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,	)	
	)	
Com plainant	)	
	)	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 REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

July 10, 2009

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INTRODUCTION

Pursuant to the Post-Hearing Scheduling Order issued on May 27, 2009, TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network ("MASN"), respectfully submits its Proposed Reply Findings of Fact and Conclusions of Law. Comcast's proposed findings of fact contain numerous errors and assertions that are unsupported by the record evidence. Comcast's proposed conclusions of law likewise contain numerous errors. To be concise, MASN does not attempt to correct all of Comcast's many errors and mistaken assertions. MASN expressly does not concede the accuracy of any item not specifically rebutted below.

PROPOSED REPLY FINDINGS OF FACT

A. Comcast Corporation Tightly Controls its Cable and Programming Arms

153. Comcast suggests (at ¶ 1) that its cable group and its programming group are "independent."[1] That is incorrect. The undisputed record evidence shows that senior Comcast executives are not constrained by corporate distinctions among Comcast's various entities. In particular, Comcast has admitted acting against the best interests of its programming group in order to benefit its cable group.[2] This is why Comcast denies CSN-Philly millions of dollars in license fees each year from satellite providers. Comcast forces CSN-Philly to lose this money in order to allow its cable arm to profit by increasing its share of the market. As Comcast's expert witness admitted: "Q: And they're willing to lose that revenue for Comcast SportsNet Philly because Comcast Cable benefits, correct? A: Precisely."[3]

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[1] *See also* Comcast Proposed Findings of Fact ¶¶ 2-5 ("Comcast PFOF").

[2] *See* MASN Proposed Findings of Fact ¶¶ 41-43 ("PFOF").

[3] Tr. at 7228 (Orszag Test.).

154. Abundant record evidence further shows that Comcast does not view its various arms to be independent. Executives within Comcast's cable and programming groups [redacted] [4] ignore the requirement of having [redacted],[5] and aggressively promote cooperation[6] – even having cable executives attend programming budget meetings.[7] Comcast has admitted that its sister arms "get treated like siblings as opposed to like strangers."[8]

155. Additional examples abound, but just two unravel Comcast's claims of "independent" action. *First*, Steve Burke, the President of Comcast Cable, wrote a letter to the Commissioner of MLB seeking Nationals programming rights,[9] and David Cohen, the Executive Vice President of Comcast Corporation, testified before Congress about seeking those rights.[10] If Comcast truly respected its internecine distinctions, Jeff Shell (or some other executive from Comcast Programming Group) would have written that letter and provided that testimony. *Second*, David Cohen, an executive in Comcast *Corporation*, signed legal documents requiring carriage by Comcast Cable[11] and dismissing a case brought by Comcast's programming affiliate,

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[4] *See* PFOF ¶ 99.

[5] *See* PFOF ¶ 97.

[6] For example, [redacted] MASN Ex. 128 (emphasis added).

[7] *See* MASN Ex. 136, at 14 [redacted]

[8] Tr. at 7089 (Orszag Test.).

[9] *See* MASN Ex. 2.

[10] *See* MASN Ex. 3.

[11] *See* MASN Ex. 90, at 11 (Aug. 4, 2006 Carriage Agreement).

Comcast SportsNet-Mid-Atlantic.[12] If Comcast truly respected its corporate divisions, executives from those entities would have executed those documents.

B. Comcast Vigorously Sought To Telecast Nationals and Orioles Programming

156. Comcast does not dispute having vigorously sought to obtain the rights to telecast the Nationals.[13] [redacted][14]

157. Comcast does not dispute having vigorously sought to retain the rights to telecast the Orioles.[15] [redacted][16] Under a [redacted][17]

C. Comcast Refused To Carry Nationals and Orioles Programming After Losing These Rights to MASN Until the FCC Applied "Heavy Pressure"

158. Notwithstanding Comcast's extensive efforts to obtain the rights to both the Nationals and the Orioles, it is undisputed that Comcast refused to carry MASN after it had obtained the rights to telecast this programming.[18]

159. Comcast would have continued to retaliate against MASN by denying carriage throughout its geographic footprint – but for intervention by the FCC in late July 2006. In its

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[12] *See* MASN Ex. 90, at 22 (Aug. 4, 2006 Release Agreement).

[13] *See* PFOF ¶¶ 23-28.

[14] *See* MASN Ex. 91.

[15] *See* PFOF ¶¶ 23, 29-33.

[16] *See* MASN Ex. 99.

[17] MASN Ex. 99, at 1, 20-23.

[18] *See* PFOF ¶ 19.

Proposed Findings, Comcast concedes that "[u]nder heavy pressure from the FCC, Comcast agreed to a contract that provided MASN with carriage."[19] Comcast did not seriously contemplate carrying MASN in any region – including Baltimore and Washington, D.C. – until the FCC applied that "heavy pressure."

D. Comcast Has Refused To Exercise its Discretion To Carry MASN in the Foreclosed Areas

160. It is undisputed that, under the affiliate term sheet between MASN and Comcast, Comcast has "discretion" to carry MASN in the Foreclosed Areas. Likewise undisputed is Comcast's obligation to exercise its discretion within the bounds of federal law: Comcast cannot deny MASN carriage on the basis of discrimination.[20] It is undisputed that MASN has sought carriage in the Foreclosed Areas since at least 2007, and that Comcast has refused.[21]

161. Comcast also has refused to carry MASN in numerous areas with any justification. Comcast has admitted that MASN could be carried "without issue" in systems with at least 550 MHz of bandwidth. But Comcast has refused to carry MASN to thousands of subscribers in systems with sufficient bandwidth in the Pittsburgh, Charlottesville, and Raleigh-Durham regions.[22] With respect to these subscribers, Comcast has never alleged a low demand and/or a high price for MASN.

162. It is undisputed that almost 100 percent of Comcast's subscribers within MASN's footprint receive one (or more) of Comcast's affiliated RSN.[23] It is undisputed that far fewer

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[19] Comcast PFOF at 2 (Summary).

[20] Tr. at 6919 ("Q: And another limitation on Comcast's discretion is federal regulatory law, correct? A: Yes.") (Bond Test.).

[21] *See* PFOF ¶ 92.

[22] *See* Joint Ex. 1.

[23] *See* PFOF ¶ 20.

subscribers receive MASN. Comcast does not carry MASN to hundreds of thousands of subscribers within MASN's footprint.[24]

E. Comcast Never Mentioned Excluding Any Systems from the Launch Under the August 2006 Agreement Except for the Adelphia Systems in Roanoke-Lynchburg and Other Virginia Areas

163. It is undisputed that Comcast representatives assured MASN that Comcast needed to exclude 150,000 former Adelphia subscribers from the August 2006 deal because of supposed bandwidth constraints.[25] *Both* Mr. Wyche and Mr. Gluck testified as to these representations. Comcast only introduced the testimony of Mr. Bond on this issue. Rather than disputing Messrs. Wyche's and Gluck's sworn testimony, Mr. Bond testified that he did not recall whether he ever discussed excluding former Adelphia systems.[26]

164. It is undisputed that, in accepting Comcast's representations about the former Adelphia systems, MASN told Comcast "it's got to be everything else."[27]

165. Comcast suggests (at ¶ 55) that Mr. Gluck erred in identifying both Mr. Bond and Alan Dannenbaum as having discussed the former Adelphia systems in Roanoke-Lynchburg and other Virginia areas. That is not correct. Comcast erroneously conflates different conversations. "On August 3, 2006, the parties *held multiple conversations* by telephone."[28] In one of those

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[24] *See* PFOF ¶ 21.

[25] *See* MASN Ex. 236, ¶ 35 (Wyche Written Test.); MASN Ex. 237, ¶ 20 (Gluck Written Test.).

[26] Tr. at 6931 ("Q: So as you sit here today, your testimony is you do not recall the subject of the former Adelphia systems in Roanoke-Lynchburg and the other Virginia areas; correct? A: No, I don't recall.") (Bond Test.).

[27] Tr. at 6141 (Gluck Test.).

[28] MASN Ex. 237, ¶ 19 (Gluck Written Test.) (emphasis added).

conversations, Mr. Bond discussed the former Adelphia systems.[29] But no one said that Mr. Bond was the *only* person who ever mentioned this subject. Mr. Dannenbaum also mentioned the former Adelphia systems, representing to MASN (incorrectly) that: "We don't know what we're getting, we don't know what we have."[30] There is no inconsistency.

166. Comcast did not cross-examine, much less attempt to impeach, Mr. Gluck about this supposed issue. If Comcast truly believed that Mr. Gluck was mistaken about the Comcast representative who discussed the Adelphia systems, Comcast could have presented the testimony of other witnesses – including other Comcast employees who participated in these discussions – to impeach Mr. Gluck. Comcast's failure to present such evidence suggests that it does not exist.

167. Nor would it matter even if Mr. Gluck had incorrectly identified Mr. Dannenbaum as having discussed the former Adelphia systems. As set forth above, it is undisputed that some Comcast representative discussed the former Adelphia systems in Roanoke-Lynchburg and other Virginia areas with MASN, as contemporaneous documents confirm.[31] Comcast likewise claims (at ¶ 56) that Messrs. Gluck and Wyche did not pinpoint precisely which Adelphia systems were discussed, but both agreed that it amounted to approximately 150,000 subscribers whose precise locations are not relevant to this litigation.

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[29] *See* MASN Ex. 237, ¶ 20 ("Mr. Bond stated that . . . he believed that those Adelphia systems currently lacked sufficient capacity to carry MASN.") (Gluck Written Test.); MASN Ex. 236, ¶ 35 ("Mr. Bond further explained that the other estimated 150,000 expanded basic subscribers in Regions 4 and 5 were former Adelphia cable systems . . . [from] low-bandwidth/un-rebuilt systems that did not have sufficient capacity to carry MASN.") (Wyche Written Test.).

[30] Tr. at 6058 (Gluck Test.).

[31] *E.g.*, Comcast Ex. 32, at 1 ("When we entered into the Comcast affiliation agreement, Comcast said they would be acquiring some Adelphia systems in our territory for which Comcast would not commit carriage of MASN" consisting of "about 150,000" subscribers.).

168. It is undisputed that Comcast's representations regarding the former Adelphia systems were not correct. In fact, Comcast did include numerous former Adelphia systems in the Carriage Agreement. Comcast's counsel made this clear in questioning Mr. Gluck:[32]

> Q: If you could give me a yes or no answer, do you believe that the agreement excluded all former Adelphia systems that Comcast was acquiring?
>
> A: At the time I did, yes.
>
> Q: Okay, were you aware that there were 24 former Adelphia systems listed in Schedule A?
>
> A: I'm aware of that fact now. There's some number. I don't know if it's 24.

F. Comcast Assured MASN that Changes to the Carriage Agreement Were Tied to the Omission of Former Adelphia Systems in Roanoke-Lynchburg and Other Virginia Areas

169. Comcast makes much (at ¶ 59) of certain edits that Comcast made to the Carriage Agreement. It is undisputed that Mr. Gluck called Comcast to inquire about these changes.[33] A lawyer for Comcast assured him that these changes were necessary because of the Adelphia systems the parties had discussed. For example, Comcast assured MASN that it had struck language requiring carriage on "all" systems because MASN had agreed to forgo certain low-bandwidth former Adelphia systems.[34] Comcast never even intimated that these edits were designed to exclude other systems that the parties had not discussed. To the contrary, Comcast represented that the edits reflected "the deal we've been discussing."[35]

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[32] Tr. at 6078 (Gluck Test.).

[33] *See* PFOF ¶ 69.

[34] 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.).

[35] Comcast Ex. 14, at 1; MASN Ex. 89, at 29.

170. Comcast offered no evidence to dispute Mr. Gluck's recollection of these assurances. There is therefore no evidentiary basis for Comcast to argue that this change somehow put MASN on notice that Comcast would be denying carriage on *non*-Adelphia systems, much less the specific systems in the Foreclosed Areas. It is undisputed that everyone at MASN believed that, consistent with their negotiations over two days, Schedule A contained a complete list of systems within MASN's footprint, except for the former Adelphia systems in Roanoke-Lynchburg and other Virginia areas.[36]

G. Comcast Has Offered No Reliable Explanation of How Schedule A Was Prepared

171. The preparation of Schedule A is shrouded in mystery. Comcast did not offer evidence of who actually prepared it. Even the timing of its preparation is unclear. It is undisputed that Comcast first showed Schedule A to MASN on August 4, 2006 at 1:31 p.m. EDT, when Comcast attached it to an email representing that it "reflects the deal we've been discussing over the past two days."[37] Schedule A, of course, must have been prepared before this time. But there simply is no documentary evidence of that.

172. Comcast produced *only* one document discussing Schedule A: An internal Comcast email purporting to transmit "the final list," and attaching "Schedule A: List of Systems."[38] But this email is dated August 4, 2006 at 4:23 p.m. – three hours *after* the list had been sent by Comcast to MASN. Not only must other documents exist that reflect *when* Schedule A was prepared, but there also must be other documents that show *how* Schedule A was prepared. It is evident that there would be drafts of earlier versions. Those drafts would

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[36] *See* PFOF ¶ 70; *see also* Comcast Exs. 27, 28 (emails evidencing MASN's belief that it would be launched in Harrisburg).

[37] Comcast Ex. 14, at 1.

[38] Comcast Ex. 11.

reflect different systems that Comcast had considered including or excluding. Earlier drafts of Schedule A, for example, may have shown that Harrisburg would be included. It is problematic that no such materials were produced, and that Comcast has failed to explain the complete omission of this highly material information.

173. No document supports Mr. Ortman's claim, cited by Comcast (at ¶ 48 & n.109), to having "reviewed Schedule A after they met my criteria to see if it was accurate." To the contrary, Comcast produced *no documents at all* for Mr. Ortman during this period of time.[39] It is undisputed that Mr. Ortman (nor anyone involved in the preparation of Schedule A) never even discussed with MASN excluding systems in the Harrisburg, Roanoke-Lynchburg or Tri-Cities DMAs.[40]

174. If Comcast had produced a Schedule A that comported with "the deal we've been discussing," MASN would not have objected to any other aspect of the Carriage Agreement.[41] But significant questions remain as to who prepared Schedule A, when it was prepared, how many drafts were prepared, what systems were included or excluded in prior versions, why it included former Adelphia systems that Comcast representatives told MASN would be excluded, and why it excluded systems that Mr. Ortman suggested should have been included.[42] This information is entirely within Comcast's custody and control. It is evident that Comcast's failure

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[39] *See* PFOF ¶ 81.

[40] *See* PFOF ¶ 82.

[41] 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.).

[42] *See* PFOF ¶¶ 75-82.

to produce reliable information about these important details of that significant document show that any such information would not have been favorable to Comcast.[43]

H. MASN's Reliance on Schedule A Was Reasonable

175. It is undisputed that standard industry practice requires an MVPD to produce a list of systems that accurately reflects the carriage negotiations.[44] The MVPD is in the best position to know the names and locations of its systems. Messrs. Wyche and Gluck have negotiated hundreds of carriage agreements. This was the first time in their experience that an MVPD has provided a list of systems that was different from the ones agreed upon during the carriage negotiations.[45] Comcast has offered no evidence that this type of deviation has ever occurred before.

176. Just as Comcast's own witness reasonably relied upon the list of systems that Comcast provided, so too did MASN reasonably rely upon the list of systems that Comcast provided in Schedule A as "reflect[ing] the deal [they had] been discussing."[46] There is no record evidence that MASN could have verified this list with publicly available information.[47] To the contrary, it is undisputed that Mr. Wyche had to spend several months – working with

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[43] *See United States v. Steve*, 919 F.2d 182, 1990 WL 194509, at *2 (D.C. Cir. 1990) ("The missing evidence instruction, like the missing witness instruction, is based on the logic that if the evidence were favorable to the party who had control over the item or testimony, that party would have offered the evidence as proof of its position. *See* Wigmore, Evidence Sec. 285 (3d ed. 1940).") (*per curiam*; unpublished decision); *International Union, UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.").

[44] *See* PFOF ¶ 88.

[45] *See* PFOF ¶ 88.

[46] Comcast Ex. 14, at 1.

[47] *See* PFOF ¶ 90.

Comcast – in order to determine the specific Comcast systems on which MASN was not being carried.[48]

177. Despite the general industry practice and the specific history in this case, Comcast faults MASN (at ¶¶ 33-39) for not attempting to compile a list of Comcast's systems prior to entering carriage negotiations in August 2006. *First*, Comcast claims (at ¶ 33) that Mr. Cuddihy's testimony shows that MASN should have done so. That is not correct. Comcast selectively quotes the record as follows: "Mr. Cuddihy[] testified that 'any RSN worth its salt,' before entering into negotiations with a cable operator, would find it essential to prepare a list of the operator's cable systems." But Mr. Cuddihy expressly qualified that this would now be appropriate only "*given the history of what's gone on here*."[49] What would be reasonable to do *after* Comcast's deception in August 2006 does not show what MASN should have done before those negotiations occurred. Before those negotiations, MASN's highly experienced representatives – with dozens of years in negotiating hundreds of carriage agreements – had never before received an inaccurate list of systems from an MVPD.

178. *Second*, Comcast claims (at ¶ 36) that Mr. Gluck testified that "a common practice in negotiations with cable companies was to compile a system list and have it checked and verified by the cable operator." But Mr. Gluck testified that this was practical with respect to a small MVPD, using the example of "MediaCom" which had "like six systems." In contrast, "Comcast is the biggest MSO in the market" with "multiple systems, multiple, in five states."[50] Mr. Gluck was unequivocal: "I didn't have [a list] to send them."[51]

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[48] *See* PFOF ¶ 90.

[49] Tr. at 5635 (Cuddihy Test.) (emphasis added).

[50] Tr. at 6104-05 (Gluck Test.).

[51] Tr. at 6104 (Gluck Test.).

179. *Third*, Comcast claims (at ¶ 34) that Mr. Cuddihy easily compiled "a list of a cable operator's systems from public sources." This list, however, actually shows the inadequacy of publicly available information. It contains only 20 Comcast systems in four States that Mr. Cuddihy was able to locate through public sources. Schedule A, on the other hand, contains more than 60 systems in five States – even while excluding even more systems in the Foreclosed Areas. Comcast therefore is mistaken to claim (at ¶ 39) that "almost every system name matched up perfectly" between Schedule A and Mr. Cuddihy's list. To the contrary, there were scores of systems – and one entire State – on Schedule A that had no counterpart on Mr. Cuddihy's list. Further, there were dozens of systems within MASN's footprint that were not included on Schedule A.[52] Public sources therefore only revealed a small fraction of the Comcast systems within MASN's footprint.

I. Comcast Knowingly Misrepresented the Bandwidth on the Former Adelphia Systems to MASN

180. Notwithstanding Comcast's representations in 2006 that the former Adelphia systems lacked the bandwidth to carry MASN, at that time Adelphia had already upgraded about two-thirds of its systems in Roanoke-Lynchburg to 750 MHz.[53]

181. It is undisputed that the former Adelphia systems in the Tri-Cities DMA have been upgraded to be at 750 MHz and therefore pose no bandwidth constraints in carrying MASN.[54]

182. And although it was not a former Adelphia system, Comcast's Harrisburg DMA systems had also been rebuilt prior to the 2006 negotiations between Comcast and MASN. [redacted]

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[52] See Joint Ex. 1.

[53] Tr. at 6616 (Ortman Test.).

[54] Tr. at 6618 (Ortman Test.) ("I have seen reports that suggest that most of [Tri-Cities DMA] is now 750.").

[redacted] were at 750 MHz. Comcast's witness testified that "bandwidth was adequate in the Harrisburg DMA" to carry MASN.[55]

183. Prior to the August 2006 negotiations, Mr. Ortman had supervisory responsibility for integrating the programming lineups for the Adelphia systems that Comcast was acquiring. He therefore had knowledge of the bandwidth of the Adelphia systems within the Eastern Division under his responsibility.[56] Comcast thus knew (or should have known) prior to its representations to MASN that those former Adelphia systems were not inadequate as Comcast claimed.

J. MASN Was Surprised To Discover that Comcast Had Secretly Excluded the Foreclosed Areas from Schedule A

184. It is undisputed that MASN believed that Comcast would carry MASN in all areas, except for the former Adelphia systems in Roanoke-Lynchburg and other Virginia areas.[57] MASN did not discover that Comcast had secretly omitted systems from Schedule A until January 2007.[58] Comcast highlights (at ¶¶ 67-78) MASN's genuine surprise and confusion regarding this discovery. MASN's genuine surprise, however, squarely confirms that Comcast had never openly negotiated or otherwise signaled these highly material omissions from the Carriage Agreement.

185. An example of MASN's genuine confusion is an email exchange involving Mr. Gluck. Upon learning on January 11, 2007, that Comcast was claiming it had no obligation to launch approximately [redacted] subscribers within MASN's footprint, Mr. Gluck said "that

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[55] Tr. at 6617 (Ortman Test.).

[56] Tr. at 6619 (Ortman Test.).

[57] *See* PFOF ¶ 70; *see also* Comcast Exs. 27, 28 (emails evidencing MASN's belief that it would be launched in Harrisburg).

[58] *See* PFOF ¶ 86.

number struck [him] as high" and asked for a list of the systems excluded.[59] (Comcast refused to provide such a list.[60]) Mr. Gluck expressly noted the former Adelphia systems that had been discussed in August 2006, but cautioned that the number of subscribers excluded should be "about 150,000," not [redacted][61]

186. Comcast suggests (at ¶ 71, 73) that MASN accepted the exclusion of [redacted] subscribers with equanimity. That is not correct. MASN clearly believed that this number was solely connected to the former Adelphia systems specifically discussed – but that it was much higher than Comcast's estimate had represented during carriage negotiations.[62] Mr. Gluck viewed *the former Adelphia systems* that MASN had agreed to temporarily exclude as "an opportunity for MASN to acquire additional subscribers."[63] Contrary to Comcast's claims (at ¶¶ 73, 75), no one at MASN therefore accepted that Comcast could permissibly exclude *non*-Adelphia systems.

187. Comcast claims (at ¶ 78) that MASN had previously "misunderstood the scope of a carriage agreement it signed." That is not correct. Comcast points to a single email suggesting that [redacted] had withheld more subscribers than MASN had expected. But the undisputed record evidence shows that [redacted] fully "identified all systems that would not carry MASN."[64] A MASN employee who was not involved in these negotiations subsequently questioned whether [redacted] improperly had withheld additional systems, but Mr. Wyche noted that "[m]aybe [he]

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[59] *See* Comcast Ex. 32, at 2.

[60] *See* Comcast Ex. 37, at 1 (noting that MASN "was unable to procure a list of Comcast Blue Ridge systems directly from Comcast (against corporate rules)").

[61] Comcast Ex. 32, at 1.

[62] *See* Comcast Ex. 32, at 1.

[63] Comcast Ex. 32, at 1.

[64] Tr. at 6015 (Wyche Test.).

was confused on what was included and within our territory with [redacted] "[65] It is undisputed that MASN has never challenged the accuracy of its carriage agreement with [redacted]

K. Internal Documents Confirm that Comcast's Foreclosure of MASN Was Discriminatory

188. Comcast greatly desired MASN's programming, but then refused to carry MASN in *any* region for two years. It now concedes that it would have continued that foreclosure of MASN – but for the "heavy pressure" it received from the FCC.[66] Immediately after receiving that pressure, Comcast's most senior executives compared MASN's size *vis-a-vis* Comcast's affiliated RSN.[67] Finding that MASN would be larger,[68] Comcast's lead negotiator directed his team to determine "the total subs that we would be giving them" and "what systems on the periphery [of MASN's footprint] we can carve off."[69]

189. This timeline and these undisputed documents undermine Comcast's assertions (at ¶ 89) that "affiliation played no role in their decisions regarding the extent of Comcast's carriage of MASN." So, too, do the numerous unanswered questions surrounding the preparation of Schedule A. Nor does Comcast dispute the preferential treatment that its affiliated RSNs regularly receive.[70]

190. This Tribunal witnessed Mr. Bond testify for several hours. In certain regards, his testimony was difficult to credit. *First*, Mr. Bond claimed to have no recollection of the

[redacted]

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[65] Tr. at 6021 (Wyche Test.).

[66] Comcast PFOF at 2 (Summary).

[67] *See* PFOF ¶¶ 51-52.

[68] *See* MASN Ex. 103, at 1 (MASN [redacted]).

[69] MASN Ex. 104, at 1.

[70] *See* PFOF ¶¶ 94-107.

[redacted][71] But Mr. Bond did not receive many emails from [redacted] [72] who authored the [redacted], and who Mr. Bond acknowledged was a more senior Comcast official.[73] As this Tribunal observed, "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?"[74] In fact, Steve Burke and David Cohen – Mr. Bond's superiors and two of the three highest ranking officers of Comcast – also were copied on the [redacted] which further suggests that Mr. Bond should have been familiar with it.

191. *Second*, Mr. Bond claimed not to recall discussions about the Adelphia systems during the carriage negotiations in August 2006.[75] He did not dispute the sworn testimony of Messrs. Gluck and Wyche, who made clear that Mr. Bond and Mr. Bond's subordinate, Alan Dannenbaum, represented that these systems had insufficient bandwidth to carry MASN. It is difficult to understand how Mr. Bond would have forgotten such a critical part of these carriage negotiations – indeed, these were the only systems that Comcast actually discussed not including in the August 2006 contract that were within MASN's footprint. In any event, it is undisputed

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[71] *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.); s*ee also* PFOF ¶¶ 51-54.

[72] *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.).

[73] [redacted] (Bond Test.).

[74] Tr. at 6834 (Bond Test.).

[75] Tr. at 6931 ("Q: So as you sit here today, your testimony is you do not recall the subject of the former Adelphia systems in Roanoke-Lynchburg and the other Virginia areas; correct? A: No, I don't recall.") (Bond Test.).

that Comcast's representation was not correct; the vast majority of these systems had at least 550 MHz of bandwidth in August 2006,[76] and in fact, Comcast listed many former Adelphia systems on Schedule A.[77]

192. *Third*, Mr. Bond claimed that MASN should have gone directly to the local system managers to seek carriage because such systems "have been free to add [MASN] at their discretion."[78] That is not correct. On cross-examination, Mr. Bond conceded that a system could not launch MASN without his approval.[79] It is incredible to suggest that individual systems would seek Mr. Bond's approval to carry MASN given Mr. Bond's public claims in this litigation that MASN was undesirable in those very systems.

L. Comcast's Claims of Low Demand Are Pretextual

193. It is undisputed that Comcast never mentioned low demand in any of the Foreclosed Areas during the Carriage Agreement in August 2006.[80] Comcast did not mention low demand for the first time until long after these negotiations had ended.[81]

194. It is undisputed that Comcast's major competitors carry MASN in the Foreclosed Areas on the same prices, terms, and conditions that have been offered to Comcast. There is no record evidence that each of these sophisticated business entities failed to properly assess the demand for MASN in these regions.

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[76] *See* Tr. at 6616 ("about two-thirds" of these systems had been upgraded to 750 MHz by July 2006) (Ortman Test.).

[77] Tr. at 6078 (Gluck Test.).

[78] Comcast Ex. 1, ¶ 30 (Bond Written Test.).

[79] Tr. at 6942 ("Q: So if you say no, the individual system cannot launch MASN, correct? A: Yes, but in cases where they asked to launch we had said yes.") (Bond Test.).

[80] *See* PFOF ¶¶ 93, 108.

[81] *See* PFOF ¶¶ 93, 108.

195. Documentary evidence confirms that Comcast's non-carriage justifications are pretextual. Just weeks before the Carriage Negotiations in August 2006, Comcast prepared [redacted][82] Comcast also promised in writing to carry Nationals games "across the Nationals' territory" (which included each of the Foreclosed Areas) if Comcast owned those rights.[83] Because MASN carries both Nationals and Orioles games, there is an even more compelling case for Comcast to carry MASN in each of the Foreclosed Areas.

196. Comcast suggests (at ¶ 95) that MASN has admitted to low demand outside of Baltimore and Washington. That is not correct. MASN has never disputed that demand may decrease with distance; that is precisely why MASN charges several different rates for different regions. In fact, MASN charges [redacted] in the Harrisburg, Roanoke-Lynchburg and Tri-Cities DMAs than it does in Baltimore and Washington.[84] There is a strong demand for MASN in these regions at those rates. It is undisputed that every major MVPD (except Comcast) carries MASN in these regions at those rates.

M. Comcast *Post-Hoc* Claims Were Made For Litigation

197. Comcast claims (at ¶ 93) to have "consulted with its system managers in the field about whether there was demand by their subscribers for MASN's programming." That is not correct. Each of the three emails that Comcast cites (at ¶ 93 n.225) to support this claim was written in 2007 and 2008 – long after the carriage negotiations in August 2006. Mr. Ortman

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[82] MASN Ex. 99, at 20-23.

[83] MASN Ex. 2, at 2.

[84] *See* PFOF ¶ 122.

testified that he did not consult with anyone in the field about the demand for MASN before determining which systems to "carve off."[85]

198. Having decided to "carve off" the Foreclosed Areas in August 2006, Comcast's *post-hoc* attempts (at ¶ 93 & n.226) to justify that decision in 2007 and 2008 were made in anticipation of this litigation and are therefore unreliable. In no event do these *post-hoc* rationalizations show what actually motivated Comcast to "carve off" territories in August 2006.

199. This Tribunal witnessed Mr. Ortman testify for several hours. In certain regards, his testimony was difficult to credit. *First*, Mr. Ortman testified that ACC basketball – and not Orioles games – was the reason why CSN-MA was carried in the Roanoke-Lynchburg and Tri-Cities DMAs.[86] On cross-examination, however, Mr. Ortman conceded that he did not know how many ACC basketball games were telecast, how much these games cost, or whether the relationship between CSN-MA and the ACC was exclusive.[87] Nor could Mr. Ortman identify a single MVPD that made a carriage decision based on ACC programming.[88] Mr. Ortman's testimony, moreover, is inconsistent with an internal Comcast document [redacted][89]

200. *Second*, Mr. Ortman testified about his involvement in preparing Schedule A. No document supports Mr. Ortman's claim, cited by Comcast (at ¶ 48), to his having "reviewed

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[85] *See* PFOF ¶ 81 & n.200.

[86] Tr. at 6565 ("Q: Okay, so ACC games is what drove carriage decisions in southwest Virginia? A: It was a factor, a major factor.") (Ortman Test.); *see also* Comcast Ex. 2, ¶ 28 (CSN-MA "obtained carriage in southwestern Virginia not because it carried Orioles programming (for which there was little interest), but because it carried ACC and other programming (such as the Redskins) for which there was (and still is) great interest") (Ortman Written Test.).

[87] Tr. at 6566-74 (Ortman Test.).

[88] Tr. at 6574-75 (Ortman Test.).

[89] *See* MASN Ex. 99; s*ee* PFOF ¶ 109.

Schedule A after they met my criteria to see if it was accurate." To the contrary, Comcast produced *no documents at all* for Mr. Ortman during this period of time.[90] Mr. Ortman also did not explain numerous differences between Schedule A and the standards that he says were used to create Schedule A.[91]

N. Comcast's Previous Carriage Decisions Prove Its Disparate Treatment of MASN

201. Comcast's own carriage decisions confirm that its refusal to carry MASN is discriminatory. *First*, with respect to the Roanoke-Lynchburg and Tri-Cities DMAs, Comcast carried Orioles programming in these areas for years when these games were telecast on its affiliated RSN, CSN-MA.[92] Comcast stopped showing Orioles games in these regions only when MASN acquired these rights. Comcast's claim (at ¶ 91) of low demand for Orioles programming in these regions is belied by an internal document: Comcast predicted [redacted][93] Comcast's claim (at ¶ 92) of insufficient bandwidth for MASN's programming is belied by a joint document: [redacted] of subscribers in the Roanoke-Lynchburg and Tri-Cities DMAs receive adequate bandwidth, and *every single subscriber* in those areas receives Comcast's affiliated RSN, CSN-MA.[94]

202. *Second*, Comcast carried Orioles games in Harrisburg until it determined that it would not be able to renew those rights. Comcast then simultaneously withdrew both Orioles and Pittsburgh Pirates games from the Harrisburg market, leaving this market captive to only

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[90] *See* PFOF ¶ 81 & n.199.

[91] *See* PFOF ¶¶ 78-81.

[92] *See* PFOF ¶ 102.

[93] MASN Ex. 99, at 20-23.

[94] *See* Joint Ex. 1.

the MLB games of the Phillies – which are telecast by Comcast's affiliated RSN.[95] Comcast's claims (at ¶ 90) of low demand for Orioles programming in this region is belied by an internal document: [redacted][96] Nielsen ratings also show a strong demand for MASN's programming in this region.[97] It is undisputed that these systems have adequate bandwidth to carry MASN.[98]

O. No Other Evidence Supports Comcast's Pretextual Defenses

203. Comcast claims (at ¶¶ 96-99) that denial of carriage to MASN in the Foreclosed Areas is justified by the decisions of very small MVPDs. Notably, Comcast's narrow focus (at ¶ 99) on the decisions of other *cable* operators impermissibly ignores the actions of its major competitors, DISH and DirecTV. It is undisputed that DISH and DirecTV carry MASN in the Foreclosed Areas, as does another significant competitor, Verizon FiOS.[99] By contrast, Comcast cites (at ¶¶ 96-99) the carriage decisions of very small MVPDs – most with fewer than [redacted] subscribers.[100] Those decisions bear no resemblance to what a very large MVPD like DISH or Comcast would do; indeed, Comcast is the largest MVPD in MASN's footprint with more than two million subscribers.[101] In fact, approximately [redacted] of MVPD subscribers (excluding

[95] *See* PFOF ¶ 103.

[96] *See* MASN Ex. 99, at 20-23.

[97] *See* PFOF ¶ 116.

[98] *See* Joint Ex. 1.

[99] *See* PFOF ¶ 112.

[100] *See* PFOF ¶ 137.

[101] *See* PFOF ¶ 18.

Comcast) in the Harrisburg, Roanoke-Lynchburg and Tri-Cities DMAs receive MASN, which is empirical proof of the overwhelming market demand for MASN in these regions.[102]

204. It is undisputed that the testimony of Larry Gerbrandt, upon which Comcast relies (at ¶¶ 102-103), does not measure whether people in the Foreclosed Areas wanted to watch MASN.[103] Mr. Gerbrandt also did not understand basic details of the statistical studies he purported to analyze, nor did he follow any established statistical methodologies, which made his testimony unreliable.[104]

205. Comcast's own studies show strong demand for MASN in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs. Contrary to Mr. Gerbrandt's single focus on an irrelevant question ("Which MLB team do you tend to follow the most?"), another question in the survey ("rate [your] interest" in MLB teams) consistently revealed high marks for MASN's programming in each of these areas.[105]

206. Comcast observes (at ¶ 13) that Mr. Ortman had mentioned being opposed to the carriage of MASN during the 2006 MLB season, and suggests (at ¶ 89) that this supports its refusal to carry MASN in the Foreclosed Areas. That is not correct. *First*, what Mr. Ortman thought about the 2006 MLB season is unpersuasive evidence of what Comcast intended to do in subsequent MLB seasons, which is the subject of this carriage dispute. In 2006, MASN telecast only Nationals games, which was a new team in the Washington, D.C. area, and the issue of which RSN would telecast Orioles games had not been resolved. [redacted]

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[102] *See* PFOF ¶ 114.

[103] *See* PFOF ¶¶ 125-126.

[104] *See* PFOF ¶¶ 127-128.

[105] *See* PFOF ¶¶ 119-120.

[106]

However, MASN began telecasting both Nationals and Orioles games from the beginning of the 2007 MLB season. [107] (Comcast deleted this portion of the document in quoting (at ¶ 13) from it.)

207. *Second*, Mr. Ortman's personal views were different from Comcast's. In the very document cited by Comcast, Mr. Ortman conceded that Comcast should reduce its rates once CSN-MA lost the rights to telecast the Orioles in 2007: [108]

Mr. Ortman's personal view on the value of Nationals programming is likewise different from the leadership of Comcast. Mr. Ortman admitted that the President of Comcast, Steve Burke, [109] It is evident that Mr. Burke did not make such efforts because he believed Nationals program to be of low value. Indeed, internal documents evince Comcast's belief that [110] Mr. Burke went so far as to send a letter to MLB Commissioner Selig in April 2006 requesting that MLB

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[106] Comcast Ex. 21, at 1.

[107] Comcast Ex. 21, at 2.

[108] Comcast Ex. 21, at 3.

[109] Comcast Ex. 21, at 3.

[110] *See* MASN Ex. 91.

abrogate its agreement with MASN for the Nationals programming rights, so that Comcast could acquire those rights.[111] It is therefore evident that Comcast's leadership desired to telecast Nationals games in 2005 and 2006, notwithstanding Mr. Ortman's personal musings that viewers would [redacted] such games.

208. *Third*, Mr. Ortman's personal views were problematic. During negotiations of the Carriage Agreement, Mr. Ortman recommended limiting carriage of MASN to Washington and Baltimore.[112] Nobody – not even Comcast – has defended that extreme position, which would clearly violate federal laws prohibiting discriminatory carriage decisions. Not surprisingly, Mr. Ortman admitted that he never received any training on Comcast's non-discrimination obligations.[113] Under these circumstances, Mr. Ortman's personal opinions offer no support for any claim that Comcast did not intend to discriminate.

P. Comcast Has Harmed MASN's Ability to Compete Fairly

209. It is undisputed that Comcast's refusal to carry MASN in the Foreclosed Areas will cause MASN to lose about [redacted] in license revenues, as well as [redacted] n advertising revenues.[114]

210. It is undisputed that Comcast is the major MVPD in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs.[115] Accordingly, Comcast's foreclosure strategy has impaired MASN's ability to compete fairly for subscribers and advertisers within these specific regions.

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[111] *See* MASN Ex. 2.

[112] *See* Tr. at 6649 ("I wanted included just Baltimore-Washington, everything else would have been excluded.") (Ortman Test.).

[113] Tr. at 6688 ("Q: But you never had training on discrimination based on affiliation. Correct? A: No formal training, that's correct.") (Ortman Test.).

[114] *See* PFOF ¶¶ 142-143.

[115] *See* PFOF ¶¶ 150-152.

211. It is undisputed that an RSN with more coverage has an advantage in obtaining programming rights over an RSN with less territory.[116] MASN must pay more money to compensate a sports team for the coverage gaps that Comcast has created within its footprint.[117] Internal documents show [redacted] which was motivation for Comcast to reduce MASN's ability to compete effectively by creating coverage gaps.[118]

212. It is undisputed that MASN competed with Comcast's affiliated RSN for rights to telecast certain Washington Redskins content, and that MASN lost this contest.[119] Comcast notes (at ¶ 113) that MASN could not outbid Comcast, which proves MASN's point: Because of the coverage gaps that Comcast created, MASN could not simply match Comcast's bid; it had to pay even more to compensate for those gaps. Such a super-competitive bid, as Mr. Cuddihy testified, would make the price of these rights "way too high."[120] Likewise, Mr. Cuddihy confirmed that in order to win the rights to the Baltimore Ravens (again, over Comcast), MASN "had to pay a high price" because "we were not carried by Comcast."[121]

213. It is undisputed that an RSN with more coverage has an advantage in obtaining advertising over an RSN with less coverage.[122] The coverage gaps that Comcast has created in MASN's footprint cause MASN to be a less attractive vehicle for advertisers. MASN has pointed to two significant examples of lost advertising: [redacted]

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[116] *See* PFOF ¶¶ 146-148.

[117] *See* PFOF ¶¶ 146-148.

[118] *See* PFOF ¶ 149.

[119] *See* PFOF ¶ 146; MASN Proposed Conclusions of Law ¶ 72 ("PCOL").

[120] Tr. at 5779 (Cuddihy Test.).

[121] Tr. at 5778 (Cuddihy Test.).

[122] *See* PFOF ¶¶ 144-145.

214. Recognizing the serious injury these concrete harms caused MASN, Comcast claims for the first time (at ¶ 105) that evidence of these lost advertising contracts is hearsay. Having never raised such an objection, Comcast has waived it.[123] Nor did Comcast create a record to suggest (incorrectly) that Mr. Cuddihy was not knowledgeable about these lost accounts. Comcast complains (at ¶¶ 106-107) that details are lacking, but Comcast never asked Mr. Cuddihy the questions that would have elicited more information. That was Comcast's failing, not MASN's. The unambiguous record evidence is that MASN lost these significant accounts because of the coverage gaps Comcast created.

Q. Comcast's Remaining Arguments Lack Merit

215. Comcast claims in passing (at ¶ 120) to have "taken many actions that *improve* MASN's competitive position." There is no requirement that a discriminator must discriminate 100 percent of the time, but in any event, the examples cited by Comcast do not pass muster. *First*, Comcast launched certain systems earlier than required because it could not do otherwise.[124] *Second*, Comcast deleted its affiliated RSN in three markets because it had little to no professional programming to telecast in these markets.[125] *Third*, Comcast moved MASN's channel position – along with its own affiliated RSNs' – because it wanted to aggregate similar programming content.[126] *Fourth*, Comcast provides its affiliated RSNs to almost 100 percent of subscribers within MASN's footprint, while far fewer (only 87 percent) receive MASN.

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[123] *See* Fed. R. Evid. 103(a); *see also*, *e.g.*, *Akro Corp. v. Luker*, 45 F.3d 1541, 1546 (Fed. Cir. 1995) ("Luker did not, however, object to the truth of the statements in the letters, nor to their status as hearsay, when the letters were presented to the trial court. Such objections have thus been waived.").

[124] *See* PFOF ¶ 139.

[125] *See* PFOF ¶ 140.

[126] *See* PFOF ¶ 141.

216. Comcast concludes by faulting MASN (at ¶ 121) for not seeking carriage from the managers in the field. That is a remarkable claim. It is undisputed that Mr. Bond must approve any individual cable system's request to carry MASN.[127] In light of his desire to "carve off" MASN's territories, his litigation claims that MASN is undesirable, and his misrepresentations regarding the truth of the former Adelphia systems' bandwidth, it is simply fanciful to believe that a field employee would request to carry MASN, much less that Mr. Bond would bend to the will of lower ranking employees.

[127] *See* Tr. at 6941-42 ("Q: The systems cannot launch without Comcast corporate approval, correct? A: Yes.") (Bond Test.).

PROPOSED REPLY CONCLUSIONS OF LAW

I. COMCAST'S CHALLENGES TO THE COMMISSION'S BURDEN-SHIFTING FRAMEWORK LACK MERIT

97. At the threshold, Comcast makes several arguments regarding the breadth and application of the program-carriage rules, and the legal framework through which affiliation-based discrimination by vertically integrated cable companies should be policed. As explained below, Comcast's proposed reading of the program-carriage rules is deeply flawed. Ultimately, however, this Tribunal need not resolve many of these threshold legal issues because the evidence submitted in this proceeding conclusively establishes that Comcast's conduct falls within the heartland of the prohibition on affiliation-based discrimination in the program-carriage rules and thus can be condemned under any reasonable legal standard.

A. The Program-Carriages Rules Should Be Implemented Through a Burden-Shifting Framework

98. Congress and the FCC have prohibited vertically integrated cable companies from discriminating on the basis of affiliation. In the *TWC Order*, the Media Bureau implemented the Cable Act's and the FCC's prohibition on affiliation-based discrimination through a burden-shifting framework.[128] Under that framework, MASN must prove that MASN and Comcast's affiliated RSNs are similarly situated; that Comcast has treated MASN differently from its affiliated RSNs; and that Comcast's discriminatory conduct has unreasonably restrained MASN's ability to compete fairly. Comcast then has the burden of establishing a legitimate, non-discriminatory reason for its differential treatment. If Comcast cannot establish such a legitimate, non-discriminatory reason, MASN has proven affiliation-based discrimination.

[128] *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*"); PCOL ¶¶ 10-11.

99. This burden-shifting framework is well-grounded in Commission precedent. The FCC has used this framework in the program-access context,[129] in adjudicating claims of discrimination by telephone companies,[130] and in determining whether Internet access service providers' network management practices unreasonably discriminate against unaffiliated interests.[131] Using a burden-shifting framework to identify or smoke out affiliation-based discrimination is appropriate. In light of the strong incentives of vertically integrated cable companies to favor the interests of affiliated networks and the informational asymmetry between cable operators and video programmers, if a vertically integrated cable company cannot establish a legitimate, non-discriminatory reason for disparate treatment of affiliated and unaffiliated networks, the FCC should conclude that such conduct is motivated by affiliation.[132]

100. Recognizing that it has failed to establish a legitimate, non-discriminatory justification for its discriminatory treatment of MASN, Comcast protests the application of a burden-shifting framework here.[133] Although MASN prevails even under the discrimination standard proposed by Comcast, Comcast's arguments against the burden-shifting framework are unavailing.

101. Comcast argues (at ¶ 123), for example, that, "because the Presiding Judge must prepare a recommended decision" for the Commission and because the FCC is not bound by decisions of its bureaus, this Tribunal is not bound by the burden-shifting framework set forth in the *TWC Order*. That argument incorrectly states the law and defies common sense. The *TWC*

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[129] *See* PCOL ¶ 12.

[130] *See* PCOL ¶ 14.

[131] *See* PCOL ¶ 14.

[132] *See* PCOL ¶ 13; *see also National Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001).

[133] *See* Comcast Proposed Conclusions of Law ¶¶ 136-137 ("Comcast PCOL").

Order has the force and effect of law, as if it were issued by the full Commission.[134] Comcast's argument is therefore no different from asking this Tribunal to overrule prior Commission precedent.

102. Even if this Tribunal were free to disregard the *TWC Order*'s burden-shifting framework, it ought not do so. That framework is grounded in FCC precedent (including the mirror-image program-access precedent) and it furthers the policies animating the Cable Act, as MASN has explained.[135] Nothing in the Administrative Procedures Act ("APA") or the Cable Act requires that MASN bear the burden of proof on all issues in this hearing. To the contrary, the FCC may alter the "burden of proof" in a hearing.[136] Comcast concedes (as it must) that the APA's default burden of proof must give way to a specific statute that is being adjudicated[137] and, it follows, by agency implementations of a specific statute,[138] as the *TWC Order* has done here in implementing the burden-shifting framework.[139]

B. Employment Discrimination Case Law Does Not Provide a Good Model For Understanding Affiliation-Based Discrimination

103. In interpreting the prohibition on affiliation-based discrimination in the Cable Act and the FCC's rules, Comcast advocates exclusive reliance on the *McDonnell Douglas Corp. v.*

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[134] *See* 47 U.S.C. § 155(c)(3) ("Any order, decision, report, or action made or taken pursuant to any such delegation . . . 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.").

[135] *See* PCOL ¶¶ 12-14 & nn.407-413 (collecting cases).

[136] *See* 47 C.F.R. § 1.254.

[137] *See* 5 U.S.C. § 556(d) ("*Except as otherwise provided by statute*, the proponent of a rule or order has the burden of proof.") (emphasis added); Comcast PCOL ¶ 136 & n.328.

[138] *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 54 (2007) ("Insofar as the statute's language is concerned, to violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute.").

[139] *See TWC Order* ¶¶ 21-25.

Green, 411 U.S. 792 (1973) framework, developed, Comcast admits, in the context of "allegations of racial discrimination under the Civil Rights Act of 1964."[140] This line of argument is unpersuasive.

104. *First*, the Media Bureau has already rejected this argument.[141] A recommended decision is not a proper means for collaterally attacking that determination.

105. *Second*, as previously explained, case law from the employment discrimination context provides an exceptionally poor model for understanding economic-based discrimination by vertically integrated cable companies.[142] Vertical integration, as this case vividly illustrates, creates powerful and rational economic incentives to favor the interests of affiliated entities; such incentives do not exist in the employment-discrimination context. Given these incentives, it is reasonable to require a vertically integrated cable company to justify the differential treatment of similarly situated entities. This does not, as Comcast implies, create a rule requiring carriage. Vertically integrated cable companies may treat unaffiliated networks differently so long as they can establish a legitimate, non-discriminatory reason for the difference in treatment.

106. *Third*, resolution of this issue is ultimately beside the point. Under employment-discrimination case law, one may infer pretext and discriminatory intent from the implausibility of a stated justification.[143] When a vertically integrated cable company cannot reasonably explain a discriminatory carriage decision, it is logical to infer that the cable company was acting rationally to favor the interests of its affiliated programming arm at the expense of unaffiliated

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[140] Comcast PCOL ¶ 165; *see also* PCOL ¶¶ 164-169.

[141] *See* Comcast PCOL ¶ 165 n.390; *TWC Order* ¶ 24; PCOL ¶ 20.

[142] *See* PCOL ¶¶ 15-21.

[143] *See*, *e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

networks, as Comcast's its own expert witness testified,.[144] Where, as here, there is an economic "incentive and . . . ability" to discriminate, one should conclude that discrimination actually occurred when the cable company cannot provide a legitimate justification.[145]

107. *Finally*, even under the employment-discrimination model proposed by Comcast, the evidence is overwhelming that Comcast's conduct was motivated by considerations of affiliation and non-affiliation.[146] Comcast Cable's President, for example, has effectively admitted that affiliation and non-affiliation drive carriage decisions.[147] And the evidence is compelling that MASN has been a victim of such discriminatory carriage decisions here.

C. The First Amendment Does Not Restrict the Scope of the Cable Act's Non-Discrimination Rules

108. In seeking to avoid a finding that it has discriminated on the basis of affiliation, Comcast challenges (at ¶¶ 138-144) the constitutionality of the program-carriages rules under the First Amendment. But courts have (correctly) long rejected efforts by cable companies to shield themselves from important economic regulation under the First Amendment. That is not surprising: "few of us would march our sons and daughters off to war to preserve," under the banner of the freedom of speech, a vertically integrated cable company's "right" to engage in discriminatory carriage decisions.[148] Comcast's constitutional arguments reflect desperation.

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[144] *See*, *e.g.*, 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.); *see also* Tr. at 6378-79 (discussing the economic reasons for Comcast's strong motives to discriminate against MASN in this case) (Singer Test.).

[145] Tr. at 6381 (Singer Test.).

[146] *See* PCOL ¶¶ 39-47.

[147] *See* MASN Ex. 243, at 8.

[148] *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

109. Comcast's lead argument (at ¶¶ 138-144) that the program-carriage rules are content-based has no merit. *First*, as MASN has explained, Congress enacted the program-carriage rules at issue to protect against anti-competitive abuses arising from vertical integration in the cable industry and to promote programming diversity.[149] And, as the D.C. Circuit and the Supreme Court have held, protecting unaffiliated programmers from anti-competitive conduct and promoting programming diversity are not content-based ends.[150] Strict scrutiny is thus inappropriate.[151]

110. Attempting to avoid the clear significance of this precedent, Comcast argues that the program-carriage rules are nonetheless content-based because "[t]he requirement to carry unaffiliated programming . . . is 'activated' by the cable operator's speech."[152] According to Comcast, "MASN would not be able to invoke the rule if Comcast's only affiliated programming related to news, food , or comedy; its attempt to compel Comcast to carry MASN's regional

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[149] *See* PCOL ¶ 23.

[150] *See Time Warner Entm't Co. L.P. v. United States*, 211 F.3d 1313, 1316-18 (D.C. Cir. 2000); *Time Warner Entm't Co. L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

[151] As applied in this case, there is no question that the program-carriage rules are not content-based. The evidence establishes that Comcast has no editorial objection to carrying MASN's core programming (Orioles and Nationals games): it aggressively sought that same programming itself and Comcast has agreed to carry MASN's programming in some parts of MASN's territory (making clear that Comcast's conduct is not based on an ideological objection to any message conveyed by MASN's programming). Those facts underscore that Comcast is using the First Amendment here to attempt to shield its discriminatory carriage decisions from public regulation, not to advance any legitimate First Amendment interest that would justify the application of strict, or even intermediate, scrutiny.

[152] Comcast PCOL ¶¶ 140-141. Comcast's reliance on the Supreme Court's discussion of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), in *Turner* is incomplete. The Court in *Turner* noted that the right-of-reply statute at issue in *Tornillo* was subject to strict scrutiny because it "would deter newspapers from speaking in unfavorable terms about political candidates" and "induce[] the newspaper to respond to the candidates' replies when it might have preferred to remain silent." *Turner*, 512 U.S. at 654. Neither of those concerns is present on the record here.

sports programming is specifically premised on the fact that Comcast made the editorial decision to carry regional sports programming supplied by an affiliate."[153] But the premise of Comcast's argument is fundamentally misplaced: MASN's entitlement to invoke the program-carriage rules stems from Comcast's abuse of its market power as a vertically integrated cable company in *discriminating* against an unaffiliated programming network. The program-carriage rules, in other words, apply regardless of the content of the affiliated speech – the basic requirement is that a cable company that vertically integrates must treat similar programming similarly regardless of affiliation or non-affiliation. The distinction between affiliated and unaffiliated programming and Congress's interest in protecting unaffiliated networks against disparate treatment have *nothing* to do with Congress's disagreement or agreement with the content of any speech. The program-carriage rules are thus content-neutral under settled precedent.[154]

111. *Second*, and in all events, Comcast's argument is a challenge to the constitutionality of the Cable Act itself. As the FCC has held, however, "[it] has an obligation to

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[153] Comcast PCOL ¶ 142.

[154] *See Turner*, 512 U.S. at 642 ("We have said that the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys.") (internal quotation marks and alterations omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys. *The government's purpose is the controlling consideration*. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.") (citation omitted and emphases added). Comcast's argument (at ¶ 144) that "[t]he program carriage rules *require* an analysis of programming content to determine whether the networks are substantially similar" and thus are "subject to strict scrutiny," accordingly misunderstands the distinction between content-based and content-neutral regulation. The program-carriage rules are content-neutral because Congress did not "adopt[]" them "because of agreement or disagreement with the message" conveyed by unaffiliated networks. Besides, Comcast's theory would lead to absurd results: a mandate that cable companies carry all unaffiliated networks would be subject to intermediate scrutiny; whereas a mandate that cable companies not discriminate in carriage selection against unaffiliated networks would be subject to strict scrutiny.

execute and enforce the provisions of [the Cable Act] enacted by Congress and therefore is not free to declare an act of Congress unconstitutional."[155] That is especially the case where, as here, the constitutional challenge raised would eviscerate the ability of Congress to prevent affiliation-based discrimination at all in the video programming and distribution marketplaces.

112. Comcast also argues (at ¶ 146) that, if the program-carriage rules are content-neutral and subject to intermediate scrutiny, the rules must be "applied in a constitutional manner" and thus that the FCC must have "a high degree of certainty" that "affiliation-based discrimination" has occurred and that any remedy should be narrow. But MASN has already shown why there is no constitutional basis for reading the scope of the program-carriages rules narrowly or imposing anything less than mandatory carriage in the name of the First Amendment.[156]

D. The Cable Act Does Not Require a Narrow Reading of the Program-Carriage Rules

113. Comcast contends the Cable Act requires a "narrow[]" reading of the program-carriage rules because Congress directed the FCC to "rely on the marketplace, to the maximum extent feasible."[157] Comcast further argues the Tribunal should not "preclude legitimate business practices common to a competitive marketplace."[158] But adjudicating MASN's Complaint in this proceeding does not require the Tribunal to second-guess or to condemn legitimate, non-discriminatory business practices. Comcast has failed to adduce any reliable or relevant

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[155] Second Report and Order, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, ¶ 55 (1993), *aff'd in part*, *rev'd in part*, *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

[156] *See* PCOL ¶¶ 22-25.

[157] Comcast PCOL ¶ 147 (internal quotation marks omitted).

[158] Comcast PCOL ¶ 147 (internal quotation marks omitted).

evidence that its carriage decisions regarding MASN have been based on any "legitimate business practice[] common to a competitive marketplace." Instead, the evidence is compelling that Comcast's conduct with respect to MASN has been motivated by a desire to favor and to protect the interests of its affiliated RSNs.[159] Comcast's conduct accordingly falls within the core of the prohibition on affiliation-based discrimination and there is no risk that imposing liability here would impair any legitimate business practices.[160]

II. COMCAST HAS DISCRIMINATED ON THE BASIS OF AFFILIATION IN REFUSING TO CARRY MASN IN THE FORECLOSED AREAS UNDER ANY LEGAL STANDARD

A. MASN and Comcast's Affiliated RSNs Are Similarly Situated

114. As previously explained, the evidence in this proceeding is conclusive that MASN and Comcast's affiliated RSNs are similarly situated and compete head-to-head in the marketplace.[161] Comcast is therefore wrong that "MASN has yet to demonstrate that it is similarly situated with respect to Comcast's affiliated RSNs."[162]

115. Because Comcast did not dispute this element of MASN's case in its Answer[163] and because Comcast set forth no proposed findings of fact on this issue,[164] Comcast has forfeited any challenge to this element of MASN's case.[165]

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[159] *See, e.g.*, PFOF ¶¶ 51-60, 104-106, 108-111; PCOL ¶¶ 39-47.

[160] *See* PCOL ¶ 3 & nn.388-389 (collecting legislative history that Congress sought broadly to prevent vertically integrated cable companies from favoring the interests of affiliated networks).

[161] *See* PCOL ¶¶ 27-33.

[162] Comcast PCOL ¶ 171.

[163] *See* Memorandum Opinion and Hearing Designation Order, *Herring Broadcasting, Inc. v. Time Warner Cable Inc.*, 23 FCC Rcd 14787, ¶ 108 (2008) ("*HDO*") ("Comcast has not attempted to demonstrate that MASN, CSN-MA, and CSN-P[hilly] are not similarly situated.").

[164] Comcast PCOL ¶¶ 170-171 (not pointing to any record evidence on this issue).

B. Comcast Treats MASN Differently from MASN in the Terms and Conditions of Carriage

116. The evidence is also conclusive – and essentially uncontested – that Comcast treats MASN disparately from its affiliated RSNs.[166] In each of the Foreclosed Areas, Comcast carries affiliated RSNs to 100 percent of Comcast subscribers, whereas it carries MASN to zero percent of Comcast subscribers. Furthermore, across 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. Finally, the evidence in this proceeding readily establishes that Comcast employs myriad double standards in its treatment of MASN and its affiliated RSNs.

117. Comcast has submitted no reliable or relevant evidence to dispute these findings.

C. Under Any Legal Standard, Comcast's Discriminatory Carriage Decision Is Affiliation-Based Discrimination

118. Comcast's assertion (at ¶ 172) that MASN has failed to "provid[e] evidence that leads to an inference of discrimination" has no merit. The evidence is conclusive that Comcast's disparate treatment is motivated by considerations of affiliation and non-affiliation.[167]

119. *First*, Comcast Cable's President has publicly acknowledged that affiliation and non-affiliation get taken into account in Comcast's carriage decisions.[168] Such statements

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[165] Any new findings of fact or conclusions of law on this issue in Comcast's reply should be stricken. Comcast knew well that this was an element of MASN's case under any legal standard and it should have provided findings of fact and conclusions of law in its opening papers. By waiting to address this issue until reply, Comcast has unfairly deprived MASN of an ability to respond to the evidence and arguments of Comcast on this point.

[166] *See* PCOL ¶¶ 35-38.

[167] *See* PCOL ¶¶ 39-47. Under the Media Bureau's burden-shifting framework, of course, Comcast's failure to prove a legitimate, non-discriminatory reason for its carriage decisions itself compels an inference of affiliation-based discrimination.

[168] *See* MASN Ex. 243, at 8; PFOF ¶ 94.

constitute evidence of discriminatory intent.[169] Moreover, Comcast's use of [redacted] calculations and its practice of [redacted] are examples of the discrimination that independent networks have long feared. Such practices ensure that unaffiliated networks such as MASN are categorically disfavored as compared to affiliated networks.[170] That Comcast applies these disparate standards in selecting networks for carriage is conclusive evidence of affiliation-based discrimination.[171] An employer's admission that female candidates need to score 20 percent higher on a job test than male candidates – the equivalent of Comcast's [redacted] calculation – would amount to discrimination under any legal standard. Comcast has said nothing to dispute any of this evidence – which squarely confirms this Commission's prior findings that Comcast has strong "incentive[s]" to discriminate against unaffiliated RSNs such as MASN.[172]

120. *Second*, Comcast's history of discrimination and retaliation against MASN is independently strong evidence that its carriage decisions in 2007 with respect to the Foreclosed

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[169] *See Machinchick v. PB Power, Inc.*, 398 F.3d 345, 353 (5th Cir. 2005) ("purely indirect references to an employee's age, such as comments that an employee needed to look sharp if he were going to seek a new job, and that he was unwilling and unable to adapt to change, can support an inference of age discrimination").

[170] *See* PCOL ¶¶ 40-41.

[171] *See*, *e.g.*, *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").

[172] Memorandum Opinion and Order, *Applications for Consent to the Assignment 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, ¶¶ 116, 189 (2006) ("*Adelphia Order*"); PFOF ¶ 48.

Areas were motivated by considerations of affiliation and non-affiliation.[173] Once again, Comcast offers no evidence or argument to dispute those findings and conclusions.

121. *Third*, the patent unreasonableness of Comcast's proffered justifications for not carrying MASN independently support a finding of discriminatory intent.[174] There is no documentary support for Comcast's proffered justifications, nor were these justification ever mentioned to MASN (or ever considered by Comcast) during the 2006 negotiations when Comcast first "carved off" the Foreclosed Areas. The failure of Comcast even to establish how Schedule A was compiled supports the conclusion that the real motivation of Comcast was to "carve off" the subscriber numbers of a rival programming network.[175] In particular, the carriage decisions of other major MVPDs and non-Comcast MVPDs to carry MASN in the Foreclosed Areas conclusively undermine the plausibility of Comcast's stated justifications.[176]

122. *Finally*, Comcast's failure to adopt any meaningful safeguards to prevent favoritism for affiliated networks and discrimination against unaffiliated networks, as well its failure to train its key decision-makers regarding affiliation-based discrimination, independently supports an inference of discrimination.[177] That Comcast continues to view MASN as a competitor to contain even after the 2006 Term Sheet illustrates concretely the consequences of Comcast's wholesale failure to train its employees regarding the Commission's non-discrimination obligations.[178]

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[173] *See* PCOL ¶ 42 & n.455.

[174] *See* PCOL ¶¶ 44-45.

[175] *See* PFOF ¶¶ 57-58.

[176] *See* PCOL ¶ 45; PFOF ¶¶ 112-114.

[177] *See* PCOL ¶ 47; *TWC Order* ¶ 32 n.127.

[178] *See* PCOL ¶ 47.

123. Any one of these factors would be sufficient to support an inference of affiliation-based discrimination in this case, especially because nearly all of the underlying facts are unrebutted. Taken together, they conclusively support a finding of discrimination.

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

124. Comcast claims (at ¶ 173) to have rebutted any "inference of discrimination on the basis of affiliation" with "evidence that it had legitimate business reasons for its carriage decisions." That is not correct. The evidence is substantial and persuasive that Comcast lacks a legitimate, non-discriminatory justification for its disparate treatment of MASN and affiliated RSNs.

1. Comcast's Contract-Based Defense Is Unpersuasive

125. Comcast's principal defense (at ¶¶ 178-183) to MASN's Complaint continues to be based on contract law. But this is no defense to MASN's claims under federal law and FCC regulations for multiple reasons.

126. *First*, as previously explained, the Media Bureau has rejected this defense.[179] The Media 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."[180] The question of whether Comcast violated the program-carriage rules in refusing to carry MASN in the Foreclosed Areas in 2007 is accordingly unaffected by a Term Sheet signed in August 2006.[181] Even if they had so intended, the parties could not have excused Comcast from its prospective

[179] *See* PCOL ¶¶ 49-50.

[180] *HDO* ¶ 105.

[181] *See*, *e.g.*, Tr. at 6155-57 (Singer Test.).

statutory and regulatory obligations.[182] The Tribunal need not reach that issue, however, because the record is clear that Comcast understood its discretion would be bound by the program-carriage rules.[183]

127. *Second*, considered *de novo*, the Term Sheet is no defense to Comcast's discriminatory decisions. The Term Sheet does not give Comcast the right to make discriminatory (and unlawful) carriage decisions. Comcast's witnesses have admitted as much. And the case law is legion that such an agreement would not be enforceable.[184] It is thus understandable that, prior to Comcast's case-in-chief, this Tribunal instructed Comcast that the Term Sheet should not play a substantial role in the remainder of this litigation.[185]

128. Indeed, this Tribunal independently arrived at a similar conclusion in a separate proceeding.[186] In the *NFL Enterprises* matter, this Tribunal noted that NFL Enterprises was involved in pending state-court litigation in which NFL Enterprises had alleged that Comcast violated the terms of the affiliation agreement in moving the NFL Network to a different programming tier. This Tribunal held that the fact that re-tiering of the NFL Network was

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[182] *See HDO* ¶ 72 ("Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules."); *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).

[183] *See* Tr. at 6919 ("Q: And another limitation on Comcast's discretion is federal regulatory law, correct? A: Yes.") (Bond Test.); *see also* PFOF ¶ 69; 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.).

[184] *See* PCOL ¶¶ 51, 53.

[185] *See* Tr. at 6446 (Judge Sippel).

[186] *See* Memorandum Opinion and Order, *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, MB Docket No. 08-214, FCC 09M-36, ¶ 3 (rel. Apr. 17, 2009) ("*April 17 Order*").

subject to an ongoing contract dispute did not preclude NFL Enterprises from also alleging that Comcast violated the program-carriage rules in engaging in the same conduct. The Tribunal held that "NFL Enterprises seeks to vindicate its alleged private contractual rights in the New York litigation and its alleged federal statutory and regulatory rights in this case."[187] "The statutory and regulation issues in this case," this Tribunal held, "are *separate and distinct* from the contractual issues in the New York action."[188] That same analysis necessarily controls: MASN is seeking to vindicate statutory and regulatory rights, not contractual rights, and, unlike the *NFL Enterprises* matter, there is no state-court litigation pending regarding MASN's and Comcast's rights or obligations under the Term Sheet.

129. *Third*, and independently, the Term Sheet should not serve as a legitimate, non-discriminatory defense because the exclusion of the Foreclosed Areas in the Term Sheet was the result of misconduct and subterfuge during the 2006 carriage negotiations.[189] The evidence on this point is conclusive, and it rebuts Comcast's claims (at ¶¶ 149-162) that it negotiated the Term Sheet in good faith. Comcast also errs in asserting (at ¶ 183) that its reliance on the Term Sheet was "reasonable." Unambiguous law settles that release clauses should not be read to

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[187] *Id.*

[188] *Id.* (emphasis added).

[189] *See* PFOF ¶¶ 51-74, 83-91; *supra* MASN Proposed Reply Findings of Fact ¶¶ 163-170 ("RPFOF").

grant impunity from future violations of the law.[190] Comcast's lead negotiator admitted the Term Sheet did not grant Comcast the right to violate the carriage rules in perpetuity.[191]

130. *Fourth*, Comcast cannot rely on the Term Sheet for a legitimate, *non-discriminatory* defense because affiliated RSNs never face such concerns. It is undisputed that Comcast allows affiliated RSNs to operate without contracts.[192] Comcast's reliance on the Term Sheet is thus an example of holding an unaffiliated RSN to a disparate carriage standard. It would not be a defense to an employment-discrimination claim that an employer reasonably (but mistakenly) relied on test results in denying employment to a female applicant when unrebutted evidence establishes that the employer does not even require male applicants to take such tests. The very act of requiring female applicants to take the test in that circumstance would be discriminatory. Likewise, the very act of relying on the Term Sheet as a justification for refusing to carry MASN is affiliation-based discrimination regardless of the motives of Comcast's decision-makers.[193]

131. *Finally*, the evidence at trial showed that Mr. Bond, Comcast's lead negotiator, was not even aware of where the excluded systems and the Foreclosed Areas were located. He

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[190] *See*, *e.g.*, *Richardson*, 448 F.3d at 1054 (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); PCOL ¶¶ 51, 53.

[191] *See* Tr. at 6919 ("Q: And another limitation on Comcast's discretion is federal regulatory law, correct? A: Yes.") (Bond Test.).

[192] *See* PCOL ¶ 40.

[193] *See Ricci v. DeStefano*, 77 U.S.L.W. 4639, 2009 WL 1835138, at *14 (U.S. June 29, 2009) (No. 07-1428) (city's disqualification of test results in an effort to avoid litigation over a disparate impact of the test on minority candidates was race-based discrimination: "[w]hatever the City's ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race" because "[t]he City rejected the test results solely because the higher scoring candidates were white").

could not even recall ever discussing Harrisburg, Roanoke-Lynchburg, or the Tri-Cities regions with MASN's negotiators.[194] Any such reliance argument by Comcast, therefore, founders on a lack of proof as to its reasonableness.

2. Comcast's Bandwidth Defense Is Unfounded

132. Comcast continues (at ¶¶ 173-174) to cite "bandwidth" as a purported "business reason[]" for its refusal to carry MASN in the Foreclosed Areas. This defense has no legal or factual support.

133. As MASN has explained, this argument fails, first, as a legal matter: capacity issues cannot constitute a defense to *discriminatory* carriage decisions – where a vertically integrated cable company has made room on its cable systems for its affiliates, it is not enough to say there is no room for an unaffiliated network.[195] Furthermore, Comcast's defense is pretextual: this issue was not raised until 2007 after prior representations by Comcast that the *only* Comcast systems with capacity issues were former Adelphia systems.[196]

134. More fundamentally, the evidence conclusively forecloses Comcast's reliance on this justification. Mr. Ortman – Comcast's most knowledgeable witness about bandwidth[197] – testified there would be no unmanageable capacity concerns with any cable system with 550

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[194] Tr. at 6892 (no recollection of seeing list of systems in Schedule A); *id*. at 6914 ("I don't recall that I discussed, specifically discussing unlaunched areas with the MASN representatives when I did this, no."); *id*. at 6915-6916 (not recall discussing Harrisburg, Roanoke-Lynchburg, or Tri-Cities areas with MASN) (Bond Test.).

[195] *See* PCOL ¶ 55.

[196] *See* PCOL ¶ 56.

[197] *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.).

MHz capacity or more.[198] The overwhelming majority of systems in the Foreclosed Areas are at or above 550 MHz.[199] His testimony on this score, moreover, contradicted the testimony of Mr. Bond.[200] Comcast's internally contradictory testimony further supports an inference of pretext with respect to this and all of Comcast's proffered justifications.[201]

3. Comcast's Demand Defense Is Unavailing

135. Comcast also argues (at ¶¶ 175-176) that low demand for MASN in the Foreclosed Areas represents a legitimate, non-discriminatory reason for its carriage decisions. MASN has established that this defense provides no cover for Comcast's discriminatory conduct. *First*, the defense is pretextual: Comcast did not study demand in creating Schedule A, and the demand defense was first raised only in 2007.[202] *Second*, Comcast has never submitted any evidence of comparative demand for its affiliated RSNs and it has admitted it has never subjected its affiliated RSNs to demand studies like those it submitted for MASN here.[203] *Third*, compelling internal documents make clear that Comcast knows there is strong demand for MASN's programming in the Foreclosed Areas.[204] *Fourth*, the carriage decisions of other major

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[198] *See supra* PFOF ¶ 84.

[199] *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).

[200] *See* Tr. at 6922 (testifying that "generally a 550 system is channel constrained" and would not be able to launch MASN) (Bond Test.); Tr. at 6922 ("Wait a minute, we had testimony from Mr. Ortman yesterday, he said 550 was okay; is that right? Did I misquote him?) (Judge Sippel).

[201] *See 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.").

[202] *See* PCOL ¶ 59.

[203] *See* PCOL ¶ 60.

[204] *See* PCOL ¶ 61.

MVPDs and non-Comcast MVPDs establish there is strong actual and potential demand for MASN in the Foreclosed Areas.[205] *Fifth*, Nielsen data show real demand for MASN's programming.[206] *Sixth*, the history of carriage of the Orioles in the Foreclosed Areas is reliable evidence of actual and potential demand for MASN's programming.[207] *Finally*, Comcast's aggressive efforts to retain Orioles rights and to acquire Nationals rights and to carry that programming across the teams' geographic footprints speaks volumes about Comcast's true assessment of the demand for MASN's programming.[208]

136. Comcast does not attempt to refute most of this evidence, and the limited arguments that it does make fall short. Comcast first argues (at ¶¶ 175, 177) that cable operators other than Comcast have chosen not to carry MASN in the Foreclosed Areas. But MASN has shown that this evidence is misleading: the vast majority of cable operators in these markets are very small: [redacted][209] The decisions of these small operators shed no light on the reasonableness of Comcast's carriage decisions; the relevant comparators are Comcast's significant MVPD competitors – namely, DirecTV and DISH Network, and, in some areas, Verizon.[210] Furthermore, Comcast's argument is refuted by undisputed evidence that approximately [redacted] of all non-Comcast MVPD subscribers in the Foreclosed Areas receive MASN.[211]

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[205] *See* PCOL ¶ 62.

[206] *See* PCOL ¶ 63.

[207] *See* PCOL ¶ 64.

[208] *See* PCOL ¶ 65.

[209] *See* Comcast Ex. 4, at 17-18, Tables 1-3 (Orszag Written Test.); PFOF ¶ 137.

[210] *See* PFOF ¶ 138.

[211] *See* PFOF ¶¶ 113-114.

137. Comcast also attempts (at ¶ 176) to defend the "expert testimony" of Mr. Gerbrandt, which, Comcast insists, proves "there is little fan interest in the Orioles and Nationals game[s] telecast by MASN." That testimony is entitled to no weight: Mr. Gerbrandt's testimony was not credible; he did not measure whether fans would watch MASN's programming on television; he did not determine whether his results were statistically significant; and, to the extent that his studies are relevant at all, they are consistent with the conclusion there is demand for MASN's programming in the Foreclosed Areas.[212]

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

138. Comcast continues (at ¶¶ 173-174) to cite "MASN's high price" as a purported "business reason[]" for its refusal to carry MASN in the Foreclosed Areas. But Comcast has pointed to no relevant or reliable evidence on this issue in its proposed findings of fact and conclusions of law. Comcast ignores the record evidence that this defense is pretextual;[213] that an expert study demonstrates that MASN is either [redacted] in price to Comcast's affiliated RSNs;[214] that the carriage decisions of other major MVPDs makes clear that MASN is a good value proposition in the Foreclosed Areas;[215] and that the reasonableness of MASN's rates is confirmed by a sophisticated PSPPE analysis and a regression analysis of the rates that Comcast pays for other RSNs across the nation.[216] Because all of this evidence stands unrebutted, the conclusion that Comcast's cost-based defense is unfounded and pretextual is unassailable.

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[212] *See* PFOF ¶¶ 125-129; *supra* RPFOF ¶ 205.

[213] *See* PCOL ¶ 67.

[214] *See* PCOL ¶ 68.

[215] *See* PCOL ¶ 69.

[216] *See* PCOL ¶ 70.

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

1. MASN Has Carried Its Burden of Proof On This Issue

139. MASN has also proved that Comcast's conduct "unreasonably restrain[s] the ability" of MASN "to compete fairly."[217] The evidence 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 four ways.

140. *First*, Comcast's discriminatory conduct has restrained MASN's ability to compete fairly for programming rights, which are imperative to RSNs' competitiveness.[218] *Second*, Comcast's discriminatory conduct has restrained MASN's ability to compete fairly for advertising revenue by punching significant coverage gaps in MASN's territory.[219] *Third*, Comcast's discriminatory conduct has restrained MASN's ability to compete fairly with Comcast's affiliated RSNs by inflicting substantial harm to MASN's licensing revenues.[220] Comcast's conduct will cause MASN to lose more than [redacted] in licensing revenues over the course of the parties' agreement, the equivalent of [redacted] per month.[221] *Fourth*, Comcast's discriminatory conduct has foreclosed MASN's ability to compete at *all* in each of the Foreclosed Areas because Comcast is the dominant MVPD in each of those areas.[222]

141. This evidence is largely unrebutted and, taken together, it establishes that Comcast's conduct has unreasonably restrained MASN's ability to compete fairly. The little

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[217] 47 U.S.C. § 536(a)(3).

[218] *See* PCOL ¶¶ 72-73.

[219] *See* PCOL ¶ 74.

[220] *See* PCOL ¶ 75.

[221] *See* PCOL ¶ 75.

[222] *See* PCOL ¶ 76.

testimony that Comcast has submitted on this issue addressed the wrong legal standards.[223] Furthermore, inasmuch as Comcast suggests (at ¶ 185) that the compete-fairly prong requires that MASN show "more than hypothetical or minor cost burdens," the evidence easily satisfies Comcast's proposed standard. The harm to MASN here is concrete and far from minor.

2. Comcast's Contrary Arguments Are Unpersuasive

142. Comcast has argued (at ¶ 185) in this litigation that, in applying the compete-fairly prong, MASN must show "concrete adverse effects of a significant nature." It is not clear what Comcast means by this standard or why MASN's unrebutted evidence does not satisfy it, but to the extent that Comcast suggests that an unaffiliated network must show that it would suffer catastrophic losses that would imperil the ability of the network to compete, Comcast's reading of the statute has no basis in the text, history, or purposes of the Cable Act,[224] and its interpretation is foreclosed by binding Commission precedent.[225]

143. Furthermore, a strict interpretation of the compete-fairly prong would have negative policy consequences by allowing vertically integrated cable operators to engage in discriminatory conduct that stops just short of bankrupting or inflicting catastrophic losses on an unaffiliated network.[226] There is no reason to believe that Congress would have intended such a result, which would tilt the competitive playing field permanently in favor of affiliated networks

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[223] *See* PCOL ¶ 79; Tr. at 7216-17 (admitting he did not address it meant to restrain a rivals ability to "compete fairly") (Orszag Test.); PCOL ¶ 80; Tr. at 7213-16 (admitting he applied antitrust standards measuring harm to competition not harm to competitors) (Orszag Test.).

[224] *See* PCOL ¶¶ 79-83.

[225] *See* PCOL ¶ 78.

[226] *See* PCOL ¶ 84.

contrary to Congress's stated aim of preventing affiliation-based discrimination.[227] Nor does such a result make sense as a matter of regulatory policy.

144. Comcast's few specific arguments regarding MASN's evidence of competitive harm are unpersuasive. *First*, Comcast contends (at ¶ 186) that "MASN has not presented evidence that it failed to acquire the rights to telecast games of any professional sports teams based on the fact that it is not carried on 100 percent of Comcast's systems in MASN's footprint." But the professional sports teams for which RSNs in MASN's footprint can compete are limited. The evidence shows that Comcast's carriage decisions have already forced MASN to overpay for the pre-season rights to Baltimore Ravens games, that the Ravens have cited the coverage gaps as an ongoing problem,[228] that Comcast's carriage decisions have undermined MASN's negotiating position with respect to pre-season rights to the Washington Redskins,[229] and that MASN would bid for the rights to the Washington Wizards and Washington Capitals when those rights are available but MASN will be materially restrained in its ability to obtain those rights for a market price because of Comcast's coverage gaps.[230] Furthermore, the

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[227] *See generally* Tr. at 6370-71 (discussing dangers of a "Death by 100 Cuts" view under which vertically integrated cable companies could engage in discriminatory conduct so long as they did not inflict catastrophic injury on an unaffiliated network) (Singer Test.).

[228] Tr. at 5778 (Cuddihy Test.); Tr. at 6327 (discussing evidence that "the Ravens are citing these gaps in coverage" as a "reason[] why they don't want to do business with us") (Singer Test.). Comcast's position that MASN's ability to secure the rights to pre-season Ravens games somehow proves the absence of competitive harm when the evidence is unrebutted that MASN overbid for those rights and now faces serious problems in its relationship with the team because of coverage gaps is impossible to credit.

[229] *See* PFOF ¶ 146. Comcast's claim that MASN's failed to secure Redskins rights because "MASN did not bid high enough" is question begging: the point is that because of Comcast's decisions, MASN would have had to bid a much higher price to secure those rights. *See* Tr. at 6438-40 (Singer Test.).

[230] *See* PFOF ¶ 147; 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

evidence establishes that Comcast's coverage gaps have already affected MASN's ability to obtain rights to the ACC, CAA, and D.C. United.[231] Finally, the evidence shows that Comcast expressed serious concern about the "bidding wars" that would arise from MASN's entry into the marketplace, which explains *why* Comcast would use coverage gaps to undermine MASN's ability to compete fairly.[232]

145. *Second*, Comcast maintains (at ¶ 186) that Comcast is unable to bid for the rights to the Orioles and Nationals, and thus "MASN has a 'built in' guarantee to the games of two professional teams." The premise of this argument, however, is that MASN will not go bankrupt as a result of Comcast's carriage decisions. That is not the standard. The standard is whether Comcast's discrimination is impairing MASN's ability to compete fairly with Comcast's affiliated RSNs. The record evidence is conclusive that, notwithstanding MASN's rights to the Orioles and Nationals, it is suffering concrete competitive injury as a result of the actions of Comcast's distribution arm to favor the interests of its programming arm.

146. *Third*, Comcast contends (at ¶ 187) that MASN "has failed to show that it has been seriously handicapped in selling advertising" by Comcast's carriage decisions and the resulting coverage gaps. That is not so. Economic literature teaches that coverage gaps can impair an ability to attract advertising dollars and, unsurprisingly, the evidence establishes that

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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.).

[231] *See* PFOF ¶ 147.

[232] *See* PFOF ¶ 149.

MASN has, in fact, suffered concrete instances of impairment.[233] Comcast's assertion that this evidence is "anecdotal hearsay evidence of dubious reliability" is unfounded.[234]

147. *Fourth*, Comcast insists (at ¶ 188) that "MASN [has] not suffered, and will not suffer, any concrete and significant adverse effects as a result of Comcast's carriage decisions" based on testimony that MASN will remain profitable even in the face of Comcast's discriminatory conduct. But as a matter of licensing revenue alone, the loss of [redacted] dollars as a result of discriminatory decisions by Comcast is "concrete and significant," especially for an unaffiliated RSN like MASN. Furthermore, Comcast's reliance on Mr. Orszag's testimony for the claim that this lost revenue would not affect "MASN's ability to compete" is not persuasive in view of Mr. Orszag's admission that he assessed harm to competition, not harm to a competitor, as the statute and the FCC's rules require.[235]

148. *Fifth*, Comcast argues (at ¶ 189) that it has taken steps "that enhance MASN's ability to compete." But, as legal matter, this is irrelevant: Comcast cites no authority for the counterintuitive proposition that some favorable treatment by Comcast would excuse Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas. In all events, the evidence establishes that all of the conduct cited by Comcast is conduct aimed at helping Comcast.[236]

149. *Sixth*, Comcast contends – with no supporting legal or factual authority – that the "failure to receive compensation to which MASN has no contractual entitlement does not *unreasonably* restrain MASN's ability to compete fairly."[237] But this argument proves too much:

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[233] *See* PFOF ¶¶ 144-145; MASN Ex. 238, ¶¶ 49, 86 (Singer Written Test.).

[234] *See supra* RPFOF ¶¶ 213-214.

[235] *See* PCOL ¶ 80; Comcast PCOL ¶ 188.

[236] *See* PFOF ¶¶ 139-141; *supra* RPFOF ¶¶ 215.

[237] Comcast PCOL ¶ 191.

vertically integrated cable companies could always deny carriage to unaffiliated networks and then argue that those networks lack a "contractual entitlement" to licensing revenues resulting from a carriage deal. The question in these cases is thus not what the rights of the parties are under a contract, but whether vertically integrated cable operators have made carriage decisions on the basis of affiliation and non-affiliation that restrain unreasonably unaffiliated networks' ability to compete fairly. The evidence here is convincing that Comcast's conduct is discriminatory and that it does have a material impact on MASN's ability to compete fairly.[238]

III. COMCAST'S THRESHOLD LEGAL ARGUMENTS HAVE NO MERIT

150. In light of the overwhelming evidence that Comcast has violated the program-carriage rules in refusing to carry MASN in the Foreclosed Areas, it is not surprising that Comcast goes to great lengths to shield its conduct from review by the Commission through two threshold legal arguments. Comcast's threshold arguments, however, lack merit.

A. The Statute of Limitations Does Not Bar MASN's Complaint

151. Comcast argues that the Commission has no authority to adjudicate MASN's Complaint – and thus to remedy Comcast's discriminatory conduct – because, the theory goes, MASN filed its complaint out of time. This argument is flawed in multiple respects.

152. *First*, as previously explained, the Media Bureau has rejected Comcast's statute-of-limitations defense in a decision that is binding on this Tribunal.[239]

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[238] Comcast's assertion (at ¶ 191) that it would not be "fair" or "reasonable" to require "Comcast to fund MASN's operations by paying for programming for which there is little or no consumer interest" likewise lacks any factual or legal support. Objective marketplace evidence shows that other major MVPDs have decided that there is consumer demand for MASN's programming in the Foreclosed Areas. *See*, *e.g.*, PCOL ¶ 62.

[239] *See* PCOL ¶ 88; *HDO* ¶¶ 102-105. In the *NFL Enterprises* matter, this Tribunal treated this conclusion as binding. *See April 17 Order* ¶ 7.

153. *Second*, considered *de novo*, the Media Bureau's conclusion is undoubtedly correct. The Commission's rules provide that a complaint must be filed within one year of the date "[a] party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section."[240] As it was required to do under the Commission's rules, MASN sent Comcast a notice letter on March 7, 2008, notifying Comcast that MASN intended to file a complaint based on Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas.[241] Tellingly, no reference was made in that letter to the prior carriage complaint or to the 2006 Carriage Agreement. MASN filed its current Complaint on July 1, 2008, well within one year of "notif[ying] [Comcast] that it intend[ed] to file a complaint with the Commission" based on Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas.[242] Under the plain terms of the Commission's rules, the Complaint was timely filed.[243]

154. Comcast's contrary arguments are unpersuasive. Comcast's principal contention is that, under a separate provision of the Commission's rules, a complaint must be brought within one year of the date "[t]he multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules

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[240] 47 C.F.R. § 76.1302(f)(3).

[241] *See* MASN Ex. 66.

[242] 47 C.F.R. § 76.1302(f)(3).

[243] This Commission is bound to apply the plain text of § 76.1302(f)(3) as written. *See AT&T Corp. v. FCC*, 448 F.3d 426, 434 (D.C. Cir. 2006) ("it is elementary that an agency must adhere to its own rules and regulations") (internal quotation marks omitted); *Teleprompter Cable Communications Corp. v. FCC*, 565 F.2d 736, 742 (D.C. Cir. 1977) (it is an "elementary principle that an administrative agency is bound to adhere to its own rules and procedures" and that the Commission cannot "disregard[] the plain meaning" of its rules). That is especially the case given that MASN relied on the plain terms of the rule in bringing a carriage complaint.

contained in this section."[244] But that provision has no possible application here because MASN's Complaint does not, in any way, "allege[]," nor does MASN seek to prove, that any "contract" "violate[s] one more of the [Commission's] rules." Instead, MASN has alleged, and seeks to prove, that Comcast's refusal to carry MASN in the Foreclosed Areas since January 2007 is affiliation-based discrimination in violation of 47 C.F.R. § 76.1301(c).

155. The test for identifying the nature of MASN's claims here is straightforward: this Tribunal could easily hold Comcast in violation of the Commission's program-carriage rules without *any* holding that *any* part of the 2006 Term Sheet "violate[s] one more of the [Commission's] rules," nor has MASN sought such a determination. In light of the plain text of the Commission's rules, that should be the end of the matter, as § 76.1302(f)(1) has no possible application here.

156. Comcast attempts (at ¶ 126) to sidestep the unambiguous terms of the Commission's rules by arguing that "[t]he evidence developed during the hearing makes clear that the subject matter here is the parties' dispute over the 2006 Agreement." That is simply not so no matter how many times Comcast asserts it to be the case. This case is about Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007.[245]

157. In support of its theory, Comcast argues (at ¶ 127) that "MASN's own witnesses indicate that the Agreement lies at the core of this dispute." But MASN's witnesses have

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[244] 47 C.F.R. § 76.1302(f)(1).

[245] *See* Tr. at 5878-79 ("Q: Do you believe that Comcast is discriminating against MASN? A: Yeah, the issue is – yes, I do, because there – where they haven't launched MASN is in areas where they have an affiliate RSN, either CSN MA, or CSN Philly.") (Wyche Test.); Tr. at 6135 ("Q: But this is a contract dispute, correct? A: No, not now. We went back to them in January of whatever, I guess 2007 and said, 'We want you to launch us in these systems that you didn't launch us in.' . . . And they've said, 'No' unequivocally.") (Gluck Test.); *see also* PCOL ¶¶ 92-96.

testified that this case is about Comcast's discriminatory refusal to carry MASN.[246] That certain MASN witnesses also discussed the 2006 Term Sheet in this proceeding is hardly surprising given that *Comcast* has elected to make that Term Sheet its principal *defense* to Comcast's discriminatory carriage decisions. Just because MASN has adduced evidence to refute Comcast's defense does not remotely suggest that the Term Sheet is somehow a principal element of MASN's case-in-chief, from which a statute-of-limitations period should be triggered.

158. Furthermore, simply because the same conduct (i.e., Comcast's refusal to carry MASN in the Foreclosed Areas) could amount to discrimination in violation of the program-carriage rules as well as violate the parties' contract is legally irrelevant: MASN is not invoking any rights under a contract in this proceeding. Nor is it seeking to have any part of a contract held in violation of the law. This Tribunal has already recognized that there is a basic difference between invoking private rights under a contract and rights under a statute and regulation, even when claims are based on the same underlying conduct.[247] As the Supreme Court has held in an analogous context, a plaintiff's assertion of one claim that falls outside the scope of a federal preemption provision when the plaintiff "could" also but "did not" bring a separate claim based

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[246] *See* MASN Ex. 235, ¶¶ 3-5 (discussing Comcast's retaliation and bias against MASN); *id.* ¶¶ 6-9 (discussing the similarly situated nature of Comcast's RSNs and MASN); *id.* ¶¶ 10-14 (discussing Comcast's discrimination against MASN); *id.* ¶¶ 26-36 (discussing Comcast's favoritism and double standards) (Cuddihy Written Test.); MASN Ex. 238, ¶¶ 28-43 (discussing the anticompetitive and discriminatory nature of Comcast's carriage decisions) (Singer Written Testimony); *see also* Tr. at 5878-79 ("Q: Do you believe that Comcast is discriminating against MASN? A: Yeah, the issue is – yes, I do, because there – where they haven't launched MASN is in areas where they have an affiliate RSN, either CSN MA, or CSN Philly.") (Wyche Test.); Tr. at 6135 ("Q: But this is a contract dispute, correct? A: No, not now. We went back to them in January of whatever, I guess 2007 and said, 'We want you to launch us in these systems that you didn't launch us in.' . . . And they've said, 'No' unequivocally.") (Gluck Test.).

[247] *See supra* RPCOL ¶ 128.

on the same facts that would be preempted does not mean the former is also preempted: "There is nothing new in the recognition that the same conduct might violate multiple proscriptions."[248] So, too, here: just because Comcast's refusal to carry MASN might be condemned as fraud-in-the-making of the Term Sheet does not mean that MASN's claims before the Commission now is based on the Term Sheet.[249]

159. For similar reasons, Comcast's contention that "MASN's 2008 Complaint makes plain that MASN's dispute with Comcast is based on the Agreement itself" is wide of the mark. The Media Bureau has already rejected this argument.[250] With good reason: the Complaint unambiguously seeks to hold Comcast liable for its discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007. The Complaint alleges repeatedly not that Comcast's conduct violates the Term Sheet, but that Comcast's conduct is an "unreasonable refusal to carry MASN" in the Foreclosed Areas.[251] The Complaint states, for example, that "Comcast's refusal

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[248] *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 546 n.9 (2008).

[249] This also addresses Comcast's argument based on an April 18, 2008 letter from MASN's counsel to Comcast. *See* Comcast PCOL ¶ 127 (citing Comcast Ex. 19). That MASN would state in that letter that the parties have "very different views of the facts surrounding the formation of the August 4, 2006 agreement" is not the least bit surprising in view of the fact that Comcast had raised that agreement as a defense to its failure to carry MASN in the Foreclosed Areas. *See* Comcast Ex. 18. That has nothing to do with the nature of MASN's case here.

[250] *See HDO* ¶ 103 n.460.

[251] *See* Compl. at viii (alleging Comcast has "refused to provide carriage" on the unlaunched systems although Comcast carries affiliated RSNs on those systems; that Comcast "lacks a lawful business justification for its differential treatment" of MASN and affiliated RSNs; and that this conduct constitutes "an unreasonable refusal to carry MASN"); *see also*, *e.g.*, *id.* at vii ("When MASN complained to Comcast and demanded carriage on the unlaunched systems, Comcast refused. Comcast has taken the position that the contract MASN entered into forecloses MASN from demanding carriage in those non-launched markets."); *id.* ¶ 51 (under heading: "*Comcast's Discriminatory Refusal to Carry* MASN in Harrisburg and Other Areas," alleging that "Comcast has refused to carry MASN's programming in numerous other systems . . . that are *not* former Adelphia systems in which Comcast carries an affiliated RSN") (first emphasis added); *id.* ¶¶ 54-55 (alleging that Comcast's refusal to carry MASN on unlaunched systems "represent[s] a failure to extend equal treatment to MASN as an unaffiliated RSN").

to carry MASN on those systems is discrimination in violation of the Cable Act and the FCC's rules."[252] The allegations of Count I are to the same effect: "Comcast's refusal to carry MASN in those systems that were not former Adelphia systems (such as in the Harrisburg and Tri-Cities DMAs) is discrimination against an unaffiliated video programmer in violation of the Cable Act and the Commission's implementing regulations."[253] Count I further alleges that "Comcast's refusal to carry MASN in the unlaunched systems is discriminatory . . . : Comcast is denying to an unaffiliated RSN the same carriage terms and conditions that it provides to its affiliated RSNs. There can be no doubt that if Comcast's affiliated RSNs carried Orioles and Nationals games, those games would be shown throughout the teams' seven-state television territory."[254] Those are allegations of a program-carriage violation, not a contract claim.

160. MASN's discussion of the Term Sheet and the 2006 negotiations in its Complaint does not prove that the *legal* theory set forth in the Complaint is based on the Term Sheet or the 2006 negotiations. The Term Sheet and the 2006 negotiations are important parts of MASN's refutation of Comcast's *defense*. Furthermore, evidence of past discriminatory conduct, "even if it occurred well before the statute of limitations, may support an inference of [] discriminatory intent."[255] MASN's discussion of these issues in the Complaint thus does not evidence that MASN is seeking a declaration that the Term Sheet "violate[s] one or more of the [Commission's] rules" – which is what Comcast would need to establish to prove that the limitations period in 76.1302(f)(1) applies and was triggered in August 2006.[256]

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[252] *Id.* ¶ 56.

[253] *Id.* ¶ 63.

[254] *Id.* ¶ 71.

[255] *Little v. National Broad. Co.*, 210 F. Supp. 2d 330, 379 (S.D.N.Y. 2002).

[256] MASN's position is supported by the *Adelphia Order*. There, the Commission authorized the filing of an arbitration demand "within 30 days after the denial of carriage,"

161. Comcast's reliance on the Commission's *Part 76 Order* is misplaced for similar reasons. The FCC there clarified its program-access rules to make clear that an "offer" by a defendant programming vendor "to renegotiate . . . an allegedly discriminatory contract . . . does not reopen the existing contract to complaints that the provisions therefore are discriminatory."[257] Prior to that time, the program-access limitations provision stated that a complaint must be brought within one year from the date "[t]he satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules."[258] The FCC amended that provision to require that a complaint based on an offer to sell programming be brought within a year from the date "[t]he satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, *and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming or satellite broadcast programming vendor.*"[259]

162. The *Part 76 Order* is irrelevant here for two reasons. First, MASN does not seek a determination that any existing contract or "offer to sell [or purchase]" – the subject of the program-access provision – is "discriminatory" or in violation of the program-carriage rules.

Adelphia Order ¶ 190 – that is, 30 days after an "unaffiliated RSN [was] unable to reach a carriage agreement" with Comcast, *id.* ¶ 189. The fact that the limitations period in the *Adelphia Order* was triggered from the date that the parties reached a final negotiating impasse establishes that there is nothing unusual about reading the Commission's rules to the same effect.

[257] Report and Order, *1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418, ¶ 18 (1999) ("*Part 76 Order*"), *recon. denied*, Order on Reconsideration, *1998 Biennial Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, 1999 WL 766253, CS Docket No. 98-54, FCC 99-258 (Sept. 29, 1999).

[258] 47 C.F.R. § 76.1003(r)(2) (1998).

[259] 47 C.F.R. § 76.1003(f)(2) (emphasis added).

Because MASN does not rely on an "offer" by Comcast "to renegotiate" a contract as triggering a new limitations period, the Commission's discussion of § 76.1003 in the *Part 76 Order* is inapposite. Second, and more fundamentally, although the FCC amended the program-access rules to make clear that offers to sell programming subject to an existing contract does not start a new limitations period, the FCC made *no* such changes to the program-carriage rules. The carriage rules, as explained, provide clearly that a complaint may be brought within one year of the date "[a] party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section."[260] There is *no* limitation in that rule with respect to any relationship to an existing agreement. The inclusion of such a limitation in the program-access provisions, coupled with the exclusion of such a limitation in the program-carriage provisions, must be presumed to be intentional.[261] The Commission is bound to apply the plain text of its regulations as written.

163. The bureau decisions in *Echostar*[262] are similarly inapposite. In that case, under the program-access rules and the limitations provision discussed above, an MVPD filed a complaint alleging, among other things, that the terms of an *existing* contract were discriminatory. In holding that a complaint based on the existing contract (signed several years prior) was untimely and that the limitations period was not restarted by an offer to amend, the Media Bureau explained that its holding reflected that "[a] party has one year to seek redress for

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[260] 47 C.F.R. § 76.1302(f)(3).

[261] *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

[262] Order on Reconsideration, *Echostar Communications Corp. v. Fox/Liberty Networks LLC, Fox Sport Net LLC, Fox Sports Direct*, 14 FCC Rcd 10480 (CSB 1999) ("*Echostar Reconsideration Order*"), *denying petition for recon. of* 13 FCC Rcd 21841 (CSB 1998).

actions that entail unfair or anti-competitive practices by a vertically integrated program supplier."[263] Here, setting aside that there are dispositive textual differences between the program-access and program-carriage limitations periods, the unfair and anti-competitive action that MASN seeks to redress is Comcast's refusal to carry MASN in the Foreclosed Areas. MASN is not seeking to condemn any provision of the Term Sheet. The Media Bureau's *Echostar* decisions thus have no application.

B. *Res Judicata* Does Not Bar MASN's Complaint

164. Comcast's threshold argument that *res judicata* bars MASN's Complaint is similarly unfounded. *First*, as previously explained, the Media Bureau – in a holding binding on this Tribunal – rejected Comcast's defense.[264] Comcast's assertion (at ¶ 135 n.327) that "[t]he record now makes clear that MASN is basing its case entirely on the negotiated scope of the 2006 Agreement," and thus that the Media Bureau's determination may be disregarded is flawed. Setting aside that Comcast's assertion that MASN's legal claim is about the "scope of the 2006 Agreement" is unfounded (MASN seeks to hold Comcast liable for discriminatory carriage decisions after the date of the Release), Comcast's argument regarding *res judicata* now is precisely the same argument that Comcast presented to the Media Bureau.[265]

165. *Second*, and also as previously explained, the Media Bureau's determination is persuasive. This case is about Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007.[266] Comcast has acknowledged that, after MASN learned

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[263] *Echostar Reconsideration Order* ¶ 7.

[264] *See* PFOF ¶¶ 92-93; PCOL ¶¶ 89-91.

[265] *See HDO* ¶ 106.

[266] *See* Tr. at 5878-79 ("Q: Do you believe that Comcast is discriminating against MASN? A: Yeah, the issue is – yes, I do, because there – where they haven't launched MASN is in areas where they have an affiliate RSN, either CSN MA, or CSN Philly.") (Wyche Test.);

of Comcast's non-carriage of MASN in the Foreclosed Areas, MASN asked for carriage on those systems, but Comcast refused.[267] This case is about *that* discriminatory refusal to carry MASN. The facts that MASN's prior and current discrimination claims cover different time periods, involve different carriage demands, and concern different carriage negotiations necessarily defeat any preclusive effect from MASN's prior complaint.

166. Comcast's position (at ¶ 135) that adjudicating MASN's Complaint here would require "the Commission to reopen the resolution of the 2005 Complaint" is accordingly wrong. This Tribunal can resolve MASN's Complaint without reference to the Carriage Agreement or to the prior complaint: as the Media Bureau has previously held, whatever the meaning of the 2006 Carriage Agreement, that agreement cannot shield Comcast's unlawful conduct in 2007 from review.[268] Neither the Carriage Agreement nor the prior complaint is a necessary element of MASN's case-in-chief. As explained, each is relevant only in two respects: first, Comcast's past discriminatory treatment of MASN, consistent with well-established legal principles, can shed light on Comcast's current discriminatory decisions;[269] and, second, the Carriage Agreement is relevant to refute the *defense* raised by Comcast to MASN's Complaint.[270]

Tr. at 6135 ("Q: But this is a contract dispute, correct? A: No, not now. We went back to them in January of whatever, I guess 2007 and said, 'We want you to launch us in these systems that you didn't launch us in.' . . . And they've said, 'No' unequivocally.") (Gluck Test.).

[267] 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.).

[268] *See* PCOL ¶¶ 49-50.

[269] *See supra* RPCOL ¶ 120.

[270] *See supra* RPCOL ¶ 160.

167. *Third*, and alternatively, *res judicata* cannot constitute a defense where a prior judgment or settlement is procured through misconduct.[271] Here, there is substantial evidence that Comcast obtained the exclusion of the Foreclosed Areas through misconduct and misrepresentation.[272] Particularly because this Commission has a responsibility to ensure that carriage negotiations are conducted in good faith, *res judicata* does not bar MASN's Complaint.

IV. MASN'S PROPOSED REMEDY IS NECESSARY AND APPROPRIATE

168. MASN has also established that the appropriate remedy for Comcast's violation of the program-carriage rules is carriage of MASN on the terms and conditions agreed to by other major MVPDs (as well as Comcast) in the Foreclosed Areas. That remedy is necessary to put MASN in the position it would be in but for Comcast's discrimination, to advance the public interest, and to address the overwhelming evidence of Comcast's discriminatory carriage practices brought to light by this proceeding.[273] Comcast's contrary arguments merely rehash points that have already been rejected on the merits.

169. *First*, Comcast asserts that "mandatory carriage" would be contrary to the First Amendment because the remedy would not be narrowly tailored.[274] But, as MASN has

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[271] *See McCarty v. First of Ga. Ins. Co.*, 713 F.2d 609, 612 (10th Cir. 1983) (noting that "[r]es judicata, however, does not shield a blameworthy defendant from the consequences of his own misconduct" and holding that appellants had sufficiently pleaded wrongful concealment to defeat preclusion); *see also United States v. De Lucia*, 256 F.2d 487, 491 (7th Cir. 1958) (order of naturalization not *res judicata* of issues where procured by willful concealment and misrepresentation); *Riggs v. Loweree*, 56 A.2d 152, 156 (Md. 1947) (*res judicata* does not operate in favor of party with "exclusive knowledge and means of information" who makes a fraudulent report of that information in obtaining judgment). *See generally* 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4415 (2008).

[272] *See* PFOF ¶¶ 48-91; PCOL ¶ 52.

[273] *See, e.g.*, PCOL ¶¶ 39-47.

[274] Comcast PCOL at 98 (Remedies).

established and the Media Bureau has held, the First Amendment does not prevent mandatory carriage, a remedy expressly set forth in the Commission's rules.[275]

170. *Second*, Comcast contends that "the Commission should not be in the business of rewriting agreements that are the product of serious negotiation between experienced industry players."[276] This argument is unfounded for two reasons: First, MASN's Complaint seeks to remedy Comcast's discriminatory carriage decisions in 2007, not to "rewrit[e]" the parties' Term Sheet. Second, the FCC has a responsibility to ensure that carriage negotiations between vertically integrated cable giants like Comcast and unaffiliated networks like MASN are conducted in good faith. The evidence here is convincing that Comcast did not engage in good-faith negotiations. Any theoretical concern about interfering with legitimate negotiations thus has no application on the facts here. Instead, there is substantial evidence that Comcast's treatment of MASN is part of a pattern and practice of discriminating against the interests of unaffiliated networks. The Commission has a strong interest in ending such practices.

171. *Third*, Comcast argues that "[t]he public interest will not be served by ordering Comcast to carry costly programming contrary to Comcast's evaluation of the price-value proposition in the systems at issue."[277] But the evidence in this proceeding demonstrates that Comcast's carriage decisions with respect to MASN are not based on an objective price-value evaluation, but rather are the result of an interest in favoring the economic interests of affiliated RSNs. Furthermore, objective and largely unrebutted economic evidence establishes that MASN's price is [redacted] to the price that Comcast pays for RSNs nationwide and that MASN's price is [redacted] based on the carriage decisions of other unaffiliated

[275] *See* PCOL ¶¶ 93-94; *TWC Order* ¶ 49.

[276] Comcast PCOL at 98 (Remedies).

[277] Comcast PCOL at 99 (Remedies).

MVPDs.[278] Comcast's argument on this point also assumes there is no "interest" for MASN's programming in the Foreclosed Area, an argument that is conclusively refuted by the record.[279]

172. *Fourth*, Comcast argues that any mandatory carriage should be limited in key respects. Comcast asserts, for example, that "Comcast should not be required to carry MASN on any system that currently lacks [the] capacity to do so."[280] But Comcast is simply rearguing a failed bandwidth defense at the remedial stage: a lack of capacity is no defense to discriminatory carriage decisions and, in any event, evidence from Comcast's own witnesses establishes that carriage on the majority of systems in the Foreclosed Areas would not create any capacity issues.[281] Beyond that, Comcast proffered no evidence of a lack of capacity as to any of its systems within MASN's territory. Comcast should not benefit from its failure of proof.

173. *Finally*, Comcast proposes that any carriage of MASN should be limited to a "sports tier."[282] But this remedial proposal itself can be taken as further evidence of Comcast's discriminatory intent, as it underscores Comcast's commitment to locking MASN into discriminatory and unfavorable carriage terms vis-à-vis Comcast's affiliated RSNs. None of Comcast's affiliated RSNs across MASN's footprint, including in the Foreclosed Areas, is carried on a sports tier.[283] Sports tiers, moreover, are economically ruinous for RSNs.[284]

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[278] *See* PCOL ¶¶ 69-70.

[279] *See* PCOL ¶¶ 58-65 (collecting evidence of demand for MASN in the Foreclosed Areas).

[280] Comcast PCOL at 99 (Remedies).

[281] *See* PCOL ¶ 57.

[282] Comcast PCOL at 99 (Remedies).

[283] *See*, *e.g.*, MASN Ex. 238, ¶ 7 ("Comcast carries either CSN-MA or CSN-Philly on its analog Expanded Basic tier in all of the disputed areas") (Singer Written Test.).

[284] *See*, *e.g.*, *TWC Order* ¶ 31 (finding that a refusal to extend carriage on expanded basic tier to MASN would undermine MASN's ability to compete fairly); *id.* ¶ 40 (recounting evidence of the economic harm to RSNs from sports-tier carriage).

Comcast's proposal to place MASN on a sports tier along side its affiliated RSNs – which enjoy carriage on an expanded basic tier – would not remedy discrimination; it would lock that discrimination into place. As matter of law and common sense, unlawful discrimination cannot be remedied by a mechanism that perpetuates discriminatory treatment.[285] Comcast's claim that sports-tier carriage is in the interest of subscribers rings particularly hollow in view of the fact that Comcast's affiliated RSNs – which are [redacted] than MASN – are carried on widely distributed programming tiers in the Foreclosed Areas.[286]

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[285] *Accord United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (at the remedial phase, "[t]he purpose of relief in an antitrust case is . . . *(to) cure the ill effects of the illegal conduct*, and assure the public freedom from its continuance") (emphasis added; internal quotation marks omitted); *Morgan v. Kerrigan*, 530 F.2d 401, 415-16 (1st Cir. 1976) (once a showing of discrimination in violation of the Constitution is made, "remedial principles . . . do not tolerate anything less than ensuring that the effects of constitutional violations are eliminated"; rejecting the theory that "the trial on liability should be treated as the first of two battles, and that the second battle should involve a more particularized inquiry into the causes of the segregation at the individual schools within the system").

[286] Although Comcast claims that such a remedy is justified by the prior history of carriage of CSN-MA on its Harrisburg system, this argument ignores that Comcast currently carries CSN-Philly on an expanded basic tier in Harrisburg, and that the decision to drop CSN-MA was based on a desire to advance the interests of CSN-Philly. *See* PFOF ¶ 103. Comcast also contends that CSN-Philly should not be a comparison because, Comcast nakedly asserts, CSN-Philly's programming is "highly desired by consumers." Comcast PCOL at 100-01 (Remedies). But Comcast offers literally no evidence in support of this claim and the evidence is clear and convincing that there is strong actual and potential demand for MASN in all of the Foreclosed Areas, including Harrisburg. *See* PFOF ¶¶ 108-135; *supra* RPFOF ¶¶ 193-195, 203, 205.

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

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

CERTIFICATE OF SERVICE

I, David C. Frederick, hereby certify that, on July 10, 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

David C. Frederick