treatment of similarly situated networks. Even in the employment discrimination context, a fact-finder can conclude that a defendant’s failure to set forth a credible explanation for differential treatment can support an inference that a prohibited factor (such as race or gender) motivated the decision. The Supreme Court has said that “[p]roof that the defendant’s explanation is unworthy of credence” is “circumstantial evidence that is probative of intentional discrimination,” and, based on a finding that a stated justification is implausible, “the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”⁴²² The Court has also held that a “suspicious” and “implausib[le]”

⁴¹⁷ See *supra* PFOF ¶ 95.

⁴¹⁸ See *supra* PFOF ¶ 94.

⁴¹⁹ See *supra* PFOF ¶ 136.

⁴²⁰ See *supra* PFOF ¶¶ 100-107.

⁴²¹ E.g., Tr. at 7229 (“Q: And that’s just Comcast doing what’s best for Comcast, right? A: I assume that Comcast is being rational, yes.”) (Orszag Test.).

⁴²² *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (internal quotation marks omitted).

explanation for a decision “gives rise to an inference of discriminatory intent.”⁴²³ It follows *a fortiori* that such a framework – in which an inference of discrimination is drawn from the failure to establish a legitimate, non-discriminatory reason for a decision – is appropriate in implementing the Cable Act’s prohibition on *economic* discrimination.

20. Contrary to Comcast’s argument, a reference in a House Conference Report of the 1992 Cable Act to “discrimination in normal business practices” does not alter this analysis. As the Media Bureau has held, that reference “is not persuasive evidence of Congress’ intent to apply employment law standards to program carriage disputes, an area wholly unrelated to economic-based discrimination like that at issue in this case.”⁴²⁴

21. In all events, as explained below, in this case the question of the appropriate legal framework is ultimately of no moment. The evidence is overwhelming – and essentially admitted by Comcast – that Comcast takes affiliation and non-affiliation into account in the selection, terms, and conditions of carriage. Comcast’s conduct can accordingly be condemned under any legal standard.

E. The First Amendment Does Not Limit The Scope of Congress’s Non-Discrimination Obligation

22. Comcast has also argued in this litigation that First Amendment concerns weigh in favor of adopting a watered-down legal standard for policing affiliation-based discrimination. Comcast’s constitutional argument is unconvincing.

23. Courts time and again have rejected cable companies’ efforts to seek sanctuary in the First Amendment from sensible economic regulation. The Supreme Court, for example, has upheld the Cable Act’s local broadcast must-carry provision, which imposes direct limits on the

⁴²³ *Snyder v. Louisiana*, 128 S. Ct. 1203, 1210-12 (2008).

⁴²⁴ *TWC Order* ¶ 23.

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editorial discretion of cable operators, as consistent with the First Amendment.⁴²⁵ Congress enacted the must-carry provision at the same time as and for many of the same reasons that it adopted the program-carriage prohibitions at issue in this proceeding.⁴²⁶ The D.C. Circuit, moreover, has upheld the Cable Act’s leased-access provision – which also restricts the editorial discretion of cable operators – in the face of similar First Amendment arguments.⁴²⁷ Policing program-carriage discrimination by vertically integrated cable operators is therefore entirely consistent with the First Amendment, as the Media Bureau has correctly found.⁴²⁸

24. The Supreme Court’s decision in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), further refutes Comcast’s argument. The Court there rejected a First Amendment challenge to a rule that broadcasters must allow reasonable access to their networks by election candidates. The Court noted that deference to editorial judgments of broadcasters might be appropriate *if* the

⁴²⁵ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196-225 (1997); see also *Time Warner Entm’t Co. v. United States*, 211 F.3d 1313, 1318 (D.C. Cir. 2000) (“The must-carry obligation and the subscriber limits provision both preserve for consumers some competition in the provision of programming. The must-carry obligation preserves competition between broadcasters and the cable operator, while the subscriber limits preserve competition between the cable operator and its affiliated programmers on the one hand and unaffiliated providers of cable programming on the other. By placing a value upon diversity and competition in cable programming the Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers”).

⁴²⁶ See H.R. Rep. No. 102-628, at 78 (1992) (noting that cable and broadcast television “compete for television advertising and audience” and thus that there is a resulting “economic incentive” to deny carriage to local broadcast stations; for that reason, must-carry regulations are imperative), available at 1992 WL 166238; see also *supra* Proposed Conclusions of Law (“PCOL”) ¶¶ 1-6.

⁴²⁷ *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 969-71 (D.C. Cir. 1996) (finding that there was “nothing to” the argument that the leased-access provisions are “content-based” because the “qualification to lease time . . . depends not on the content of [] speech, but on [a network’s] lack of affiliation with the operator, a distinguishing characteristic stemming from considerations relating to the structure of cable television”; rejecting facial challenge to the rules under intermediate scrutiny).

⁴²⁸ See *TWC Order* ¶ 49.

challenged decision took “appropriate [statutory] factors into account” and the broadcaster “act[ed] reasonably and in good faith.”⁴²⁹ The Court, however, went on to uphold the FCC’s finding that a broadcaster’s stated justification for denying access was “speculative and unsubstantiated,”⁴³⁰ which forecloses any suggestion the First Amendment bars a regulatory body from assessing the credibility of Comcast’s purported business justifications for refusing carriage of MASN. Indeed, the majority in *CBS* rejected the dissenters’ emphasis on “broadcaster discretion,” concluding that blanket deference to such discretion would “endow[] licensees with a ‘blank check’ to determine what constitutes ‘reasonable access,’” which would “eviscerate” the statutory right of access.⁴³¹ The same considerations weigh against Comcast’s narrow reading of the program-carriage rules here: allowing cable companies to shield themselves from regulatory scrutiny simply based on their invocation of editorial discretion would effectively eviscerate the program-carriage rules.

25. Finally, the First Amendment concern with regulating program-carriage discrimination is misplaced because such obligations govern *only* those cable operators that *choose* to become vertically integrated.⁴³² Comcast, of course, has taken substantial advantage of the privileges of vertical integration knowing well the regulatory obligations that would accompany the melding of the cable company’s distribution arm with a programming arm.⁴³³ If the First Amendment permits Congress to ban vertical integration, it must allow Congress to

⁴²⁹ 453 U.S. at 387.

⁴³⁰ *Id.* at 393 (internal quotation marks omitted).

⁴³¹ *Id.* at 390 n.12.

⁴³² *See, e.g., TWC Order* ¶ 24 (rejecting claim that program-carriage rules impose “common carrier obligations on MVPDs,” reasoning that “the carriage obligations imposed by Section 616 attach only where a vertically-integrated MVPD is carrying an affiliated programming network”).

⁴³³ *See supra* PFOF ¶ 2.

adopt the lesser remedy of permitting such integration but regulating the carriage decisions made by cable operators that avail themselves of the benefits of vertical integration.

II. COMCAST'S REFUSAL TO CARRY MASN IN THE FORECLOSED AREAS VIOLATES FEDERAL LAW

26. Under any legal standard, MASN has proved that Comcast has discriminated against MASN by refusing to carry MASN in the Foreclosed Areas. MASN is similarly situated to Comcast's affiliated RSNs. Comcast has treated MASN differently from its affiliated RSNs and that difference in treatment is based on MASN's status as an unaffiliated programming network. Comcast's discriminatory conduct, moreover, has restrained MASN's ability to compete fairly. Finally, Comcast's threshold objections to MASN's Complaint lack merit.

A. MASN and Comcast's RSNs are Similarly Situated

27. Under the program-carriage rules, MASN must establish, first, that it is similarly situated to affiliated RSNs of Comcast.⁴³⁴ MASN has carried its burden in this proceeding with respect to the first element of its *prima facie* case.

28. *First*, the Media Bureau has already held that MASN proved this element of its *prima facie* case.⁴³⁵ This Tribunal is bound by those determinations.⁴³⁶

⁴³⁴ See Memorandum Opinion and Hearing Designation Order, *Herring Broad., Inc. v. Time Warner Cable Inc.*, 23 FCC Rcd 14787, ¶ 108 (2008) (“HDO”) (submitted to the Tribunal as a Judicial Notice document); *TWC Order* ¶ 29.

⁴³⁵ See *HDO* ¶ 7 (explaining that each complainant had “the burden of proof” with respect to each element of the *prima facie* case and that each complainant carried that burden); *id.* ¶ 90 (“After reviewing the pleadings and supporting documentation filed by the parties, we find that MASN has established a *prima facie* case under Section 76.1301(c).”); *id.* ¶ 108 (discussing MASN's proffer with respect to the similarly situated element).

⁴³⁶ See Decision, *Ft. Collins Telecasters*, 103 F.C.C.2d 978, ¶ 7 (Rev. Bd. 1986) (“It is black-letter law that where there has been a thorough consideration of [a] particular question in the designation order, subordinate staff officials such as presiding hearing officials . . . may not reconsider the matter or take any action inconsistent with the designation order.”) (internal quotation marks and alterations omitted); Memorandum Opinion and Order, *Richard L. Oberdorfer*, 2 F.C.C.2d 4464, ¶ 8 n.5 (Rev. Bd. 1987) (findings in a designation order “b[ind]”

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29. *Second*, Comcast did not dispute in its Answer that MASN and CSN-MA and MASN and CSN-Philly are similarly situated.⁴³⁷ Comcast has thus forfeited its right to contest this element of MASN's *prima facie* case now.⁴³⁸ Similarly, because Comcast did not contest this element of MASN's case in its Answer, this could not have been an issue of factual dispute within the scope of the Media Bureau's designation to this Tribunal.

30. *Third*, and in all events, under *de novo* review, the evidence easily establishes that MASN is similarly situated to CSN-MA and CSN-Philly. MASN is an RSN and thus a "video programming vendor" as defined in Section 76.1300(e) of the Commission's rules.⁴³⁹ CSN-MA and CSN-Philly are also RSNs and thus also "video programming vendor[s]."⁴⁴⁰

31. RSNs are a unique category of video programming that the FCC has defined as "must have."⁴⁴¹ Evidence submitted in this proceeding makes clear that Comcast itself views RSNs as a distinctive category of programming that is "must have."⁴⁴²

32. MASN carries the live games of major professional sports teams.⁴⁴³ CSN-MA and CSN-Philly also carry the live games of major professional sports teams.⁴⁴⁴

an "ALJ"); Memorandum Opinion and Order, *Tequesta Television*, 2 FCC Rcd 41, ¶ 10 (1987) (Commission precedent establishes "that an ALJ may not countermand a designation order issued under delegated authority as to matters already considered by the delegating authority").

⁴³⁷ See *HDO* ¶ 108 ("Comcast has not attempted to demonstrate that MASN, CSN-MA, and CSN-P[hilly] are not similarly situated.").

⁴³⁸ See 47 C.F.R. § 76.1302(d)(2) (the answer "shall address the relief requested in the complaint, including legal and documentary support, for such response").

⁴³⁹ See *TWC Order* ¶ 27 n.101.

⁴⁴⁰ See *supra* PFOF ¶ 17.

⁴⁴¹ See *Adelphia Order* ¶¶ 124, 189.

⁴⁴² See *supra* PFOF ¶¶ 23, 38-43.

⁴⁴³ See *supra* PFOF ¶¶ 15-16.

⁴⁴⁴ See *supra* PFOF ¶ 17.

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33. Furthermore, there is abundant evidence that MASN and Comcast's RSNs compete head-to-head in the marketplace. MASN and CSN-MA and CSN-Philly compete for sports programming rights, advertisers, and subscribers.⁴⁴⁵ The evidence thus easily supports Dr. Singer's testimony that, "[b]y almost any metric, MASN, CSN-MA, and CSN-Philly are similarly situated in the contested areas. All three are RSNs that operate in largely the same areas. All three seek to appeal principally to the same demographic: men aged 24 to 49. MASN and Comcast's affiliated RSNs compete directly with MASN for the same type of regional sports programming."⁴⁴⁶

34. Comcast has offered no relevant evidence to undermine MASN's showing.

B. Comcast Has Treated MASN Differently from Its Affiliated RSNs

35. MASN must also establish that Comcast has treated MASN differently.⁴⁴⁷ MASN has readily established this element of its *prima facie* case.

36. *First*, in each of the Foreclosed Areas, Comcast carries an affiliated RSN to 100 percent of Comcast's subscribers. But in each of the Foreclosed Areas, Comcast has refused to carry MASN to *any* of its subscribers.⁴⁴⁸ In each of those Foreclosed Areas, there is thus a palpable difference in treatment of MASN and Comcast-affiliated RSNs.

⁴⁴⁵ See *supra* PFOF ¶¶ 44-47; see also Tr. at 6152-54 (Singer Test.); Tr. at 5591 ("We compete with those networks [CSN-MA and CSN-Philly] on a daily basis in a lot of ways in terms of programming and advertising and viewership and ratings. There is no doubt we compete with [CSN-MA and CSN-Philly].") (Cuddihy Test.).

⁴⁴⁶ MASN Ex. 238, ¶ 6 (Singer Written Test.).

⁴⁴⁷ See *HDO* ¶ 109.

⁴⁴⁸ See *supra* PFOF ¶ 21.

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37. *Second*, across the overlapping portions of MASN’s, CSN-MA’s, and CSN-Philly’s territories, Comcast carries an affiliated RSN to more than 99 percent of subscribers, but Comcast has refused to carry MASN to more than 87 percent of Comcast’s subscribers.⁴⁴⁹

38. *Third*, the evidence in this proceeding also establishes that Comcast employs myriad double standards in its treatment of MASN and affiliated RSNs.⁴⁵⁰ As discussed further below, Comcast’s pattern and practice of differential treatment of affiliated and unaffiliated networks is powerful evidence the Comcast carriage decisions at issue in this proceeding were motivated by considerations of affiliation and non-affiliation.

C. The Evidence Conclusively Establishes That The Differential Treatment Is Motivated By Affiliation and Non-Affiliation

39. In addition, this Tribunal concludes there is overwhelming evidence that Comcast’s disparate treatment is motivated by considerations of affiliation and non-affiliation.

40. *First*, the application of different standards to affiliated and unaffiliated networks in selecting networks for carriage is affiliation-based discrimination.⁴⁵¹ Comcast Cable’s President has publicly acknowledged that unaffiliated networks get held to a “different level of scrutiny” than affiliated networks.⁴⁵² He has also admitted that Comcast’s affiliated networks

⁴⁴⁹ See *supra* PFOF ¶ 20.

⁴⁵⁰ See *supra* PFOF ¶¶ 94-107.

⁴⁵¹ See *TWC Order* ¶ 33 (TWC engaged in affiliation-based discrimination in not applying the same ratings requirements to affiliated and unaffiliated RSNs, explaining the FCC’s rules “prohibit[] TWC from applying to unaffiliated programming services more stringent standards . . . than those it applied to affiliates”); *Vance v. Young*, No. 2:05cv00316-WRW, 2007 WL 1975604, at *3 (E.D. Ark. July 6, 2007) (discrimination plaintiff demonstrated “that he was treated unequally when [employer] disregarded numerous, serious infractions of [a similar candidate], while holding Plaintiff strictly accountable”; “[f]rom this evidence, a reasonable juror could infer that [the employer] intentionally held Plaintiff to a higher standard” and thus Plaintiff “offered enough evidence of discriminatory intent as a motivating factor in his termination”).

⁴⁵² MASN Ex. 243, at 8; *supra* PFOF ¶ 94.

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“get treated like siblings as opposed to like strangers.”⁴⁵³ The record in this proceeding corroborates these admissions. Whereas Comcast demands that unaffiliated RSNs negotiate lengthy carriage contracts, [REDACTED]

[REDACTED] Unrefuted evidence also establishes that Comcast uses [REDACTED] calculations when considering whether to carry affiliated and unaffiliated networks – a standard that ensures systematic discrimination because an affiliated network will always be favored over a similarly situated unaffiliated network.⁴⁵⁴

41. There would be no serious question that a statement by an employer that “female employees get held to different hiring standards than male employees” amounts to proof that an employment decision is motivated by considerations of sex. It likewise is clear that requiring female employees to sign employment contracts, while male employees can work without them, would prove employment discrimination based on sex. Comcast’s similar admissions and disparate treatment here accordingly satisfy any meaningful legal standard for identifying affiliation-based discrimination.

42. *Second*, it is black-letter law that past acts of discriminatory conduct can evidence present discriminatory intent.⁴⁵⁵ Here again, the evidence is conclusive that Comcast has engaged in campaigns of discriminatory and retaliatory treatment of MASN. Comcast refused to carry MASN at all for nearly two years even in MASN’s core market despite aggressively

⁴⁵³ MASN Ex. 243, at 7-8; *see also* Tr. at 7089 (Orszag Test.).

⁴⁵⁴ *See supra* PFOF ¶ 95.

⁴⁵⁵ *See Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1112 (7th Cir. 1998) (“In other contexts, there most certainly will be circumstances in which evidence surrounding a previous employment decision such as a demotion would be relevant to and probative of an employer’s intent in a subsequent termination decision.”); *Little v. National Broad. Co.*, 210 F. Supp. 2d 330, 379 (S.D.N.Y. 2002) (evidence of past conduct, “even if it occurred well before the statute of limitations, may support an inference of racially discriminatory intent”).

seeking MASN's core programming: Comcast bid for (and made unprecedented public requests demanding) the rights to the Nationals, and Comcast sued for the rights to the Orioles.⁴⁵⁶

Comcast at that time took the extraordinary step of sending letters to other MVPDs threatening them if they carried MASN, and, once Comcast began carrying MASN in some places, took the further extraordinary step of sending letters to subscribers blaming MASN for a rate increase.⁴⁵⁷

This conduct, which Comcast's own witnesses acknowledged was unprecedented, reveals that Comcast's dealings with MASN have not been in good faith.

43. Furthermore, Comcast's disparate treatment of MASN and its affiliated RSNs with respect to overflow channels and split-feed advertising strengthens the conclusion that Comcast regularly treats its affiliated RSNs in more favorable ways than MASN – a network that is not affiliated with the Comcast family.⁴⁵⁸

44. *Third*, the unreasonableness of proffered justifications can support an inference of discrimination.⁴⁵⁹ Here, Comcast has rested on the supposed low demand for and high cost of MASN. But unrebutted evidence shows that Comcast never raised these purported issues with MASN during the negotiations that preceded the Carriage Agreement in August 2006.⁴⁶⁰ It is difficult to suppose that Comcast was so concerned with the low demand for MASN that it

⁴⁵⁶ See *supra* PFOF ¶¶ 23-33.

⁴⁵⁷ See *supra* PFOF ¶ 100.

⁴⁵⁸ See *supra* PFOF ¶¶ 104-106.

⁴⁵⁹ *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1143 (10th Cir. 2009) (“[a] claim of pretext need not be supported with direct evidence, but may be based on weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions’ in the employer’s claimed legitimate, non-discriminatory reason such that a rational trier of fact could find the reason unworthy of belief”) (internal quotation marks omitted); see also *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 579 (7th Cir. 2003) (“One can reasonably infer pretext from an employer’s shifting or inconsistent explanations for the challenged employment decision.”).

⁴⁶⁰ See *supra* PFOF ¶¶ 108-111.

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would not carry MASN in the Foreclosed Areas, but that it decided never to raise this issue with MASN. To the contrary, if Comcast was genuinely motivated by concerns of the purportedly high cost of MASN, it at least would have sought to negotiate a lower price for carriage in these areas – just as DirecTV did for various regions during its protracted carriage negotiations with MASN.

45. Likewise unambiguous is the fact that virtually every other major MVPD has elected to carry MASN in the Foreclosed Areas.⁴⁶¹ In fact, MASN has secured carriage from approximately 80 percent of all non-Comcast MVPD subscribers in the Foreclosed Areas.⁴⁶² There is no evidence that these other MVPDs (which lack Comcast’s incentive to discriminate but share Comcast’s incentive to carry only valuable programming) are mistaken in their assessment of the value for MASN. That Comcast is alone among major MVPDs in refusing to carry MASN in the Foreclosed Areas demonstrates the implausibility of Comcast’s proffered justifications for not carrying MASN.

46. *Fourth*, although direct evidence is not required to show discrimination under any legal standard,⁴⁶³ the evidence in this proceeding puts beyond any reasonable dispute that Comcast’s takes affiliation and non-affiliation into account in making carriage decisions. In particular, the [REDACTED] and the events surrounding the adoption of the August 2006 Term Sheet – including [REDACTED]

⁴⁶¹ See *supra* PFOF ¶¶ 112-113.

⁴⁶² See MASN Ex. 240 (demonstrative); MASN Ex. 238, ¶ 94, Table 8 (Singer Written Test.); *supra* PFOF ¶ 114.

⁴⁶³ See *Amrhein v. Health Care Serv. Corp.*, 546 F.3d 854, 858-59 (7th Cir. 2008) (“Because direct evidence of discriminatory intent is rare, a plaintiff can also offer circumstantial evidence, which allows the trier of fact to *infer* intentional discrimination by the decisionmaker, typically through a longer chain of inferences.”) (internal quotation marks omitted); *TWC Order* ¶ 25 (rejecting a requirement of “direct evidence”).

⁴⁶⁴ – reveal precisely why Congress would be concerned with a distribution company acquiring a programming arm: an unaffiliated cable company simply would not have engaged in *any* comparison of MASN and CSN-MA on the eve of a carriage negotiation – much less a comparison that expressly . Nor would an unaffiliated cable company ever come away from such an analysis with the intent to “carve off” subscribers for competitive reasons. This is direct evidence that affiliation and non-affiliation drive Comcast’s carriage decisions.

47. *Fifth*, the conclusion that Comcast’s carriage decisions were influenced by prohibited factors in this case also follows from Comcast’s failure to place any meaningful safeguards on this process. There is no reliable evidence documenting how Schedule A was prepared, even though it accomplished Mr. Bond’s goal of “carv[ing] off” MASN’s subscribers.⁴⁶⁵ Neither Mr. Bond nor Mr. Ortman received training regarding the FCC’s program-carriage rules.⁴⁶⁶ Because of the strong incentives to favor the interests of its affiliated RSNs, the confusion regarding the “carv[ing] off” of MASN’s subscribers, and the lack of training regarding the Commission’s discrimination rules, it is simply implausible to conclude that considerations of affiliation and non-affiliation did not play a role in Comcast’s carriage decisions. In fact, the Media Bureau has recognized that a similar failure of a vertically integrated cable operator to take seriously the Commission’s rules supports a finding of discrimination.⁴⁶⁷

⁴⁶⁴ See, e.g., *supra* PFOF ¶¶ 51-60.

⁴⁶⁵ See *supra* PFOF ¶¶ 75-82.

⁴⁶⁶ See *supra* PFOF ¶ 108.

⁴⁶⁷ See *TWC Order* ¶ 32 n.127 (“TWC’s failure to educate its employees about the company’s specific regulatory obligations is a serious dereliction of TWC’s responsibilities under the program carriage” rules.).

D. Comcast Has No Legitimate, Non-Discriminatory Justification For Its Differential Treatment

1. Comcast's Contract-Based Defense Has No Merit

48. Comcast's principal defense of its refusal to carry MASN in the Foreclosed Areas is that MASN forfeited its right to insist on Comcast's compliance with federal law with respect to those systems on the Term Sheet. This defense lacks merit for multiple reasons.

49. *First*, the Media Bureau rejected this defense. The Bureau held that, although "the Term Sheet committed Comcast's future carriage decisions, including carriage on systems not included in the List of Systems, to Comcast's 'discretion,'" "[t]he Term Sheet . . . does *not* indicate that MASN waived its statutory program carriage rights with respect to Comcast's exercise of such discretion."⁴⁶⁸ The meaning of the Term Sheet is thus irrelevant: the question is whether Comcast's post-agreement conduct reflects discretion in a manner that violates federal non-discrimination rules. "Whether or not Comcast" has a right "pursuant to a private agreement is *not relevant* to the issue of whether" exercising a right in certain circumstances (for example, for discriminatory purposes) would "violate[] . . . the Act and the program carriage rules."⁴⁶⁹ "Parties to a contract," the Bureau held, "cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules."⁴⁷⁰

50. That holding is binding and persuasive, and it forecloses Comcast's reliance on the Term Sheet as a defense to its discriminatory carriage decisions here.⁴⁷¹

⁴⁶⁸ *HDO* ¶ 105 (emphasis added).

⁴⁶⁹ *Id.* ¶ 72 (emphasis added).

⁴⁷⁰ *Id.*

⁴⁷¹ *See, e.g.*, Tr. at 6155-57 ("the existence of the contract" has "[no] bearing on whether or not discrimination had occurred here"; just as in the NFL case, "[h]ere one could say that Comcast secured whether by deception or whether or not the parties understood the right not to carry MASN in 13 percent of MASN's territory" and "[n]ow they're exercising that right" and it

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51. *Second*, regardless of whether the Bureau’s analysis is binding, it is correct.

Wholly apart from the Media Bureau’s holding, this Tribunal has previously held that a written agreement does not provide a prospective license to violate the Commission’s nondiscrimination rules.⁴⁷² In no event did the Term Sheet give Comcast the right to make discriminatory (and, hence, unlawful) carriage decisions.⁴⁷³ While the Term Sheet commits certain carriage decisions to Comcast’s “discretion,” Comcast has admitted that its discretion under the Carriage Agreement was bounded by federal law.⁴⁷⁴ Accordingly, this Tribunal’s prior ruling and Comcast’s admission independently require the same result here.

52. *Third*, the Term Sheet should not be enforced because it was procured through misrepresentation by Comcast’s during the parties’ carriage negotiations. This Commission has a responsibility to ensure that carriage negotiations are conducted in good faith. The evidence developed in this proceeding establishes that Comcast did not deal with MASN in good faith with respect to the exclusion of the Foreclosed Areas from the Term Sheet.⁴⁷⁵ This Tribunal therefore declines to count the Term Sheet as a defense to MASN’s Complaint.

is the “exercise of that right” that “is an act of discrimination and violation of the Cable Act”) (Singer Test.); Tr. at 6446 (noting the issue of “Schedule A” might have been “overdone” as the “economists” are not concerned about the contract with respect to discrimination) (Judge Sippel).

⁴⁷² See Memorandum Opinion and Order, *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, MB Docket No. 08-214, File No. CSR-7876-P, ¶ 3 (FCC 09M-36 Apr. 17, 2009).

⁴⁷³ See, e.g., *Richardson v. Sugg*, 448 F.3d 1046, 1054 (8th Cir. 2006) (explaining that “[a] number of other circuits have . . . held . . . that persons may not contract away *prospective claims* under Title VII” and reasoning that allowing a private party “to bargain away the right to pursue a prospective discrimination claim [would] frustrate[] t[he] statutory scheme” designed by Congress to remedy discrimination) (emphasis added).

⁴⁷⁴ See Tr. at 6919 (“Q: And another limitation on Comcast’s discretion is federal regulatory law, correct? A: Yes.”) (Bond Test.).

⁴⁷⁵ See *supra* PFOF ¶¶ 48-91.

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53. *Fourth*, the Release of the Term Sheet is no defense to Comcast’s discriminatory conduct. That clause applies to conduct “until the date of this Release clause” – that is, August 2006. MASN’s Complaint concerns Comcast’s refusal to carry MASN in the Foreclosed Areas after MASN discovered it was not being carried on those systems in January 2007, well after the date of the release clause. An agreement in 2006 did not give Comcast the right to break the law in 2007. A reading of the Release that applies prospectively after August 2006 would grant Comcast impunity to violate the Commission’s rules going forward. Foundational principles of contract interpretation and public policy foreclose such an interpretation: release clauses are to be interpreted narrowly;⁴⁷⁶ exculpatory clauses in agreements bound up with the public interest (such as carriage contracts) are generally not enforced;⁴⁷⁷ and contractual provisions that purport to exempt a party from ongoing statutory obligations are unenforceable except under circumstances not present here.⁴⁷⁸

2. Comcast’s Bandwidth Defense Is Unfounded

54. Comcast’s has not established that bandwidth constraints constitute a legitimate, non-discriminatory reason for refusing to carry MASN in the Foreclosed Areas.

⁴⁷⁶ See 8 Richard A. Lord, *Williston on Contracts* § 19:21, at 278 (4th ed. 1998) (contractual provisions “limiting future liability are strictly construed by the courts”); *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (collecting cases for the view that “an employee may validly release only those Title VII claims arising from discriminatory acts or practices which antedate the execution of the release” and that “an otherwise valid release that waives prospective Title VII rights is invalid as violative of public policy”) (internal quotation marks omitted); Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 55 (2007) (this Commission has “wide authority” to prohibit enforcement of private agreements “where . . . the public interest so requires”).

⁴⁷⁷ See *Williston on Contracts* § 19:22, at 287 (“[b]ecause certain agreements are affected with a public interest, exculpation clauses contained in them are not enforceable”).

⁴⁷⁸ See *id.* § 19:26, at 316 (“[a] purported exemption from statutory liability is usually void, unless the purpose of the statute is merely to give an added remedy which is not based on any strong policy”) (footnotes omitted).

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55. *First*, as a legal matter, a lack of unused bandwidth is no excuse for discriminatory carriage decisions. All MVPDs have an incentive fully to utilize bandwidth, and it would nullify non-discrimination obligations to allow that to serve as a defense of preferential treatment of affiliated networks. In fact, as a remedy for discrimination, the FCC rules are clear that cable operators can be required to carry unaffiliated networks,⁴⁷⁹ and that such carriage may require “the defendant . . . to *delete existing programming* from its system to accommodate carriage.”⁴⁸⁰ Those provisions refute the suggestion that bandwidth can serve as a defense to discrimination: if a lack of bandwidth were a legitimate, non-discriminatory defense to a carriage decision, there would never be a circumstance in which a cable operator would be required “to delete existing programming . . . to accommodate carriage.”

56. *Second*, even were bandwidth constraints a defense to discrimination, Comcast’s defense is pretextual. During the August 2006 negotiations, Comcast represented to MASN that it lacked capacity to carry MASN on Adelphia systems, but it never raised this as an issue with respect to any other cable system in the Foreclosed Areas.⁴⁸¹ Comcast, in fact, did not first raise this as an issue with respect to the Harrisburg and Tri-Cities DMAs until 2007.⁴⁸² The *post hoc* nature of the defense is a firm basis for concluding the defense is pretextual.⁴⁸³

⁴⁷⁹ See 47 C.F.R. § 76.1302(g)(1) (authorizing “mandatory carriage”)

⁴⁸⁰ *Id.* (emphasis added).

⁴⁸¹ See *supra* PFOF ¶¶ 65, 84.

⁴⁸² See *supra* PFOF ¶¶ 58, 84.

⁴⁸³ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001) (“a factfinder could infer from the late appearance of Sears’s current justification that it is a post-hoc rationale, not a legitimate explanation for Sears’s decision not to hire [the plaintiff]”); *Jaramillo v. Colorado Judicial Dep’t*, 427 F.3d 1303, 1311 (10th Cir. 2005) (“The timing of the change [in explanation for challenged conduct] has been found to support the inference of pretext when it occurs after significant legal proceedings have occurred.”); *Culver v. Gorman & Co.*, 416 F.3d 540, 549 (7th Cir. 2005) (explanation that “comes . . . late in the day” “permit[s] an inference of pretext”).

57. *Third*, and perhaps most importantly, Mr. Ortman – Comcast’s most knowledgeable witness about bandwidth issues⁴⁸⁴ – testified there would be no unmanageable bandwidth concerns with launching MASN on any system with 550 MHz capacity or more.⁴⁸⁵ The majority of systems in the Foreclosed Areas *are* at or above 550 MHz.⁴⁸⁶

3. Comcast’s Demand Defense Is Unavailing

58. Comcast has not shown that purportedly low consumer interest for MASN in the Foreclosed Areas is a legitimate, non-discriminatory justification for refusing to carry MASN.

59. *First*, the low demand defense is pretextual. Comcast did not raise low demand as a justification with MASN in the 2006 carriage negotiations.⁴⁸⁷ Comcast did not study demand for MASN in creating Schedule A. Consumer demand was not a criterion that Comcast used in creating Schedule A.⁴⁸⁸ The low demand defense was first raised only in 2007.⁴⁸⁹ Nor has Comcast produced contemporaneous documents demonstrating that this (or any) justification for not carrying MASN actually motivated Comcast’s refusal to carry MASN – all of Comcast’s

⁴⁸⁴ See Tr. at 6476 (“Q: And one of your responsibilities is managing bandwidth for Comcast; correct? A: That is correct.”) (Ortman Test.); Tr. at 6926 (“Q: You are not an expert on bandwidth, are you? A: No. Q: Mr. Ortman is an expert on bandwidth, isn’t he? A: Yes, he knows a lot more about it than me. . . . Q: So he understands more precisely what each system’s bandwidth constraints are than you do, correct? A: Yes.”) (Bond Test.).

⁴⁸⁵ See *supra* PFOF ¶ 84.

⁴⁸⁶ See MASN Ex. 236, Ex. A (Unlaunched Comcast Systems Within MASN’s TV Territory Designated Market Area) (Wyche Written Test.); Supplemental Filing, Joint Submission: Unlaunched Comcast Systems Within MASN’s TV Territory by Designated Market Areas (filed June 24, 2004).

⁴⁸⁷ See *supra* PFOF ¶ 108.

⁴⁸⁸ See *supra* PFOF ¶ 110.

⁴⁸⁹ See *supra* PFOF ¶¶ 108-111. Indeed, Mr. Gluck testified that Comcast never directly conveyed to him at any point that there was low demand for MASN outside this litigation. See Tr. at 6068 (Gluck Test.).

evidence is from expert witnesses retained for this litigation. That this defense is entirely *post hoc* also shows that it is entirely pretextual.⁴⁹⁰

60. *Second*, Comcast's low demand defense asks and answers the wrong question. This is a discrimination case. The relevant question is whether Comcast treats MASN differently from its affiliated RSNs. Comparative (rather than absolute) demand is the proper analysis. But Comcast has submitted no evidence of any demand for the programming of Comcast's affiliated RSNs in the Foreclosed Areas with which to compare the supposedly low demand for MASN.⁴⁹¹

61. *Third*, Comcast's internal documents belie its litigation claims of low demand. Months before the carriage negotiations in August 2006, Comcast knew there was a strong demand for MASN's programming in the Foreclosed Areas. In fact, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹² This document completely refutes Comcast's claim now there is no demand for MASN in the Foreclosed Areas.

62. *Fourth*, the carriage decisions of other major MVPDs – including Comcast's most significant competitors – to carry MASN in the Foreclosed Areas refutes Comcast's assertions there is low demand for MASN in the Foreclosed Areas.⁴⁹³ In fact, approximately 80 percent of all non-Comcast, MVPD subscribers in the Foreclosed Areas receive MASN.⁴⁹⁴ The Media Bureau has previously concluded that similar carriage decisions by other MVPDs are strong

⁴⁹⁰ See *supra* PCOL ¶ 56.

⁴⁹¹ See *supra* PFOF ¶ 101.

⁴⁹² See *supra* PFOF ¶ 31.

⁴⁹³ See *supra* PFOF ¶¶ 34-37, 112-113.

⁴⁹⁴ See *supra* PFOF ¶ 114.

evidence of actual and potential demand for MASN's programming.⁴⁹⁵ Indeed, the Media Bureau made such findings in the *HDO* here.⁴⁹⁶

63. *Fifth*, Nielsen ratings confirm there is strong demand for MASN in the Harrisburg and Roanoke-Lynchburg DMAs. The record evidence establishes that Orioles games received strong ratings in those areas in 2004-2005. Comcast's witnesses acknowledged ratings in this range were high for RSN programming.⁴⁹⁷ Comcast has submitted no comparable Nielsen information for its affiliated RSNs.

64. *Sixth*, the history of carriage of the Orioles in the Foreclosed Areas demonstrates both actual and potential demand for MASN.⁴⁹⁸ The Media Bureau has previously determined that similar evidence of a history of carriage of sports programming in an area is good evidence of actual and potential demand for such programming.⁴⁹⁹

65. *Seventh*, Comcast's aggressive efforts to retain Orioles rights and to acquire Nationals rights for carriage across those teams' footprints are strong evidence that Comcast's demand defense is manufactured for purposes of this litigation.⁵⁰⁰

4. Comcast's Cost-Based Defense Has No Merit

66. Comcast has not established that MASN's purportedly high price in the Foreclosed Areas is a legitimate, non-discriminatory justification for refusing to carry MASN.

⁴⁹⁵ See *TWC Order* ¶ 34 (“the decision by four of the five largest MVPDs . . . in North Carolina to carry MASN . . . suggests the existence of actual or potential demand for MASN”).

⁴⁹⁶ See *HDO* ¶ 118 n.528 (concluding that carriage decisions by “DIRECTV and DISH” in “southwestern Virginia” evidence the value of MASN's programming in that area).

⁴⁹⁷ See *supra* PFOF ¶¶ 116-117.

⁴⁹⁸ See *supra* PFOF ¶ 78.

⁴⁹⁹ See *TWC Order* ¶ 34 (finding it significant that “Orioles games have been broadcast in North Carolina for nearly two decades prior to the 2007 MLB season, when MASN began to produce and exhibit the games”).

⁵⁰⁰ See *supra* PFOF ¶¶ 23-33.

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67. *First*, Comcast’s cost-based defense is pretextual. Comcast never raised the cost of MASN as being too high in any particular area. Instead, Comcast sought – and obtained – an across-the-board reduction in all of MASN’s prices.⁵⁰¹ Given its success in negotiating a lower price from MASN across-the-board, it is difficult to suppose that Comcast declined to ask for a lower price in any region where it genuinely believed MASN’s price to be too high.

68. *Second*, in a discrimination case such as this, the proper legal question is not MASN’s price in the abstract, but rather MASN’s price as it compares to the price of Comcast’s affiliated RSNs in the Foreclosed Areas. An expert study conclusively demonstrates both the reasonableness of MASN’s rates and that MASN is either cheaper than or comparable to the affiliated RSN that Comcast carries in each of the Foreclosed Areas.⁵⁰²

69. *Third*, Comcast’s cost-based defense is implausible because the prices charged by MASN for carriage in the Foreclosed Areas are the same as the prices paid by other major MVPDs in the Foreclosed Areas.⁵⁰³ As the Media Bureau has held, “the best and most persuasive evidence of fair market value is the objective price that RSN programming yields in the marketplace.”⁵⁰⁴ And, as Dr. Singer has explained in his written testimony, determining a fair market value for MASN is “particularly straightforward because *all MVPDs that carry MASN in the contested areas pay the same rate.*”⁵⁰⁵ Testimony from industry expert Mr. Wyche

⁵⁰¹ See *supra* PFOF ¶ 66.

⁵⁰² See *supra* PFOF ¶ 123.

⁵⁰³ See *supra* PFOF ¶ 122.

⁵⁰⁴ *TWC Order* ¶ 46.

⁵⁰⁵ MASN Ex. 238, ¶ 52 (Singer Written Test.).

confirms that the decisions of these other MVPDs to pay rates arrived at in arm's-length negotiations is strong evidence that MASN's rates are reasonable.⁵⁰⁶

70. *Fourth*, the reasonableness of MASN's rate is confirmed by a PSPPE analysis – which shows that MASN's rate compares favorably to prices paid by Comcast to carry other RSNs – and a regression analysis – which predicts the price for MASN in the Foreclosed Areas based on numerous explanatory variables.⁵⁰⁷ As Dr. Singer testified, the result of the regression analysis is that “MASN's Zone 4 fee can be justified based on objective, marketplace data of what Comcast pays to carry other RSNs.”⁵⁰⁸

E. Comcast's Discriminatory Conduct Has Undermined MASN's Ability To Compete Fairly

71. MASN has also proven that Comcast's conduct “unreasonably restrain[s] the ability” of MASN “to compete fairly.”⁵⁰⁹ The evidence developed in the proceedings leaves no question that Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas has restrained MASN's ability to compete fairly in at least four ways.

72. *First*, Comcast's discriminatory conduct has restrained MASN's ability to compete fairly for programming rights.⁵¹⁰ Rights to professional sports programming are the lifeblood of RSNs, such as MASN, CSN-MA, and CSN-Philly. Sports teams that sell their rights to networks, moreover, want to reach the largest number of fans within their league-defined territories as possible. Coverage gaps in an RSN's footprint can accordingly materially affect an RSN's ability to bid on and acquire sports programming rights. In fact, the evidence in this

⁵⁰⁶ See MASN Ex. 236, ¶ 26 (Wyche Written Test.).

⁵⁰⁷ See *supra* PFOF ¶ 124.

⁵⁰⁸ MASN Ex. 238, ¶ 77 (Singer Written Test.).

⁵⁰⁹ 47 U.S.C. § 536(a)(3).

⁵¹⁰ See *supra* PFOF ¶¶ 146-149.

proceeding establishes that the coverage gaps in MASN's territory created by Comcast's discriminatory conduct have already tilted the competitive playing-field in favor of Comcast's affiliated RSNs: the record makes clear that MASN competed against Comcast for the rights to Washington Redskins pre-season games; that Comcast acquired these rights; and that the Redskins specifically noted MASN's lack of full coverage as a deficiency.⁵¹¹

73. In light of the concrete coverage gaps created by the Foreclosed Areas, MASN will need to bid more for sports programming to make up for the coverage gaps. Thus, because of Comcast's discriminatory conduct, a Comcast RSN that is otherwise similarly situated to MASN could acquire sports programming rights at a cheaper price than MASN because of the coverage gaps.⁵¹² This permanent tilting of the competitive playing-field in favor of affiliated RSNs is not only strong evidence of Comcast's motive in denying MASN carriage in the Foreclosed Areas but it is precisely the type of discriminatory conduct that should be the focus of any meaningful non-discrimination rule.

74. *Second*, Comcast's discriminatory conduct has restrained MASN's ability to compete fairly for advertising dollars.⁵¹³ The evidence demonstrates this competitive harm is suffered in two respects: MASN receives lower revenues from advertisers that do business with MASN because advertising fees are denominated in the number of viewers reached⁵¹⁴ *and* because some advertisers will not do business with MASN at all because of the coverage gaps in the Foreclosed Areas.⁵¹⁵ These competitive harms, moreover, are not just theoretical: evidence

⁵¹¹ See *supra* PFOF ¶ 146.

⁵¹² See *supra* PFOF ¶¶ 148-149.

⁵¹³ See *supra* PFOF ¶¶ 143-145.

⁵¹⁴ See *supra* PFOF ¶ 143.

⁵¹⁵ See *supra* PFOF ¶ 144.

that Comcast did not refute establishes that coverage gaps have caused MASN to lose business from two advertisers: [REDACTED].⁵¹⁶

75. *Third*, Comcast's conduct has restrained MASN's ability to compete fairly with Comcast's affiliated RSNs. Comcast's discriminatory carriage decisions will cost MASN more than [REDACTED] in licensing revenues alone over the length of the agreement.⁵¹⁷ That amounts to approximately [REDACTED] per month that MASN loses in licensing revenue alone. This is a significant sum that raises MASN's average costs, thereby undermining MASN's ability to compete fairly against CSN-MA and CSN-Philly.⁵¹⁸

76. *Fourth*, Comcast's conduct has foreclosed MASN's ability to compete at all in the Foreclosed Areas.⁵¹⁹ Comcast is the dominant cable operator and dominant MVPD in each of the Foreclosed Areas. Comcast's refusal to carry MASN in the Foreclosed Areas – coupled with its carriage of affiliated RSNs in those areas – prevents MASN from *competing at all* in those markets. This complete foreclosure in major DMAs, standing alone, establishes that Comcast's conduct has restrained MASN's ability to compete fairly.

77. Comcast has done little to dispute these findings. Instead, Comcast argues that the program-carriage rules are not implicated unless a discriminatory carriage decision threatens to bankrupt or inflict catastrophic loss on an unaffiliated programming network. Comcast's contrary reading of the fair competition prong of the non-discrimination rule of the Cable Act and the FCC's rules is inconsistent with the text, history, and purposes of the Cable Act.

⁵¹⁶ See *supra* PFOF ¶¶ 144-145.

⁵¹⁷ See *supra* PFOF ¶ 142.

⁵¹⁸ See *supra* PFOF ¶ 142.

⁵¹⁹ See *supra* PFOF ¶¶ 150-152.

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78. *First*, the Media Bureau has rejected such a “restrictive interpretation” of the fair competition element.⁵²⁰ That order has the force and effect of law and is binding here.⁵²¹

79. *Second*, the non-discrimination rule in the Cable Act and the FCC’s regulations prohibits any affiliation-based discrimination that “restrain[s]” a network’s “ability to compete *fairly*,” not to compete *at all*. Preserving fair competition is obviously distinct from preserving competition at all: Comcast’s reading of the provision reads the “fair[]” competition language out of the statute. Comcast’s economic expert essentially concedes this: he testified that the *fair* competition “standard” was not what he “applied.”⁵²² If Congress or this Commission had intended to limit the bar on discrimination to instances in which an unaffiliated network would be put out of business, either could have said so directly.⁵²³

80. Furthermore, Congress’s choice of the word “restrain” – rather than, for example, “foreclose” or “impair” – evinces Congress’s expectation that conduct that falls well short of completely foreclosing fair competition would be proscribed. And, crucially, the object of injury in the statute and the FCC’s regulations is the competitor (namely, the “unaffiliated video programming vendor”⁵²⁴), not competition in the abstract. Much of Comcast’s expert testimony regarding the injury arising from Comcast’s conduct applies standards developed in the antitrust context to measure harm to *competition*, not harm to *competitors*.⁵²⁵ Assessing “harm to a

⁵²⁰ See *TWC Order* ¶¶ 30-31.

⁵²¹ See 47 U.S.C. § 155(c)(4).

⁵²² Tr. at 7216-17 (Orszag Test.).

⁵²³ See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (courts should “not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply”).

⁵²⁴ *E.g.*, 47 U.S.C. § 536(a)(3).

⁵²⁵ See Tr. at 7213-16 (Orszag Test.)

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competitor,” Mr. Orszag acknowledged, “would be a different analysis” than he conducted.⁵²⁶ For that reason alone, Mr. Orszag’s testimony is of no relevance to this proceeding.

81. *Third*, the legislative history and purposes of the Cable Act confirm that Congress intended the non-discrimination provision to be construed broadly. Congress found that “vertical integration gives cable operators the incentive and ability to favor their affiliated programming services” by, among other things, unreasonably refusing to carry unaffiliated programmers or “giv[ing] its affiliated programmer a more desirable channel position than another programmer.”⁵²⁷ The relevant Senate Report explained, for example, that “the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services . . . in which he does not have an equity position.”⁵²⁸ Congress was concerned generally that cable companies would use their control over distribution to the economic advantage of affiliates and to the detriment of unaffiliated networks. Reading the program-carriage rules as inapplicable so long as Comcast does not bankrupt a network would countermand that congressional purpose.

82. Furthermore, the legislative history confirms that Congress’s concern was with preventing injury to unaffiliated networks, not to competition in the abstract.⁵²⁹

83. Comcast is also wrong that a proper reading of the fair competition prong has no limiting principle. The program-carriage rules sweep more broadly than refusal-to-carry cases

⁵²⁶ Tr. at 7214 (Orszag Test.).

⁵²⁷ S. Rep. No. 102-92, at 25, 1992 U.S.C.C.A.N. at 1158.

⁵²⁸ *Id.* at 26, 1992 U.S.C.C.A.N. at 1159.

⁵²⁹ *See id.* at 24, 1992 U.S.C.C.A.N. at 1157 (finding that vertically integrated cable operators can “abuse” their “market power to the detriment of programmers and competitors” and that the provision adopted “reflect[s] that concern”).

(such as this). Affiliation-based discrimination is prohibited with respect to “the selection, terms, or conditions” for carriage.⁵³⁰ The fair competition prong accordingly reflects Congress’s judgment that differential treatment in the abstract is not, standing alone, a basis for imposing liability. Instead, a programming vendor must produce evidence the differential treatment (in the selection, terms, *or* conditions of carriage) affects fair competition. It may well be that in most refusal-to-carry cases (such as this) that showing will be straightforward (as a refusal to carry a network in certain markets obviously restrains fair competition at least in those markets), but that does not read the fair competition prong out of the statute. This element continues to ensure that minor differences in the “terms” or “conditions” of a carriage contract will not give rise to liability without a showing that fair competition has been affected.

84. A contrary reading of the compete fairly prong would have deleterious policy consequences. Comcast’s reading – that discrimination is not actionable so long as it does not bankrupt an RSN – would permanently tilt the competitive playing-field by allowing affiliated networks to receive preferential carriage treatment so long as that treatment does inflict catastrophic injury. It is impossible to believe that Congress would have intended such a counterintuitive result, allowing vertically integrated cable companies to inflict discriminatory injury on rival programming networks so long as they stop just short of bankrupting the rival.

F. Comcast’s Threshold Objections to MASN’s Complaint Lack Merit

1. Comcast’s Statute-of-Limitations Argument Is Wrong

85. Comcast has asserted that MASN’s Complaint is time-barred. Comcast is wrong. This case is about Comcast’s unreasonable refusal to carry MASN in the Foreclosed Areas.

⁵³⁰ 47 U.S.C. § 536(a)(3).

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From the time MASN discovered that Comcast would not carry MASN in the Foreclosed Areas until the filing of its Complaint, MASN sought to reach a negotiated agreement with Comcast.⁵³¹

86. The negotiations between MASN and Comcast over carriage in the Foreclosed Areas appeared to reach a firm impasse in March 2008. At that time, MASN sent a notice letter to Comcast pursuant to 47 C.F.R. § 76.1302(a) and (b).⁵³² MASN explained that, “[g]iven that Comcast carries affiliated RSNs in these geographic regions, that Comcast has offered no legitimate business justification for its differential treatment of MASN and its affiliated RSNs, and that Comcast’s affiliates have historically carried Orioles programming in these areas, Comcast’s refusal to carry MASN is in direct violation of 47 C.F.R. § 76.1301(c).”⁵³³

87. In response, Comcast signaled a willingness to engage in further discussions, and MASN pursued a last-ditched effort to reach a negotiated agreement. Those negotiations failed, and MASN filed its Complaint on July 1, 2008, well within one year of MASN “notif[ying] [Comcast] that it intend[ed] to file a complaint with the Commission” based on Comcast’s unreasonable refusal to carry MASN in the Foreclosed Areas.⁵³⁴

88. Under the Commission’s rules, MASN’s Complaint was thus timely filed. The Media Bureau has already held as much.⁵³⁵ That conclusion is binding here.

⁵³¹ See *supra* PFOF ¶¶ 92-93; Tr. at 6955 (“Q: And then in 2007 when MASN determined that it was not being carried in all the markets it thought it was being carried on, it requested Comcast to carry it on those additional markets, the disputed markets, correct? A: Yes.”) (Bond Test.).

⁵³² See MASN Ex. 66.

⁵³³ *Id.*

⁵³⁴ 47 C.F.R. § 76.1302(f)(3).

⁵³⁵ See *HDO* ¶¶ 102-105.

2. Comcast's *Res Judicata* Argument Is Wrong

89. Comcast has also argued that *res judicata* bars MASN's Complaint. This is wrong for the same reasons Comcast's arguments regarding the Release of the Term Sheet are wrong.⁵³⁶

90. MASN's Complaint does not involve the same "common nucleus of operative facts" – a requirement of *res judicata*⁵³⁷ – as does the 2006 Carriage Complaint because MASN's current Complaint is based upon Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007.⁵³⁸ *Res judicata* accordingly does not bar MASN's Complaint.

91. The Media Bureau has already reached this result in a decision that is binding here.⁵³⁹

III. MANDATORY CARRIAGE IS THE APPROPRIATE REMEDY

92. In light of the above findings of fact and conclusions of law, a remedy of mandatory carriage on the terms proposed by MASN (and already accepted by Comcast outside the Foreclosed Areas) is necessary and proper.

93. The FCC's rules expressly authorize "mandatory carriage" as a remedy for discrimination.⁵⁴⁰ And basic remedial principles compel the conclusion that the remedy for

⁵³⁶ See *supra* PCOL ¶ 53.

⁵³⁷ See, e.g., Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, *Applications of Mid Atlantic Network, Inc. and Centennial Licensing II, L.L.C.*, 23 FCC Rcd 7582, ¶ 8 (2008).

⁵³⁸ See, e.g., Carriage Agreement Complaint ¶ 84 (filed July 1, 2008) (alleging that the "release clauses of the Term Sheet" are no defense because "[t]he core of this complaint seeks to hold Comcast liable for its conduct and its program carriage violations *since* the Term Sheet – namely, Comcast's unreasonable and discriminatory refusal to carry MASN on those unlaunched systems") (submitted to this Tribunal as a Judicial Notice document); *supra* PFOF ¶¶ 92-93.

⁵³⁹ See *HDO* ¶ 107 ("We conclude that the MASN complaint is not barred by *res judicata*.").

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Comcast's affiliation-based discriminating should be to afford MASN the same carriage terms and conditions that MASN would receive were MASN an affiliated RSN and/or to put MASN in the position it would be but-for Comcast's affiliation-based discrimination.

94. This remedy would best advance the public interest. *First*, there is a presumptive public interest in enforcing federal law and in remedying discrimination that Congress and the FCC have sought to proscribe.⁵⁴¹ The evidence here is strong that Comcast has engaged in a pattern and practice of discrimination against MASN that strikes at the core of Congress's and the FCC's concerns regarding the anti-competitive and anti-consumer effects of vertical integration.⁵⁴² The remedy of mandatory carriage is accordingly proportionate to the harm suffered by MASN, and is justified by the record of unlawful conduct here.

95. *Second*, the FCC has already recognized that decisions by vertically integrated cable companies not to carry unaffiliated RSNs based on affiliation directly harm consumers by denying them access to must-have programming.⁵⁴³ The FCC approved the Adelphia transaction – redounding to Comcast's benefit – while at the same time recognizing that the transaction would “increase the incentive and ability of . . . [Comcast] to deny carriage to RSNs that are not affiliated with them.”⁵⁴⁴ That discrimination, the FCC found, would directly harm consumers who would be “unable to view” must-have “RSN[] programming” of unaffiliated networks.⁵⁴⁵ The Commission imposed an arbitration remedy to “alleviate the potential harms to viewers who

⁵⁴⁰ 47 C.F.R. § 76.1302(g)(1).

⁵⁴¹ See Memorandum Opinion and Order, *Cablevision Sys. Corp.*, 11 FCC Rcd 12669, ¶ 17 (1996) (“passage of the 1992 Cable Act, incorporating the must carry provisions, is *prima facie* evidence that carriage . . . is in the public interest”).

⁵⁴² See *supra* PFOF ¶¶ 19-107; *supra* PCOL ¶¶ 26-84.

⁵⁴³ See *Adelphia Order* ¶¶ 189-190.

⁵⁴⁴ *Id.* ¶ 189.

⁵⁴⁵ *Id.*

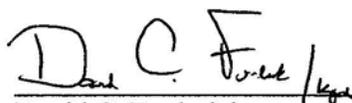
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are denied access to valuable RSN programming during protracted carriage disputes.”⁵⁴⁶

Comcast’s carriage decisions in this case have, in fact, resulted in Comcast’s subscribers in the affected regions being denied the ability to watch MASN’s must-have professional and collegiate programming for nearly *three* years. Only a remedy of mandatory carriage could advance the public interest in that respect.

96. Furthermore, MASN’s expert testimony establishes that the terms and conditions that MASN has offered to Comcast are commercially reasonable and that they reflect fair market value.⁵⁴⁷ Comcast has not offered any testimony setting forth a competing valuation method for MASN’s programming in the Foreclosed Areas.

Respectfully submitted,



David C. Frederick
Wan J. Kim
Evan T. Leo
Kelly P. Dunbar
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

June 26, 2009

Attorneys for TCR Sports Broadcasting
Holding, L.L.P.

⁵⁴⁶ *Id.* ¶ 191.

⁵⁴⁷ *See supra* PFOF ¶¶ 122-124.

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CERTIFICATE OF SERVICE

I, Kelly P. Dunbar, hereby certify that, on June 26, 2009, copies of the foregoing document were served via electronic mail on the following:

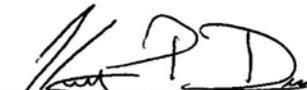
The Honorable Richard L. Sippel
(richard.sippel@fcc.gov)
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Mary Gosse (mary.gosse@fcc.gov)
Office of Administrative Law Judges
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
(courtesy copy)

Kris Anne Monteith (kris.monteith@fcc.gov)
Gary P. Schonmann (gary.schonman@fcc.gov)
William Davenport (william.davenport@fcc.gov)
Elizabeth Mumaw (elizabeth.mumaw@fcc.gov)
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

James L. Casserly (jcasserly@willkie.com)
Michael H. Hammer (mhammer@willkie.com)
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, D.C. 20006

David H. Solomon (dsolomon@wbklaw.com)
L. Andrew Tollin (atollin@wbklaw.com)
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, D.C. 20037



Kelly P. Dunbar