

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

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

FILED/ACCEPTED
AUG 10 2009
Federal Communications Commission
Office of the Secretary

To: Marlene H. Dortch, Secretary, Federal Communications Commission

Attn: Hon. Richard L. Sippel, Chief Administrative Law Judge

ENFORCEMENT BUREAU'S NOTICE OF FILING

The Chief, Enforcement Bureau, by her attorneys, and pursuant to *Order*, FCC 09M-50 (ALJ, rel. August 3, 2009), hereby submits a redacted, public version of Comments that the Bureau previously filed under a request for confidentiality on July 31, 2009, in the above-captioned proceeding.

Respectfully submitted,
Suzanne M. Tetreault
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ATTACHMENT



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ENFORCEMENT BUREAU'S COMMENTS

SUMMARY

After a thorough review of the evidence presented at hearing and the captioned-parties' Proposed Findings of Fact and Conclusions of Law, and Replies thereto, the Enforcement Bureau submits that MASN has not met its burden of demonstrating that Comcast engaged in conduct the effect of which was to unreasonably restrain the ability of MASN to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation in the selection, terms, or conditions for carriage. Accordingly, the Bureau believes the Presiding Judge should issue a Recommended Decision finding that Comcast has not violated Section 76.1301(c) of the Commission's Rules in this instance.



I. INTRODUCTION

1. By *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network*, Order, FCC 09M-43 (ALJ, rel. May 27, 2009), the Presiding Judge directed the Enforcement Bureau (“Bureau”), to submit comments by July 31, 2009, on the Proposed Findings of Fact and Conclusions of Law; Proposed Replies thereto; and Proposed Recommended Decisions, filed respectively by *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network* (“MASN” or “Complainant”) and Comcast Corporation (“Comcast” or “Defendant”).¹ The Bureau hereby submits the following comments.²

II. BACKGROUND

2. The Hearing Designation Order in this proceeding³ designated the captioned program carriage complaint case for hearing in a consolidated proceeding.⁴ The *HDO*, as initially modified in a staff-level Erratum⁵ and further modified in a Memorandum Opinion and Order by the

¹ See MASN’s Proposed Findings of Fact and Conclusions of Law, filed June 26, 2009 (“MASN Findings”); Proposed Findings of Fact and Conclusions of Law of Comcast Corporation, filed June 26, 2009 (“Comcast Findings”); MASN’s Proposed Reply Findings of Fact and Conclusions of Law, filed July 10, 2009 (“MASN Reply Findings”); and Proposed Reply Findings of Fact and Conclusions of Law of Comcast Corporation, filed July 10, 2009 (“Comcast Reply Findings”).

² Although the Bureau has, pursuant to *Herring Broadcasting, Inc. d/b/a WealthTV*, Erratum, DA 08-2269 at 4 (Media Bur., rel. Oct. 15, 2008) and 47 C.F.R. § 0.111(b), participated fully as a party in this proceeding, the Bureau’s interests in this case differ from those of the captioned parties. Thus, while MASN and Comcast have properly sought to serve their respective pecuniary and other *private* interests, the Bureau’s role has been to ensure that the *public* interest is served and that the evidentiary record in this proceeding is full and complete in order that the Presiding Judge may have an adequate basis upon which to render a fair and reasoned recommended decision.

³ See *Herring Broadcasting, Inc. d/b/a WealthTV*, Memorandum Opinion and Hearing Designation Order, DA 08-2269 (Media Bur., rel. Oct. 10, 2008) (“*HDO*”).

⁴ The *HDO* also designated five additional program carriage complaint cases for hearing in this proceeding (Case Nos. CSR-7709-P, CSR-7822-P, CSR-7829-P, and CSR-7907-P, brought by *Herring Broadcasting, Inc. d/b/a WealthTV*; and Case No. CSR-7876-P, brought by *NFL Enterprises LLC*), none of which is the subject of the instant comments.

⁵ See *Herring Broadcasting, Inc. d/b/a WealthTV*, Erratum at 3, ¶ 10 (Media Bur., rel. Oct. 15, 2008) (modifying ¶ 142 of the *HDO* to articulate specific issues to be decided by the Presiding Judge).

[REDACTED]

Presiding Judge,⁶ requires the Presiding Judge to submit, on an expedited basis, a recommended decision to the Commission based on his determination of the following issues:

[Issue No. 1:] [W]hether the defendant engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c); [and]

[Issue No. 2:] [I]f the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), whether mandatory carriage of the complainant's programming on the defendant's system is necessary to remedy the violation and, if so, the prices, terms, and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends.⁷

3. By *Herring Broadcasting, Inc. d/b/a Wealth TV*, Order, FCC 08M-44 at 2 (ALJ, rel. October 23, 2008), the Presiding Judge placed the burdens of proceeding with the introduction of evidence and of proof with respect to both issues on MASN. In addition, by *Herring Broadcasting, Inc. d/b/a Wealth TV*, Memorandum Opinion and Order, FCC 08M-47 at 3, ¶ 6 (ALJ, rel. Nov. 20, 2008), the Presiding Judge, confirming an earlier bench ruling about the extent to which he is bound by the *HDO*'s discussion of the facts to be considered, stated, "the evidence adduced at the hearing in this proceeding will be given *de novo* consideration" and "[u]ltimately, a recommended decision will be made on the specified issues based *solely* on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*." (emphasis in original).

4. Hearing sessions were held at the Commission's headquarters in Washington, DC, from May 18 through May 26, 2009. During the week-long hearing, MASN presented the testimony of four witnesses in support of its direct case, and Comcast also presented the testimony of four

⁶ See *Herring Broadcasting, Inc. d/b/a Wealth TV*, Memorandum Opinion and Order, FCC 08M-47 at 4, ¶ 8 (ALJ, rel. Nov. 20, 2008) (further modifying ¶ 142 of the *HDO* to more accurately track the language of the rule section at issue in this proceeding, Section 76.1301(c) of the Commission's Rules).

⁷ *Id.*

[REDACTED]

witnesses. The Presiding Judge received into the record a total of more than 250 documentary exhibits.

III. LEGAL STANDARD

5. This program carriage complaint hearing involves an inquiry into the circumstances under which Comcast has declined to launch MASN in certain geographic areas. As an initial matter, it is important to note that the Presiding Judge need not analyze certain legal arguments advanced by the captioned parties because they are beyond the scope of, and/or were considered and rejected in, the *HDO*. These arguments include those relating to this case as a private contractual controversy,⁸ and arguments that this hearing is barred by the statute of limitations and the doctrine of *res judicata*.⁹

6. The Bureau agrees with Comcast that the burdens of proceeding with the introduction of evidence and of proof are on MASN.¹⁰ A presiding judge is vested with broad discretion to govern the course of a hearing, especially on matters on which the designation order is silent.¹¹ In the instant case, neither the *HDO* nor the Erratum thereto contained discussions or ordering clauses referencing the assignment of burdens at hearing. Because a presiding judge has broad discretion on matters not addressed in the designation order, and the *HDO* in this case was silent as to the party bearing the burdens at hearing, the Presiding Judge properly exercised his authority by assigning the burdens to MASN, and MASN bears the burdens of proceeding with the introduction of evidence and of proof in this proceeding.

⁸ Comcast Findings at 2-5, 12, 17. MASN Findings at 29-40.

⁹ Comcast Findings at 62-69.

¹⁰ Comcast Findings at 69-70.

¹¹ See *RKO General, Inc.*, Memorandum Opinion and Order, 48 FCC 2d 826, 827, ¶ 4 (1974) (“It is well established that the presiding judge’s authority to regulate the course of a hearing is ‘plenary’ and ‘invests the presiding officer with great latitude.’”); *Atlantic Broadcasting Co.*, Memorandum Opinion and Order, 5 FCC 2d 717, 720, ¶ 9 (1966) (where a particular question has been thoroughly considered in a designation order, subordinate officials are expected to follow that judgment; however, subordinate officials are justified in reaching a different conclusion with respect to a particular question when it is established that the matter has not been fully considered in the designation order).

[REDACTED]

7. The Commission's program carriage rules are derived from the Cable Television Consumer Protection and Competition Act of 1992.¹² The *1992 Cable Act* added Section 616 to the Communications Act of 1934, as amended, which requires the Commission to adopt regulations governing program carriage agreements between cable operators and other multichannel video programming distributors and video programming vendors. Among other things, Section 616 directed the Commission to establish rules that:

contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.¹³

In adopting these provisions, Congress observed "that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."¹⁴

8. The Commission recognized that unaffiliated program vendors that compete with vertically integrated entities may suffer harm to the extent that they do not receive the same favorable terms and conditions of carriage.¹⁵ To deter discriminatory conduct in the carriage of programming, the Commission adopted Section 76.1301(c) of the Rules, which closely tracks the statute:

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

¹² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("*1992 Cable Act*").

¹³ 47 U.S.C. § 536(a)(3).

¹⁴ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 9 FCC Rcd 2642, 2643, ¶ 2 (1993) ("*1993 Program Carriage Order*").

¹⁵ *1993 Program Carriage Order*, at 2643, ¶ 2.

conditions for carriage of video programming provided by such vendors.¹⁶

9. In adopting Section 76.1301(c), the Commission specifically attempted to strike a balance between proscribing certain anticompetitive activities while preserving the ability of the parties to engage in “legitimate, aggressive negotiations.”¹⁷ The Commission also sought to implement Congress’ stated policy to “rely on the marketplace, to the maximum extent feasible, to achieve greater availability’ of the relevant programming.”¹⁸ At no point did Congress or the Commission state an intention to characterize vertically-integrated MVPDs as common carriers (thus, *requiring* them in every case to provide carriage upon reasonable request)¹⁹ or deny them the ability to exercise legitimate business and editorial discretion over their carriage decisions.

10. Although Section 76.1301(c) was adopted in 1993, there is a dearth of specific guidance and case law on the narrow subject of program carriage discrimination. Nevertheless, in evaluating Issue No. 1 in this proceeding, a plain reading of Section 76.1301(c) supports a two-pronged analysis that essentially tracks the required elements of the rule section. First, the Presiding Judge should look to whether the vertically-integrated, multichannel video program distributor (“MVPD”)²⁰ has engaged in discrimination in the selection, terms, or conditions of carriage on the basis of the program vendor’s affiliation or non-affiliation. Second, if the MVPD is found to have engaged in such discriminatory conduct, the Presiding Judge should then examine whether the effect of such conduct has been to unreasonably restrain the ability of the unaffiliated program vendor to

¹⁶ 47 C.F.R. §76.1301(c).

¹⁷ See *1993 Program Carriage Order*, at 2648, ¶ 14.

¹⁸ See *1992 Cable Act*, Section 2(b)(2), cited in *1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 15.

¹⁹ See H.R. Rep. No. 102-628, at 110 (1992) (“House Report”) (“The Committee intends that the term ‘discrimination’ is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act.”).

²⁰ MVPDs include cable operators (such as Comcast), telephone companies that distribute video programs to subscribers (such as Verizon FIOS and AT&T U-verse TV), and satellite video program distributors (such as DirecTV and DISH Network).

[REDACTED]

compete fairly. Both prongs must be satisfied to make out a violation of Section 76.1301(c) of the Commission's Rules.²¹

11. Under the first prong of the two-prong analysis, in determining whether an MVPD has engaged in discriminatory conduct, the Presiding Judge should evaluate whether the vertically-integrated distributor has: (a) favored its own affiliated programming over the programming of an unaffiliated program vendor in the selection, terms, and/or conditions of carriage on (b) the basis of affiliation or non-affiliation. The legislative history to Section 616 provides that "the Commission is to define discrimination with respect to the extensive body of law addressing discrimination in normal business practices."²² The Supreme Court has held that discrimination involves "a comparison of substantially similar entities."²³ Consequently, with respect to part (a) of the first prong, in determining whether an MVPD has favored its affiliated programming over the programming of an unaffiliated program vendor, the Presiding Judge initially should consider whether the affiliated and unaffiliated programming at issue are "substantially similar." Two programming networks need not be identical to be substantially similar. Relevant considerations should include whether the content, target demographics, focuses, and target advertisers of the two programming networks are comparable.

12. With respect to part (b) of the first prong, the Bureau submits that an MVPD is not precluded from treating unaffiliated programmers disparately from affiliates, so long as such treatment did not result from the programmer's status as an unaffiliated entity.²⁴ Relevant evidence relating to whether an MVPD had a legitimate, non-discriminatory business or editorial basis for

²¹ The Presiding Judge need not engage in an analysis of Issue No. 2 in this proceeding (requiring a determination of whether carriage should be mandated and, if so, under what prices, terms and/or conditions) if he is unable to conclude that Comcast has violated Section 76.1301(c) of the Commission's Rules.

²² *1993 Program Carriage Order*, 9 FCC Rcd at 2645 n.6, citing House Report at 110.

²³ *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

²⁴ See *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, 15794, ¶ 24 (Media Bur. 2008), application for review pending ("2008 MASN Order").

[REDACTED]

denying carriage of a non-affiliated complainant's programming includes whether there were lackluster audience ratings for complainant's programming; lack of consumer demand for complainant's programming; whether and for what reasons other MVPDs had denied carriage of complainant's programming; and unfavorable price, terms and/or conditions of proposed carriage.²⁵ As discussed further below, the Bureau also submits that other factors may include whether there were bandwidth and other technical constraints to carriage.

13. Under the second prong of the two-prong analysis, if there is a finding of discrimination under Section 76.1301(c), the Presiding Judge should then determine whether the discriminatory conduct had the effect of unreasonably restraining the unaffiliated program vendor's ability to compete fairly. Relevant considerations include the effect of the discriminatory conduct on the unaffiliated program vendor's ability to compete for viewers, advertisers, and programming.²⁶ The Presiding Judge need not find that, without carriage, the unaffiliated program vendor would be entirely unable to compete.²⁷

IV. DISCUSSION

A. Background

14. MASN is an independent Regional Sports Network ("RSN").²⁸ It currently holds the television rights for the games of the Washington Nationals and the Baltimore Orioles, both Major League Baseball ("MLB") teams.²⁹ MASN began carrying the Washington Nationals in 2005 and the Baltimore Orioles in 2007.³⁰ MASN's geographic footprint includes the District of

²⁵ See generally, 2008 MASN Order at 15800-06, ¶¶ 32-41.

²⁶ See 2008 MASN Order at 15799, ¶ 31.

²⁷ See 2008 MASN Order at 15798, ¶ 30.

²⁸ MASN Findings at 1.

²⁹ Comcast Findings at 9; MASN Findings at 4.

³⁰ Comcast Findings at 9.

[REDACTED]

Columbia; the entire states of Virginia, Maryland, and Delaware; and portions of southern Pennsylvania, eastern West Virginia, and North Carolina.³¹

15. Comcast is a vertically integrated MVPD.³² It has an ownership interest in Comcast SportsNet-Mid-Atlantic (“CSN-MA”) and Comcast SportsNet-Philadelphia (“CSN-Philly”) (collectively, “Comcast RSNs”).³³ CSN-MA serves a geographic area covering primarily the District of Columbia, Maryland, Virginia, Delaware and a portion of southern Pennsylvania.³⁴ Until 2007, CSN-MA held the television rights to the Baltimore Orioles.³⁵ CSN-MA’s current programming consists primarily of the Washington Wizards, a National Basketball Association (“NBA”) team; the Washington Capitals, a National Hockey League (“NHL”) team;³⁶ select Atlantic Coast Conference (“ACC;”) and National Collegiate Athletic Association (“NCAA”) basketball games, and other sports programming.³⁷ CSN-Philly’s geographic footprint primarily covers the Philadelphia metropolitan area, and portions of northeastern Pennsylvania, southern New Jersey, and Delaware.³⁸ CSN-Philly’s primary programming consists of the Philadelphia Phillies, an MLB team; the Philadelphia Flyers, an NHL team; and the Philadelphia 76ers, an NBA team.³⁹

16. On August 4, 2006, Comcast and MASN entered into a program carriage agreement (the “2006 Agreement”).⁴⁰ Attached to the 2006 Agreement was a list identifying the cable systems

³¹ MASN Findings at 4.

³² Comcast Findings at 6; MASN Findings at 1.

³³ MASN Findings at 5; Comcast Findings at 7-8.

³⁴ MASN Ex. 103, p. 2.

³⁵ Comcast Findings at 9.

³⁶ MASN Findings at 5; Comcast Findings at 8.

³⁷ Comcast Findings at 8-9.

³⁸ MASN Ex. 70.

³⁹ MASN Findings at 5; Comcast Findings at 8.

⁴⁰ Comcast Findings at 12.

[REDACTED]

of footprints between MASN and CSN-Philly, given that CSN-Philly's primary territory is concentrated in the Philadelphia and southern Pennsylvania areas.

19. Comcast's suggestion that MASN and the Comcast RSNs are not similarly situated because they carry programming involving different sports or different teams in the same sport,⁴⁷ is overly restrictive. In Comcast's view, the networks would need to be nearly identical to be similarly situated. As noted earlier, that is not the standard here.

2. Comcast's Treatment of MASN Was Not Affiliation-Based

20. Comcast has treated MASN differently than it has the Comcast RSNs in certain respects. There is a disparity between the number of Comcast subscribers who can receive Comcast's affiliated RSNs compared to the number who can receive MASN.⁴⁸ Also, Comcast's cable distribution and programming groups are "treated like siblings as opposed to . . . strangers."⁴⁹ Additionally, Comcast carries its affiliated RSNs [REDACTED], but requires otherwise for MASN.⁵⁰ Moreover, Comcast affords CSN-MA the ability to offer "split feeds," which allow a programming network to sell targeted geographic markets to advertisers, but does not do so for MASN.⁵¹ Comcast has ensured that CSN-MA has "overflow" channels available when two or more live televised events occur at the same time; however, it has "expressed concerns" about MASN's overflow requirements.⁵²

⁴⁷ Comcast Findings at 88.

⁴⁸ While virtually 100 percent of Comcast subscribers receive CSN-MA or CSN-Philly or both, only 87 percent of those subscribers receive MASN. MASN Findings at 6, 87.

⁴⁹ MASN Findings at 41 (quoting Stephen Burke). Comcast correctly counters that there are no structural separation requirements for vertically integrated MVPDs, as there have been for entities regulated as common carriers. Comcast Reply Findings at 25-26.

⁵⁰ MASN Findings at 42-43.

⁵¹ MASN Findings at 47-48.

⁵² MASN Findings at 46-47. The record reveals, however, that MASN regularly encounters more than twice as many programming conflicts requiring "overflow" channels as does CSN-MA because of the large number of live Washington Nationals and Baltimore Orioles baseball games that are televised simultaneously. TR. 6698 (Ortman).

[REDACTED]

21. Notwithstanding evidence of disparate treatment, the Bureau submits that the *sine qua non* for a carriage decision consistent with Section 76.1301(c) is not whether a vertically integrated MVPD has totally ignored the practical considerations and marketplace realities that come from having a financial stake in programming that it carries, treating affiliated and unaffiliated program vendors identically in all respects. Rather, Section 76.1301(c) requires a practical inquiry into whether affiliation or non-affiliation formed the basis for, or was the motivation, intention or *raison d'être* behind, the MVPD's denial of carriage and whether its claimed business decisions for such denial were legitimate or simply pretexts for discrimination.

22. In the instant case, MASN has not met its burden of showing that Comcast's disparate treatment, to the extent there was any of a material and substantial nature, establishes a pattern of conduct demonstrating that Comcast was motivated in making its carriage decision by considerations of affiliation and/or non-affiliation. In this regard, the Bureau does not believe that the evidentiary record supports MASN's overall theory that Comcast carved the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs from the periphery of MASN's coverage area either to impede MASN's success or to protect and promote the viability of the Comcast RSNs. As discussed more fully below, MASN's claims in support of its theory are speculative, not supported by the record, or otherwise contradicted by legitimate business explanations advanced by Comcast.

23. MASN claims that there was high demand for MASN programming in the Disputed Areas, and, consequently, Comcast's carriage decision could not have been made on the basis of lack of consumer interest, but rather must have been predicated on affiliation. MASN notes that Comcast previously carried the Baltimore Orioles for ten years on CSN-MA throughout the Baltimore Orioles' territory, including the Disputed Areas.⁵³ Additionally, MASN asserts that Comcast "vigorously" competed for the rights to telecast the Baltimore Orioles and Washington Nationals.⁵⁴

⁵³ MASN Findings at 9-11.

⁵⁴ MASN Findings at 8-11; MASN Reply Findings at 3.

[REDACTED]

MASN asserts that it is evident Comcast would have carried the Baltimore Orioles in the Disputed Areas had it won the rights to the team.⁵⁵

24. The Bureau does not believe that Comcast's interest in winning the television rights to the Baltimore Orioles conclusively demonstrates that it would have carried the team in the Disputed Areas had it prevailed. The record reveals that the Baltimore Orioles were initially carried on Home Team Sports ("HTS")⁵⁶ over cable systems in Harrisburg owned by Lenfest Communications, Inc. ("Lenfest").⁵⁷ Pursuant to a carriage agreement, Lenfest carried HTS (and, consequently, the Baltimore Orioles) on a premium sports tier, rather than a more widely distributed basic tier, in Harrisburg.⁵⁸ Comcast acquired Lenfest prior to MASN's existence and continued carrying the Baltimore Orioles on a premium tier.⁵⁹ According to Comcast, less than [REDACTED] percent of Comcast customers in Harrisburg subscribed to the premium sports tier on which the Baltimore Orioles were carried.⁶⁰ In early 2005, Comcast dropped CSN-MA completely from its cable systems in Harrisburg because it believed low subscriber interest did not justify the cost of moving the affiliated RSN to a basic tier.⁶¹ Notably, during all relevant times, Lenfest, and subsequently Comcast, carried CSN-Philly (which, in turn, carried the Philadelphia Phillies) on a widely distributed, basic tier in Harrisburg.⁶²

⁵⁵ MASN Findings at 11.

⁵⁶ HTS, an RSN, is the predecessor of CSN-MA.

⁵⁷ Comcast Ex. 2, at 8, ¶ 19.

⁵⁸ Comcast Ex. 2, at 8, ¶ 19.

⁵⁹ Comcast Findings at 45.

⁶⁰ Comcast Findings at 45.

⁶¹ Comcast Findings at 45.

⁶² Comcast Ex. 1, at 11, ¶ 32.

[REDACTED]

25. Thus, the record establishes that an independent MVPD -- not Comcast -- initially chose to carry the Baltimore Orioles on a lesser-viewed premium tier while carrying CSN-Philly on a more widely distributed basic tier in Harrisburg. Moreover, Comcast's decision to eliminate the Baltimore Orioles from its Harrisburg systems occurred more than a year before the creation of Schedule A to the 2006 Agreement. Consequently, notwithstanding Comcast's interest in obtaining the rights to the Baltimore Orioles, it is not evident to the Bureau that Comcast would have carried the team's games in Harrisburg had it prevailed in winning the television rights thereto over MASN. The carriage history of the Baltimore Orioles and Philadelphia Phillies in Harrisburg belies MASN's contention that Comcast denied carriage of MASN in the Pennsylvania capitol because it intended to turn Harrisburg into to a "Philadelphia Phillies town" when it lost the rights to the Baltimore Orioles.⁶³

26. MASN also claims that an internal Comcast e-mail, dated May 18, 2006,⁶⁴ which Comcast prepared when it was competing for the television rights to the Baltimore Orioles, is strong evidence of demand for the team in the Disputed Areas.⁶⁵ According to MASN, the e-mail

[REDACTED]

[REDACTED].⁶⁶ However, a more reasonable view of the e-mail reveals that, what has been characterized as a [REDACTED]

[REDACTED]. Rather, the e-mail considers [REDACTED]

[REDACTED],⁶⁷ [REDACTED]

⁶³ See MASN Findings at 45-46.

⁶⁴ MASN Ex. 99.

⁶⁵ MASN Findings at 10.

⁶⁶ MASN Findings at 10; MASN Reply Findings at 18.

⁶⁷ [REDACTED] MASN Ex. 99.

[REDACTED]

[REDACTED].⁶⁸ Accordingly, the document does little to undermine Comcast's assertion about the lack of demand for the Baltimore Orioles in the Disputed Areas.⁶⁹

27. MASN additionally claims that Comcast refused to carry MASN in the Disputed Areas because Comcast recognized the competitive threat posed by the non-affiliated RSN. In support, MASN relies on a July 28, 2006, e-mail that Comcast circulated [REDACTED]

[REDACTED].⁷⁰ Comcast responds that there is no basis for MASN's inflated assumption about the significance of the [REDACTED],⁷¹ and, in any event, Comcast ultimately provided MASN with greater coverage than CSN-MA, thus refuting MASN's claim.⁷² The Bureau agrees with Comcast that the e-mail in question contains [REDACTED]

[REDACTED].⁷³ As such, it is not evident to the Bureau that the e-mail establishes a discriminatory attempt by Comcast to protect CSN-MA or restrict MASN.

28. As shown above, the Bureau does not believe MASN has satisfied its burden of demonstrating that Comcast made its decision to refrain from carrying MASN in the Disputed Areas on the basis of affiliation or affiliation. The Bureau further believes that MASN has not sufficiently refuted the legitimate business rationales advanced by Comcast for its decision, as discussed more fully below.

⁶⁸ Comcast Reply Findings at 23-24.

⁶⁹ Comcast's assertion that there is little demand for the Baltimore Orioles in the Disputed Areas is further supported by testimony of one of its expert witnesses, Larry Gerbrandt. *See* Comcast Findings at 52.

⁷⁰ MASN Findings at 19-21.

⁷¹ Comcast Reply Findings at 20.

⁷² Comcast Reply Findings at 20.

⁷³ Comcast Reply Findings at 19.

[REDACTED]

29. Comcast maintains that it declined to carry MASN in the Disputed Areas primarily because of low consumer demand (relative to cost) and the existence of technical impediments.⁷⁴ With regard to low demand, as discussed above, Comcast presented compelling evidence that the Baltimore Orioles were never carried on a basic tier, enjoyed lackluster subscribership on a premium tier, and were ultimately eliminated completely from Comcast-owned cable systems in Harrisburg because of low consumer interest in the team in that DMA.⁷⁵

30. In addition to the carriage history of the Baltimore Orioles in Harrisburg, Comcast maintains there is relatively little interest for MASN in the Disputed Areas because each of the three DMAs is located on the periphery of MASN's footprint.⁷⁶ As such, they are not in close proximity to the baseball stadiums where the Baltimore Orioles' or Washington Nationals' home games originate.⁷⁷ Comcast states that the "Roanoke-Lynchburg and Tri-Cities systems were not included in Schedule A [of the 2006 Agreement] primarily because they are located in the southwestern corner of Virginia, far away from the District of Columbia and Baltimore."⁷⁸

31. MASN argues, however, that objective evidence in the form of Nielsen ratings shows a "strong demand for MASN in the Harrisburg and Roanoke-Lynchburg DMAs in the two years preceding the 2006 carriage negotiations" between the parties.⁷⁹ Specifically, MASN points out that in the Harrisburg DMA, cable ratings for Baltimore Orioles games were [REDACTED] in 2004 and [REDACTED] in 2005, and in the Roanoke-Lynchburg DMA, cable ratings for Baltimore Orioles games were [REDACTED] in

⁷⁴ Comcast Findings at 26, 45-46; Comcast Reply Findings at 2, 5, 34, 58.

⁷⁵ Comcast Findings at 4, 45-48.

⁷⁶ Comcast Findings at 45-48.

⁷⁷ Comcast Findings at 45-46, 48, 89. The Bureau notes that MASN's rate card reflects a graduated pricing scheme consisting of zones whereby carriage prices generally diminish as one moves further from the core Washington and Baltimore areas. *See e.g.*, TR 6462-63 (Ortman); TR 6289 (Singer).

⁷⁸ Comcast Findings at 45.

⁷⁹ There is no record evidence of Nielsen Ratings for the Tri-Cities DMA. MASN Findings at 53.

2004 and █████ in 2005.⁸⁰ A Comcast witness testified that a rating of █████ or higher would “get [his] attention.”⁸¹

32. The Nielsen ratings upon which MASN relies suffer from geographic and temporal limitations. They are restricted to Harrisburg and Roanoke-Lynchburg, and they span only 2004 and 2005. There are no objective audience ratings for Tri-Cities, and, in the two DMAs for which there are ratings, there is no information relating to MASN’s other programming beyond the Baltimore Orioles. On balance, the Bureau submits that the significance of the lengthy carriage history of the Baltimore Orioles in Harrisburg outweighs the limited audience ratings proffered by MASN. While the Bureau recognizes that the Nielsen ratings for the Baltimore Orioles in the Roanoke-Lynchburg DMA may have some significance, that evidence is outweighed by Comcast’s contrary evidence regarding a lack of demand in that area and its other claimed business justifications.⁸²

33. In addition to low demand, Comcast argues that limited bandwidth, particularly among its cable systems in southwestern Virginia, justified its decision not to carry MASN in those areas.⁸³ The record reflects some disagreement between the parties regarding whether and to what extent particular cable systems in the Disputed Areas may have been subject to bandwidth constraints. MASN, relying on the testimony of a Comcast witness, states that “there would be no unmanageable bandwidth concerns with launching MASN on any system with 550 MHz capacity or more,” and most systems in the Disputed Areas are at or above 550 MHz.⁸⁴ In contrast, Comcast states that the capacity of certain systems with 550 MHz would make it difficult for those systems to

⁸⁰ MASN Findings at 53.

⁸¹ MASN Findings at 53 n.288.

⁸² See Comcast Reply Findings at 35 (“[E]ach factor cannot be analyzed individually; they must be looked at collectively.”).

⁸³ Comcast Findings at 46, *citing* MASN Ex. 71.

⁸⁴ MASN Findings at 97.

[REDACTED]

because of a diminished subscriber base.⁸⁹ MASN has not shown, however, that such potential harm has had the effect of unreasonably restraining its competitive posture, particularly in terms of advertising, programming, and viewers.

37. With respect to advertising, MASN maintains that Comcast's foreclosure of MASN in the Disputed Areas has resulted in the receipt of lower revenues from advertisers who currently do business with MASN.⁹⁰ Furthermore, MASN receives no revenues from certain advertisers that refrain from doing business with MASN because of the gaps in its coverage.⁹¹ Comcast aptly observes, however, that MASN's ability to obtain advertising or advertising revenue is not unreasonably diminished because MASN is carried in the Disputed Areas by satellite-based MVPDs and other non-Comcast-owned cable systems.⁹² Moreover, the only two examples on which MASN relies in support of its position regarding loss of advertising accounts -- [REDACTED] -- are not compelling. There is no persuasive evidence, beyond one brief conclusory statement by a witness at trial, that MASN lost the [REDACTED] account because of coverage gaps in the Disputed Areas.⁹³ Similarly, Comcast explains that MASN allowed its advertising sales staff to incorrectly represent to [REDACTED] that MASN enjoyed 100% coverage on Comcast's systems in southwestern Virginia in January 2007, when no systems in that area had yet been launched.⁹⁴ Thus, the Bureau

⁸⁹ Specifically, MASN maintains that it will suffer lost license fees of approximately [REDACTED] over ten years, which amounts to approximately [REDACTED] "of injury that Comcast is inflicting upon a competitor." MASN Findings at 67. But Section 76.1301(c) does not look to whether an MVPD's discriminatory conduct has caused "injury" or "harm" or "loss" *per se* to a non-affiliated program vendor. Rather, it requires an inquiry into whether, as a consequence of the MVPD's discriminatory conduct, the non-affiliated program vendor has been unreasonably restrained in its ability to compete fairly. Consequently, the Bureau expresses no opinion whether, on the basis of the 2006 Agreement, Comcast caused MASN's claimed financial loss by excluding the Disputed Areas from Schedule A (as MASN asserts above) or MASN voluntarily acquiesced to the financial consequences attending its acceptance of the terms and conditions of the 2006 Agreement (as Comcast urges, at Comcast Reply Findings at 40-41).

⁹⁰ MASN Findings at 67-68.

⁹¹ MASN Findings at 68.

⁹² Comcast Findings at 56.

⁹³ Comcast Findings at 54.

⁹⁴ Comcast Findings at 55; Comcast Reply Findings at 41; Comcast Ex. 14 at 12-13.

[REDACTED]

agrees with Comcast that it appears that the [REDACTED] incident was not a “loss” attributable to Comcast; rather, it was simply the result of MASN attempting to sell ads in a geographic area where the network was not carried by Comcast.⁹⁵

38. With respect to programming, MASN asserts that it is significantly disadvantaged in competing with Comcast for programming rights “if Comcast offers a sports team the ability to reach more fans than MASN can reach.”⁹⁶ According to MASN, by denying it millions of dollars in advertising revenues and license fees, Comcast denies MASN revenues needed to bid more aggressively for programming rights.⁹⁷ Comcast correctly points out, however, that MASN successfully acquired the television rights to the pre-season games of the Baltimore Ravens, a National Football League (“NFL”) team, outbidding Comcast in the process.⁹⁸ MASN also has been able to acquire rights to telecast collegiate football and basketball games.⁹⁹ While MASN lost out to Comcast for the television rights to the pre-season games of the Washington Redskins, also an NFL team, it did so apparently because it was outbid, not because of coverage gaps in the Disputed Areas.¹⁰⁰ Thus, MASN has not demonstrated that it has been unreasonably restrained in its ability to compete fairly in terms of programming.¹⁰¹

⁹⁵ Comcast Findings at 96 n.433.

⁹⁶ MASN Findings at 68-69.

⁹⁷ MASN Findings at 70.

⁹⁸ Comcast Findings at 57-58.

⁹⁹ Comcast Findings at 58.

¹⁰⁰ Comcast Findings at 57. According to MASN, both the Baltimore Redskins and the Washington Redskins expressed concern regarding MASN’s coverage limitations. MASN Findings at 69; MASN Reply Findings at 50. Notwithstanding this possibility, the Bureau submits that MASN’s success in acquiring the television rights to particular sports games demonstrates that it has not been unreasonably restrained in its ability to compete fairly for programming.

¹⁰¹ Comcast also argues, in additional support of its claim that MASN has not been unreasonably restrained in its ability to compete fairly, that MASN is jointly owned by the Baltimore Orioles and Washington Nationals and, thus, is all but assured of retaining the television rights to both teams in the future. Comcast Findings at 56-57, 95. The record evidence, however, only supports a finding that it would be “problematic” for Comcast

[REDACTED]

39. With respect to viewers, Comcast correctly observes that MASN is carried by DirecTV and DISH Network (both large, satellite-based MVPDs) throughout MASN's geographic territory, including the Disputed Areas.¹⁰² Additionally, MASN has been able to secure carriage by other cable MVPDs serving the Disputed Areas.¹⁰³ It also is undisputed that Comcast carries MASN on cable systems covering 87 percent of MASN's territorial footprint.¹⁰⁴ Thus, of the potential 5.5 million pay video subscribers throughout MASN's territory, approximately 5.2 million are capable of receiving MASN programming.¹⁰⁵ These figures demonstrate that MASN enjoys substantial access to subscribers across its footprint, undermining MASN's claim that it has been unreasonably restrained in its ability to compete fairly in terms of viewers.

V. CONCLUSION

40. The Bureau submits that MASN has not satisfied its burden of demonstrating that Comcast engaged in discrimination in the selection, terms, or conditions of carriage on the basis of MASN's non-affiliation. Even assuming, *arguendo*, that Comcast did engage in such discrimination, MASN has not shown that Comcast's conduct unreasonably restrained MASN's ability to compete fairly.

41. Accordingly, the Bureau believes the Presiding Judge should issue a recommended decision finding that Comcast has not violated Section 76.1301(c) of the Commission's Rules in this instance and concluding that Issue No. 1 should be resolved in Comcast's favor. Furthermore, because MASN has failed to demonstrate that Defendants violated Section 76.1301(c) of the Commission's Rules, the Presiding Judge should issue a recommended decision finding there is no

to obtain the rights to the Baltimore Orioles and the Washington Nationals, not that Comcast would be foreclosed from obtaining such rights. Comcast Findings at 57 (James Cuddihy).

¹⁰² Comcast Findings at 60 n. 291; MASN Findings at 51; MASN Reply Findings at 21.

¹⁰³ Comcast Findings at 60; MASN Findings at 12.

¹⁰⁴ Comcast Findings at 16; MASN Findings at 6, 88; MASN Reply Findings at 26, 37.

¹⁰⁵ Comcast Findings at 60.

[REDACTED]

basis for mandating carriage of MASN on Comcast's cable systems in the Disputed Areas and concluding that Issue No. 2 is moot.

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July 31, 2009

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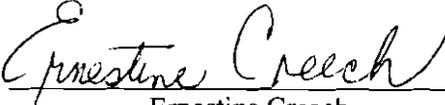
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