RECENT FCC RULINGS ON PROGRAMMING CARRIAGE UNDER SECTION 616 OF THE COMMUNICATIONS ACT

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RECENT FCC RULINGS ON PROGRAMMING CARRIAGE UNDER SECTION 616 OF THE COMMUNICATIONS ACT

A popular conception is that Republican Administrations are invariably deregulatory or at least not prone to push the regulatory envelope. In recent years, however, that assuredly has not been the case for recently departed FCC Chairman Kevin Martin and his Democratic and occasional Republican allies with respect to major multichannel video programming access and carriage matters. In particular, he has left on the table for his successors (Acting Chairman Copps and Chairman-appointee Genachowski) several intriguing controversies regarding programming carriage and the meaning of Section 616 of the Communications Act. These are the main topics of this paper.[1]

During Martin's chairmanship, the FCC demonstrated a heightened interest in using regulation to resolve disputes over the terms and conditions under which programmers obtain access to carriage by multichannel video programming distributors ("MVPDs") and newer video programming distributors obtain access to established and new programming services. The main instruments of regulation with respect to cable network (i.e., non-broadcast) programming have been around for a while. They are Sections 616 and 628 of the Communications Act[2], which were added in 1992, and the Commission's long-standing authority under that Act to impose conditions in connection with the required approval of license transfer-of-control and assignment applications in mergers and acquisitions. Section 612[3] relating to leasing of cable channels for commercial use has played a comparatively minor role with respect to programmers' obtaining access to cable systems.

With respect to MVPDs' retransmission of broadcast programming, the regulatory focus has moved away

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[2] 47 USC §§ 536, 548.

[3] *Id.* § 532.

from the old mandatory carriage rules designed for cable. These days the bulk of regulatory attention is concentrated upon the matter of broadcasters granting to MVPDs, or withholding from them, retransmission consent under Section 325(b) of the Act[4], as added in 1992. Because the requested or agreed consideration to be provided by MVPDs to broadcasters for retransmission consent may include the carriage of one or more non-broadcast networks also owned by the broadcaster, the retransmission consent regulatory process can impact significantly on the terms and conditions of carriage obtained by such networks.

This paper will focus on several recent rulings relating to programming vendors seeking carriage on cable systems through arbitration proceedings or administrative litigation of Section 616 complaints. They are: (1) the arbitration award in favor of Mid-Atlantic Sports Network ("MASN") against Time Warner Cable in North Carolina, the Media Bureau's affirmance, and the pending appeal to the Commission; (2) the complaint by WealthTV against four major cable operators; (3) the NFL Network's complaint against Comcast; and (4) MASN's complaint seeking carriage on Comcast systems in southcentral Pennsylvania and southwestern Virginia. Toward the end of this paper will be a discussion of the programming carriage issues raised in connection with the proposed 2009 spinoff of Time Warner Cable from Time Warner. Finally, this paper will touch briefly on the still-pending rulemaking regarding modification of programming carriage complaint procedures.

As discussed in more detail below, matters (2)-(4) were designated for expedited hearings before an administrative law judge by the Chief of the FCC's Media Bureau, presumably acting in close consultation with Chairman Martin. Early on, however, the appointed judge ruled he could not give weight to the Bureau's findings of *prima facie* violations and would consider evidence *de novo*. He established a schedule for discovery and eventual hearing, while holding that the Bureau's 60-day deadline for a recommended decision could not possibly be met consistent with due process. Upset with this turn of events, the Bureau declared the delegation to the ALJ terminated after 60 days had

[4] *Id.* § 325(b).

passed and reclaimed the matter for its own fact-finding. The ALJ was not pleased and issued orders indicating why his approach was the proper one. Rather than allow discovery, the Bureau then listed a small number of issues upon which it wanted immediate responses and declared it would issue decisions on the merits of all six cases a few weeks later. To complete the three-ringed circus, the cable company defendants launched urgent interlocutory appeals to the Commission. At this writing, they are asking the Commission to overrule the Bureau's sudden reversal on the need for an ALJ hearing and the purported reassertion of plenary jurisdiction as *ultra vires.*

These are troubling developments and embarrassing for the FCC as an institution. Time will tell how the FCC, as reconstituted under President Obama, will deal with them.

KEY RECENT FCC CASES INVOLVING PROGRAMMERS SEEKING CARRIAGE ON MVPD SYSTEMS

1. *Adelphia*

Before turning to the details of the pending controversies mentioned above, some precedential background should prove useful.

During the Commission's 2006 consideration of the sale of Adelphia's MVPD systems to Comcast and Time Warner Cable ("TWC"), several programmers complained that the proposed transaction's effect of enlarging the regional clusters of those two multiple system operators ("MSOs"), combined with those MSOs' existing and prospective investments in vertically affiliated programming interests, would enable Comcast and TWC to prevent the success of competing unaffiliated programming channels, particularly regional sports networks ("RSNs"). One RSN, Mid-Atlantic Sports Network ("MASN"), was especially persistent in pursuing this concern at the FCC and in Congress. Around this same time, several FCC commissioners suggested that

the processing of Section 616 program carriage complaints was not sufficiently speedy and effective and that an optional alternative mechanism for regulatory relief was needed immediately by independent RSNs while the Commission undertook to improve its complaint procedures through rulemaking.

In *Adelphia*, the FCC determined that the increased subscriber reach the Adelphia systems would provide to Comcast and TWC regional clusters would provide each MSO with an enhanced incentive and ability to deny carriage to rival unaffiliated RSNs. To mitigate that concern, the FCC conditioned its approval of the transaction on a requirement that Comcast and TWC agree for the next six years to submit unaffiliated RSN program carriage disputes, at the complainant's option, to "baseball-style" arbitration.[5] Under that form of arbitration, once a finding of liability is made, the arbitrator must choose as a remedy whichever party's final carriage offer most closely approximates the fair market value of the carriage rights in issue, thereby encouraging both parties to make realistically fair offers in the first place. This optional arbitration approach was borrowed from a still-earlier FCC proceeding in which News Corp, an RSN owner, as a condition of its acquiring a substantial indirect ownership interest in MVPD DirecTV, agreed to commercial arbitration of complaints by rival MVPDs regarding access to those News-owned RSNs.[6]

2. ***Comcast v. The America Channel ("TAC")***

Although MASN obtained carriage on Comcast's Washington, DC area systems without the need for the arbitration proceeding authorized in *Adelphia*, in early 2007 another programmer unaffiliated with Comcast, The America Channel ("TAC"), signaled its intention to invoke the *Adelphia* RSN arbitration option against Comcast. In an effort to forestall

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[5] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable Inc., et al.*, MB Docket No. 05-192, 21 FCC Rcd 8203, 8287, ¶¶ 189-90, Appendix B (2006)("*Adelphia*").

[6] *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473 (2004)("*News/Hughes/DirecTV*").

arbitration, Comcast sought an FCC declaratory order that TAC did not meet the *Adelphia* order's definition of an RSN.

First, Comcast argued that TAC was marketing itself as a national branded service and did not offer distinct and different feeds of qualifying sports programming to discrete and limited geographic areas. The FCC ruled against Comcast, finding that TAC had abandoned its original national network approach and was now going to offer six separate regional video feeds.[7]

Second, Comcast contended that TAC was not intending to carry enough live or same day programming of qualifying sports league games to meet the RSN definition. But the FCC found that TAC intended to carry the requisite 10 percent of the relevant NCAA Division 1 football or men's/women's basketball games for each of the regions.[8]

Third, Comcast argued that TAC was merely a concept and that it lacked programming expertise and funding, specific local infrastructure plans, and an advance program schedule. Nonetheless, the FCC held that the *Adelphia* arbitration option was available to potential RSN rivals as well as existing networks and that TAC's submission of a request for carriage eleven months ahead of its assuredly "firm date" for commencing program production was not so far in advance as to make the RSN too inchoate to qualify for protection under *Adelphia.*[9]

In light of the Commission's declaration that TAC qualified as a Covered RSN, the parties resolved their differences and the arbitration was dropped.

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[7] *Comcast Corp. Petition for Declaratory Ruling that The America Channel Is Not a Regional Sports Network*, File No. CSR-7108, FCC 07-172, 22 FCC Rcd 17938, _____, ¶ 10 (2007)("*TAC v. Comcast*" or "*TAC*").
[8] *Id.* ¶¶ 13-15.
[9] *Id.* ¶ 21.

3. FCC's Suspension Prospectively of the *Adelphia* RSN Carriage Obligation and Arbitration Option

Having stretched mightily to classify TAC as an eligible RSN, the FCC expressed dissatisfaction with the imprecision of its decisional process. The FCC said there were varying industry perspectives as to what constitutes an RSN and RSN business models are still nascent and evolving. Moreover, *Adelphia's* RSN definition had been constructed principally with a different focus: to ensure, in the *program access* context, that Comcast and TWC could not subdivide their own RSNs to the point that they might evade the *Adelphia* requirement to provide rival MVPDs access to competitively desirable regional interest sports programming.

Despite the complexity in defining what qualifies as an RSN for *program carriage* regulatory purposes, in the *Comcast v. TAC* decision the FCC promised to act promptly to adopt more expedited program carriage complaint processes. (See discussion *infra* of pending rulemaking in MB Docket No. 07-42.) In the meantime, the agency suspended the *Adelphia* RSN program carriage condition and arbitration obligation except for any pending disputes in which the condition or arbitration obligation had already been invoked.[10]

4. *MASN v. TWC* Arbitration Decision and Appeals

One pending post-*Adelphia* arbitration proceeding unaffected by the *TAC* suspension ruling involved MASN's campaign to obtain carriage on TWC's North Carolina systems. This proceeding raised several important questions for Section 616 enforcement and compliance: (1) Once the complaining programmer makes out a prima facie case that the MVPD treated it differently than a network affiliated with the MVPD, does the burden of proof shift to the MVPD to establish a legitimate, non-discriminatory reason for that differential treatment? (2) If the complaining programmer still retains the ultimate burden to show affiliation-based discrimination, what quantum or type of evidence is sufficient? (3) Does Section 616 obligate the MVPD to

[10] *Id.* ¶ 24.

document contemporaneously that it engaged in a good faith on-the-merits analysis of the program network seeking carriage and did not allow the absence of affiliation to influence that analysis? (4) With respect to the MVPD's explanation for its carriage decisions, what deference under the First Amendment must be accorded the MVPD's editorial discretion? (5) When the MVPD's systems are a considerable distance from the home cities of the complaining regional sports network's principal professional teams, what level of evidentiary proof is necessary to demonstrate that the MVPD's conduct unreasonably restrains the network's ability to compete fairly?

a. Arbitration Award

In mid-2007, MASN filed a request for arbitration with the American Arbitration Association. An interim award was issued in MASN's favor on January 7, 2008, finding that TWC had unlawfully discriminated against MASN by offering to carry the RSN only on the digital basic tier rather than the more widely subscribed-to analog expanded basic tier. After the AAA disqualified that arbitrator, a second AAA-appointed arbitrator conducted a new hearing. In a June 2, 2008 Decision and Award, the second arbitrator found for MASN on the discrimination and harm issues, and ordered carriage of MASN by the TWC North Carolina systems on the basis of MASN's last offer as best reflecting the fair market value of the carriage rights. TWC petitioned for *de novo* review by the Commission.

b. Media Bureau Affirmance

On October 30, 2008, the Chief of the Media Bureau, claiming the right to act under general delegated authority, affirmed the arbitrator's ruling. The Bureau found that TWC had violated Section 616 and its implementing regulations by "discriminating against MASN on the basis of affiliation," which "discrimination unreasonably restrained the ability of MASN to compete fairly."[11] The Media Bureau also determined that

[11] *TCR Sports Broadcast Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, DA 08-2441, ___ FCC Rcd ___, ___ ¶ 19 (rel. Oct. 30, 2008).

"MASN's final offer [of carriage terms and conditions] more closely approximates the fair market value of the program carriage rights at issue" than does TWC's final offer, thereby awarding carriage on that basis.[12]

The Bureau rejected TWC's arguments that the arbitrator lacked jurisdiction because TWC had never outright denied carriage but actually offered inclusion on a digital tier,[13] that the arbitration notice was filed too late,[14] and that mandatory arbitration violated TWC's First Amendment rights.[15] The Bureau held, however, that there was no basis under the program carriage rules or *Adelphia* for awarding MASN damages.[16]

Classification as Covered RSN: The Bureau disagreed with TWC's assertion that MASN, which provides live telecasts of virtually all of the Baltimore Orioles and Washington Nationals regular season baseball games, was not eligible to invoke the *Adelphia* conditions in North Carolina given that state's considerable distance from Baltimore and Washington.[17] The Bureau said that under *Adelphia* "the relevant [geographic] unit of analysis * * * encompasse[s] the authorized viewing zone for a team's programming," and here Major League Baseball ("MLB") had designated most of North Carolina as part of the authorized home team territory for MASN's two professional baseball clubs.[18]

The Bureau rejected TWC's argument that the MASN teams' popularity in North Carolina was too limited to implicate the anti-competitive concerns identified in *Adelphia*.[19]

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[12] *Id.*
[13] *Id.* ¶ 50.
[14] *Id.* ¶ 51. The Bureau said TWC's position remained sufficiently ambiguous that MASN was entitled to wait to a later meeting before concluding that TWC would not reconsider its refusal of analog carriage.
[15] *Id.* ¶ 49.
[16] *Id.* ¶ 54.
[17] *Id.* ¶¶ 27-29.
[18] *Id.* ¶ 28 and n.104.
[19] *Id.* ¶ 28. Even if MASN were unlikely to be driven out of business merely by failing to obtain carriage in more remote areas like North Carolina, the Bureau said the *Adelphia* concerns were not limited to driving unaffiliated RSNs out of business but also extended "equally" to

For support, the Bureau noted that TWC's North Carolina systems currently carried on the analog tier the then-TWC-affiliated RSN Turner South featuring other out-of-state (i.e., Atlanta-based) professional teams' games. Plus, the Charlotte Bobcat basketball telecasts that ran on TWC's own "NEWS 14" RSN, which was also transmitted on the analog tier, were actually less popular among North Carolina viewers than MASN's programming.[20]

Proof of Discrimination: The Bureau rejected TWC's argument that MASN was obligated to provide "direct evidence" that MASN's status as an independent RSN in which TWC held no attributable ownership interest "had a determinative influence on the denial of carriage."[21] It was sufficient that TWC treated MASN "differently" in carriage and tiering from TWC's RSN affiliates at the time (News 14 and Turner South) and that the complaining RSN's programming was "at least as popular as" and therefore "comparable in terms of demand" to the affiliated RSNs' programming.[22]

The Bureau found that "TWC, as a vertically integrated MVPD, continues to have an incentive and ability to

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discouraging such RSNs from entering new competitive territory. *Id.* The Bureau added that "the issue of [geographic] 'remoteness' is more appropriately considered in evaluating an MVPD's proferred justification [under Section 628] for refusing to carry an unaffiliated RSN." *Id.* n.106.

[20] *Id.* ¶ 29

[21] *Id.* ¶ 25. TWC's argument was premised on Congress' determination not to classify cable operators as Title II common carriers (which are prohibited from unreasonably discriminating among their service customers) and legislative history saying that "discrimination" under the Title VI program access/carriage provisions was "to be distinguished" from what "discrimination" means under Title II. *Id.* ¶ 24. TWC also relied upon its characterization of what is required to prove race and age employment discrimination under federal civil rights laws – evidence of the employer's reliance on a prohibited consideration. *Id.* ¶ 23.

[22] *Id.* ¶ 29. The Bureau said Nielsen ratings for Orioles games in the 2006 baseball season were "higher than" for Charlotte Bobcats 2005-6 basketball games. *Id.* n.109. The Bureau also said, somewhat cryptically, that the *Adelphia* order and the program carriage rules did not require a "more subjective comparison" of the RSNs, just a showing that the complainant's RSN was unaffiliated with TWC and that the RSNs treated more favorably were affiliated. *Id.* n.107.

acquire the programming rights of unaffiliated RSNs, like MASN, for future distribution through other [affiliated RSN] outlets."[23] Because of that presumed competitive incentive and because MASN teams' games were at least as popular as the games of teams on TWC-favored affiliated RSNs, the Media Bureau concluded that there was no need for proof that the differential treatment was motivated principally or significantly *because of* the lack of TWC ownership in MASN.

In any case, TWC was unsuccessful in persuading the Bureau that its denial of analog carriage was a reasonable exercise of editorial discretion and sound business judgment based on the alleged limited appeal of Orioles and Nationals games for North Carolina viewers and the purported lost opportunity of using the analog tier for more appealing alternative programming. The only pre-arbitration documentary evidence was a TWC executive's e-mail relying on "gut instinct" for the view that North Carolina lacked Orioles fans.[24] The Bureau found TWC's after-the-fact efforts to document MASN's alleged low appeal in North Carolina outweighed by contrary evidence.[25] The applicable law, the

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[23] *Id.* n.110.

[24] The FCC has never affirmatively required contemporaneous documentation of the reasons for carriage decisions. Nonetheless, the Bureau felt that the absence of contemporary documentation supporting a non-discriminatory rationale indicated TWC's carriage refusal was perfunctory or even pretextual (to hide a discriminatory intent) or at least evidenced serious dereliction in educating employees to TWC's *Adelphia* obligations. The Bureau noted that MASN's well-known history of litigating carriage requests, TWC's ample advance warning of MASN's intention to seek arbitration under *Adelphia* if denied analog carriage, and multiple meetings and discussions between the parties over the two years of negotiations should have prompted TWC to compile an adequate contemporary record. *Id.* n.127.

[25] The Bureau relied upon a variety of considerations: (i) Orioles games garnered significant 2006 Nielsen ratings in two central North Carolina Designated Marketing Areas ("DMAs") (Charlotte and Greensboro/High Point/Winston Salem) surpassing the Charlotte Bobcats' basketball game ratings despite one such DMA being the Bobcats' home city, despite sharing baseball fans in that viewing territory with the Cincinnati Reds and Atlanta Braves, and despite minimal promotion by the Oriole's predecessor RSN in North Carolina; (ii) the Orioles had a sizable North Carolina fan base due to two decades of game broadcasts there

Bureau held, "prohibited TWC from applying to unaffiliated programming services more stringent standards, including ratings standards, than those it applies to affiliates."[26]

Proof that the Discrimination Unreasonably Restrained the Ability to Compete Fairly: The Media Bureau held it was unnecessary to prove that MASN would actually exit the industry, operate at a loss, or suffer some other major disadvantage due to exclusion from TWC's analog basic tier. All that was necessary was a demonstration that the discrimination would restrain MASN's ability to compete in North Carolina where the relevant TWC systems are located.[27] The Bureau concluded that TWC's discriminatory treatment did unreasonably restrain MASN's ability to compete for North Carolina viewers, advertisers, and programming rights in violation of Section 616.

This determination of liability was premised on these findings: (i) team programming rights like those held by MASN are among the most expensive to acquire, (ii) the limited regional nature of RSNs make it crucial to maximize MVPD penetration throughout the entirety of their teams' authorized home territory in order to generate the requisite per-subscriber fees and advertising revenues to pay for those expensive telecast rights, (iii) other RSNs are carried on basic analog tiers, and (iv) TWC is the

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immediately prior to MASN, (iii) the MLB's decision to designate the Orioles and Nationals as hometown teams in much of North Carolina, (iv) the Nationals' home field being even closer to North Carolina than the Braves' or Reds' and the Orioles being no further than the Reds or Braves, (v) decisions of four of the next five largest North Carolina MVPDs after TWC to carry MASN on widely available tiers, (vi) Fox's expressed interest in offering Orioles and Nationals games on its two North Carolina RSNs, (vii) the absence on analog of any MLB team home games on TWC's eastern North Carolina systems and of any American League team on any TWC North Carolina system, (vii) experience showing that a team's fan base grows with analog carriage, and (viii) a dearth of evidence that carrying MASN on analog would cause TWC to incur net out-of-pocket costs (once TWC ad insert revenues were factored in) or forego possibly greater net revenue generated from carrying certain HD services in place of MASN. *Id.* ¶¶ 33-36.

[26] *Id.* ¶ 33.

[27] *Id.* ¶ 30.

most widely penetrated MVPD in North Carolina.[28] The Bureau was particularly persuaded by testimony that TWC's denial of analog carriage had prevented MASN from successfully competing for Carolina Hurricane hockey telecast rights.[29]

The Bureau determined as well that TWC had "an economic incentive to thwart MASN's widespread availability in North Carolina."[30] The evidentiary support cited was (i) TWC and MASN having competed head-to-head for North Carolina sports telecast rights for that state's collegiate basketball games, (ii) their competing expressed interests in Carolina Panther NFL games, (iii) TWC's affiliation with RSN Turner South offering Atlanta Braves games that could compete with MASN for baseball viewer interest, and (iv) part-TWC-owned iN DEMAND's right to distribute MLB Extra Innings out-of-market games that would also compete with MASN for baseball viewers and for Orioles and Nationals fans in particular.[31]

Fair Market Valuation: The final offers of TWC and MASN proposed the same per subscriber rates, but TWC's rates were for the digital basic tier whereas MASN's were for the more widely available analog tier. The Media Bureau agreed with the arbitrator's view that MASN's final offer more closely reflected the value of MASN's programming. The Bureau said that the more objective evidence on value was MASN's, including (i) a showing that MASN's proposed annual per-subscriber fee was less per major professional game telecast than the average fee TWC has been paying in North Carolina and elsewhere for other RSNs, and (ii) that both DBS MVPDs and two cable MVPDs

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[28] *Id.* ¶ 31.

[29] *Id.*

[30] *Id.* ¶ 37.

[31] *Id.* ¶¶ 37-38. Without explicitly finding any impermissible subjective intent on TWC's part with respect to MASN, the Bureau nonetheless observed that after the Charlotte Bobcats' owned RSN (C-SET) failed to obtain analog (and got only digital) carriage on TWC North Carolina systems in 2004, that RSN ceased operations within one year, and soon thereafter TWC acquired the Bobcats' rights and placed them on the analog tier. *Id.* ¶ 40. This Bobcat experience, the Bureau said, "reveals that TWC understands the adverse impact that digital, rather than analog, carriage can have on an RSN." *Id.*

(Charter and Mediacom) were carrying MASN in North Carolina on their widely available tiers for the same price.[32]

c. Appeal to the Full Commission

On appeal filed in November 2008, TWC contended the Bureau itself never affirmatively found the refusal to afford MASN basic analog carriage on TWC's North Carolina systems was due to discrimination on the basis of affiliation. TWC argued that the Bureau had inverted the applicable legal standard, impermissibly shifting the burden of proof and effectively requiring the MVPD to prove the negative, i.e., that disparate treatment of the RSNs was uninfluenced by the presence or absence of affiliation. Under applicable precedents, TWC asserted, MASN had the burden to prove by direct or circumstantial evidence that affiliation status had a determinative influence on the disparate treatment.

Not only had MASN failed to carry that burden, TWC said, but the record showed TWC's executives honestly exercised their editorial discretion in deciding against carrying MASN on the analog basic tier. Their motivation was so that all subscribers would not have to pay extra for a service that had little attraction to most subscribers even if MASN might appeal to a limited group of baseball aficionados. They also preferred to devote capacity to several HD services for which there was, in their view, more consumer demand than for MASN.

The record, according to TWC, showed MASN lacked substantial cable carriage in North Carolina and that a cable operator unaffiliated with any of the RSNs had submitted an affidavit explaining its decision was based on the same reasons as TWC gave, thus negating the notion that affiliation status affected TWC's decision. That the two DBS operators made MASN

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[32] *Id.* ¶¶ 46-47. As for TWC's contrary assertions, the Bureau found that lower per-subscriber rates charged for non-RSN programming were irrelevant and that lower rates paid by various small North Carolina cable operators were much less relevant than rates paid MASN by TWC's direct DBS competitors and by the two larger cable operators. *Id.* ¶¶ 47-48.

available in North Carolina did not indicate TWC was intentionally shielding its own TWC-affiliated services from MASN's competition but only that reasonable MVPDS may make reasonable but different carriage decisions. TWC claimed that the Bureau's second-guessing of how TWC executives evaluated data on consumer demand, actually mischaracterized the ratings data and infringed on editorial discretion in a way that conflicted with the statute and the First Amendment.

MASN responded that, under Section 616, once the RSN proved TWC treated it less favorably than similarly situated TWC affiliates, the burden necessarily shifted to TWC to establish a legitimate, non-discriminatory reason for the differential treatment. Given the MVPD's greater access to the documents and personnel involved in its internal carriage decision process, MASN should not be saddled with the negative burden of disproving the MVPD's purported justifications for the differential treatment. Instead the affirmative burden of proof should be upon the MVPD, as the Bureau held. If the MVPD cannot establish a legitimate non-discriminatory reason, MASN argued, then the statute presumes the real reason was to protect the MVPD's affiliates.

Even if Section 616 does not contemplate burden-shifting, MASN argued, the record established that considerations of affiliation did impermissibly influence TWC's decision. For support, MASN pointed to TWC executives' testimony that they were unaware they had any obligation to make a comparative assessment of MASN and the TWC affiliated RSNs under consistent standards and therefore failed to do so. MASN said: "[F]ailure to apply consistent standards to affiliated and unaffiliated programming *is* affiliation-based discrimination." Moreover, echoing the Commission's finding in *Adelphia*, the Bureau found that TWC had economic incentives (and the ability as North Carolina's largest MVPD) to use its carriage determinations so as to diminish MASN's viability as a potential rival bidder against TWC's affiliated RSNs for certain college and professional sports programming.

MASN supported the Bureau's finding that there was substantial actual and potential demand for MASN's

programming in North Carolina, that other North Carolina MVPDs had not raised their basic rates when they added MASN, and that TWC could have made room for MASN without displacing other services TWC said consumers wanted, such as HD channels. MASN insisted that when a cable operator elects to purchase its own programming interests, it assumes non-discrimination obligations that "confine its editorial discretion." In any event, according to MASN, the Bureau's ruling here was not content-based and, therefore, did not raise First Amendment concerns requiring "strict scrutiny."

5. Wealth TV v. Four Cable Operators

WealthTV describes its "truly independent stand alone" channel, carried by a number of MVPDs, as "inspirational and aspirational programming about prosperous and fulfilling lifestyles." WealthTV filed Section 616 complaints against Time Warner Cable ("TWC"), Bright House, Cox and Comcast claiming that they had refused carriage while nonetheless carrying the allegedly similar channel MOJO, distributed by iN Demand LLC, an entity owned by Comcast (54.1%), Cox (15.6%), and Time Warner Entertainment-Advance/Newhouse Partnership (30.3%), which is affiliated with TWC and Bright House.[33] The complaints were filed December 20, 2007 and March 13, March 27, and April 21, 2008. WealthTV urged the Commission to provide discovery, use "baseball style" arbitration (as made available only to RSNs under *Adelphia*), set carriage terms similar to MOJO's, and force any systems lacking capacity to drop an affiliated channel in order to accommodate WealthTV.

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[33] *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Defendant,* File No. CSR-7709-P; *Herring Broadcasting, Inc. d/b/a WealthTV v. Bright House Networks, LLC,* File No. CSR-7822-P; *Herring Broadcasting, Inc. d/b/a WealthTV v. Cox Communications, Inc.,* File No. CSR-7829-P; *Herring Broadcasting, Inc. d/b/a WealthTV v. Comcast Corporation,* File No. CSR-7907-P, Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, DA 08-2269, ___ FCC Rcd ___, ___ ¶ 8 and n.34 (rel. Oct. 10, 2008)("*WealthTV HDO*").

a. Media Bureau's Hearing Designation Order

On October 10, 2008, the Media Bureau Chief issued a Memorandum Opinion finding that WealthTV had "established a *prima facie* showing that [each MSO defendant] has discriminated against WealthTV in violation of the program carriage rules."[34] Beyond reciting details from the parties' opposing pleadings, the Chief provided almost no explanation or rationale for the *prima facie* finding.

The Bureau document also incorporated a Hearing Designation Order ("*HDO*") calling for a hearing before an administrative law judge ("ALJ") who would provide a "recommended determination" as to whether any of the cable operators had "discriminated against [WealthTV's] programming, with the effect of unreasonably restraining [WealthTV's] ability to compete fairly"and, if so, "the appropriate price, terms and conditions on which [WealthTV] should be carried" by that operator's systems and "such other remedies as [the ALJ] recommends."[35] The ALJ's recommended determination was required to issue "within 60 days of this Order."[36]

Although the Bureau said "there are several factual disputes as to whether [the four cable MSOs] discriminated against Wealth TV in favor of their affiliated MOJO service,"[37] the *HDO* did not specify precisely which material facts were in dispute (and which were not) and where the balance appeared to lay on any given dispute, nor how the Bureau was able to conclude nonetheless that there were four *prima facie* showings of illegal discrimination.

To add to the potential confusion, the Bureau included in the same *HDO* similarly worded findings of *prima facie* program carriage violations in two completely unrelated complaints brought by the NFL Network and MASN against

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[34] *Id.* ¶¶ 7, 10, 24, 25, 35, 36, 46, 47, 57, and 58.
[35] *Id.* ¶¶ 122, 126, 130, and 134,as corrected by *Erratum* (rel. Oct. 15, 2008) ¶¶ 5-8.
[36] *WealthTV HDO* ¶¶ 124, 128, 132, and 136.
[37] *Id.* ¶ 58.

Comcast. The ALJ was required to issue a recommended decision and remedy, if appropriate, in all six cases within 60 days! (These two additional complaints will be discussed *infra,* after the WealthTV complaints.

Similarly Situated: WealthTV submitted a consultant's declaration, a declaration interpreting a viewer survey, and other materials contending that the majority of both channels' programming was the same or very similar in topics (e.g., wine, autos, sports interviews, food, and electronics) (MOJO's predecessor service having changed from a general entertainment focus to be much more like WealthTV), target demographics (affluent males aged 25-29), and target advertisers. The HDO says WealthTV's declarations are "adequate" despite the cable defendants' challenges, but does not describe in any detail defendants' evidentiary proffers (to the extent they made them) or factual arguments. The Bureau does explicitly reject the notion, attributed to defendants who had pointed to certain dissimilarities between the two channels' programming, that WealthTV had no obligation to show the channels were "identical" -- only "similar".[38] Consequently, the "similarly situated" issue would seem to be one of the areas of factual dispute on which the ALJ is to hold a hearing, make findings, and render a recommended determination.

Differential Treatment: WealthTV evidently satisfied its burden of establishing a *prima facie* case on this issue simply by showing that it had unsuccessfully sought carriage whereas MOJO was being carried linearly (i.e., not on a video on demand basis) nationwide all-systems basis. That nationwide carriage of the allegedly similar rival channel was deemed "salient" by the Bureau, because Comcast and TWC purportedly refused WealthTV a nationwide linear carriage commitment and instead offered at best only a "hunting license" allowing WealthTV to seek to convince individual systems to carry it.[39]

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[38] *Id.* ¶ 17.

[39] *Id.* ¶¶ 18, 52. WealthTV also argued that it was not an adequate defense on the differential treatment point that TWC eventually also offered a commitment to carry the channel in one system (¶ 11), or that Comcast did the same (¶ 52), or that Bright House depended on TWC to

Harm to Ability to Compete: WealthTV alleged that an independent channel needs to reach at least 20 million subscribers in order to reach financial viability, that carriage in the major media markets defendants serve is essential for attracting advertisers, that when the leading MSOs refuse carriage many other MVPDs will follow suit, and that defendants' disparate treatment of WealthTV as compared to MOJO gives MOJO a "first mover" advantage in seeking viewers and advertisers.[40] With respect to defendants' contention that WealthTV has been operational for four years, is already being carried by some non-defendant MVPDs including several that compete directly with defendants, and eventually could reach 20 million subscribers even without carriage by any particular defendant (or presumably all of them), the Bureau said 'the more pertinent consideration is [WealthTV's] ability to compete over the long term absent a carriage agreement" from defendants.[41]

The Bureau "reject[ed]" the argument about WealthTV being able to meet its 20 million benchmark through carriage deals with other MVPDs, saying that such a defense "would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs."[42] The Bureau also rejected the defense that WealthTV could employ alternative distribution platforms, such as video on demand or the Internet.[43] The *HDO* did not state explicitly the extent to which the ALJ is to make specific factual findings regarding harm to WealthTV's ability to compete. Nor did the Bureau indicate unambiguously whether the ALJ should or may

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negotiate its national carriage agreements (¶ 26). The complainant proffered evidence that several of defendants' individual systems purportedly expressed interest in carrying the channel (¶¶ 26, 37) and alleged a Comcast representative implied that Comcast would not allow a non-affiliated network to become successful without owning it (¶ 49). There was also evidence that some other MSOs that had no ownership interest in MOJO carried it but did not carry WealthTV at all or on all their systems, and that the DBS companies did not carry WealthTV but also not MOJO either (¶¶ 23, 34, 45, 56).

[40] *Id.* ¶¶ 19, 29, 41, 53.

[41] *Id.* ¶¶ 30, 42.

[42] *Id.* ¶¶ 19, 30, 42, 54.

[43] *Id.* ¶ 54.

revisit the issue of WealthTV competing successfully through carriage on smaller MSOs, AT&T U-verse, Verizon FiOS, DBS, and other systems.

Alleged Business and Editorial Justifications: The Bureau ruled that if the allegedly favored channel (here MOJO) satisfies the attribution standard, the determination of whether the rules are violated does not turn on arguments as to whether any particular defendant's stake in the rival channel is sufficient to influence its decision whether to carry the complaining channel (WealthTV).[44] The Bureau also "reject[ed]" the defense that in a competitive MVPD marketplace no defendant MVPD can afford to engage in discrimination and refuse carriage to an attractively priced and programmed service regardless of ownership.[45]

With respect to claims that defendants' carriage decisions are necessarily made on the merits based on capacity restrictions, the channel's track record, its management team's experience, subscriber interest, and audience demand, the Bureau recited WealthTV's evidence demonstrating experienced management and proven consumer appeal as reflected in linear carriage by at least 75 MVPDs, viewer e-mail support, interest expressed by employees at individual defendant systems, and certain defendants' willingness to launch the service in HD VOD format.[46]

The Bureau also noted WealthTV's assertion that the decisions of DBS operators not to carry the channel are "irrelevant" in evaluating defendants' purported justifications because the DBS operators do not carry MOJO either.[47] The Bureau provided no express guidance, however, as to whether there are specific factual disputes for the ALJ to resolve with respect to any objective or subjective evidence pertaining to defendants' claimed legitimate business justifications.

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[44] *Id.* ¶ 20.

[45] *Id.* ¶ 21. The Bureau said that, in any case, the defendant's carriage of a substantially similar channel like MOJO reduces the likelihood that the defendant's subscribers would actually prefer a competitor that carries WealthTV. *Id.*

[46] *Id.* ¶ 22, 33, 44, 55.

[47] *Id.* ¶ 23, 34, 45, 56.

b. ALJ Proceedings

Defendants promptly moved ALJ Sipple to modify and clarify the issues reflected in the *HDO* to match the exact statutory language, conduct the hearing *de novo* on all relevant factual and legal issues, extend substantially the "unreasonable" 60-day hearing and decision deadline (December 9), and provide explicitly for the filing of exceptions to the ALJ's eventual recommended decision. Alternatively, they moved for full Commission interlocutory review. WealthTV opposed.

The ALJ ruled that "the 'facts' and 'conclusions' recited in the *HDO* will not be considered binding," that he would give the evidence adduced "*de novo* consideration," and would issue a recommended decision "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*."[48] As requested by the cable companies, he reformulated the hearing issues to precisely track the language of the relevant discrimination-against-unaffiliated programmer rule (47 CFR § 76.1301(c)) and not to emphasize one remedy over any other.[49] Given the complexity of the four *Wealth TV* cases and the companion *NFL* and *MASN* cases also covered by the same *HDO*, the "unique and intricate" facts in each of the six matters, and the need for discovery, live testimony, and witness credibility evaluations, he held that the *HDO*'s 60-day timeframe for reaching a recommended decision "cannot be achieved" while still affording parties their due process rights.[50] At this writing, the text of the ALJ's November 20, 2008 decision on the motions[51] has not been released to the general public. WealthTV's public response and various press accounts indicate that ALJ Steinberg agreed to reframe the issues consistent with the statute's literal language, promised his "recommended decision will be made on the specific issues based *solely* on the evidence compiled during the course of the hearing and not on the basis of

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[48] MO&O, FCC 08M-47 ¶ 6 (rel. Nov. 20, 2008)(emphasis in original) as amended by Erratum 07524 (released Nov. 21, 2008)(together "*ALJ HDO modification order*").
[49] *Id.* ¶ 8.
[50] *Id.* ¶ 7.
[51] The proper citation is expected to be FCC 08M-47.

how those questions were addressed" in the Bureau's HDO, and that (given the complexity of the four WealthTV and the two other program carriage cases) the 60-day deadline "cannot be achieved."[52] A few days later, Chief ALJ Sippel released an Order indicating that ALJ Steinberg was retiring in early 2009, Sippel would take over the six cases encompassed in the *HDO*, and a status conference was set for the following day.[53] At the conference, the Chief ALJ reconfirmed ALJ Steinberg's rulings and set a hearing date of March 17, 2009.[54]

These developments unleashed a firestorm of pleadings, counter-pleadings, and further rulings by the Chief ALJ and the Bureau. Alleging risk of irrevocable harm as a result of the ALJs' rulings, WealthTV moved the Bureau to revoke the hearing designation for its four complaints and resolve all outstanding issues itself by December 10, 2008.[55] The cable companies strongly opposed. Meanwhile designation of expert witnesses, document discovery, depositions went forward, along with requests for various minor clarifications or modifications of the ALJ rulings.[56]

c. Media Bureau Reclaims Jurisdiction

Then, on Christmas Eve, the Media Bureau Chief issued a ruling holding that the ALJs' delegated authority expired under the *HDO*'s own terms upon the failure to issue a recommended decision within 60 days, i.e., by December 9.[57] The Bureau rejected cable operators' argument (and the ALJ's determination) that a fair hearing could not have been accomplished in the allotted time. The Bureau held that it could

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[52] *Communications Daily*, Nov. 21, 2008 at 13-14.
[53] Order, FCC 08M-48, 07531 (released Nov. 24, 2008).
[54] Transcript, MB Docket No. 08-214 (Nov. 25, 2008).
[55] Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, MB Docket No. 08-214 (Nov. 24, 2008), and Supplement (Dec. 3, 2008).
[56] ALJ Steinberg clarified that depositions of fact witnesses would be permitted. Order, MB Docket No. 08-214, FCC 08M-56, 07617 (rel. Dec. 24, 2008).
[57] MO&O, MB Docket No. 08-214, DA 08-2805 (rel. Dec. 24, 2008)("*Christmas Eve Bureau Order*").

reclaim the fact-finding role in this way and declined to either review, reconsider, or revoke the *HDO* as such but simply declared the *HDO* "expired."

Not surprisingly, the *Christmas Eve Bureau Order* provoked its own firestorm of pleadings and commentary. The four cable defendants filed emergency applications for Commission review and stay, contending that the Bureau lacked authority to terminate the hearing and revoke the ALJ's jurisdiction, and asserting that due process, the relevant FCC rulemaking decisions, and the integrity of Commission processes require a trial-type hearing. Concurrently, they asked the Chief ALJ to reaffirm his scheduling order or, alternatively, certify to the Commission their application for review.[58] Meanwhile, complainants pushed for an expedited status conference before the Media Bureau and the defendants opposed. The proceeding had deteriorated into a three-ringed circus.

Soon after Chairman Martin told the press he and the FCC General Counsel thought the Bureau had acted correctly,[59] the Bureau issued an order, essentially ignoring the discovery processes (including depositions) partially begun under the ALJ.[60]

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[58] The FCC's Enforcement Bureau, a regular participant in the ALJ proceedings including discussion of proposed discovery schedules, asserted that defendants were wrong and that it had never suggested or implied the ALJ had authority to extend the *HDO* beyond the 60 day deadline sets by the Media Bureau.

Meanwhile, apparently concluding that he still had jurisdiction, Chief Judge Sippel held that, while awaiting Commission action on the defendants' petitions to stay the *Christmas Eve Bureau Order* as *ultra vires* "expedited discovery and procedural dates previously set require and deserve compliance by all parties," including complainants, and set a January 7, 2009 deadline for status reports on discovery, protective order, hearing dates, etc. Order, MB Docket No. 08-214, FCC 09M-01 (rel. Jan. 6, 2009)

[59] See *Communications Daily*, Jan. 9, 2009, at 9.

[60] Order, Chief Media Bur., MB Docket No. 08-214, DA 09-55 (rel. Jan. 16, 2009). A few days earlier, the Chief ALJ "regrettably" stayed all action at his level. MO&O, MB Docket No. 08-214, FCC 09M-05, o7655 (rel. Jan. 12, 2009). He did so "without conceding that the Media Bureau has lawfully or effectively asserted exclusive jurisdiction to adjudicate its own [*HDO*] without benefit of independent findings on,

The Bureau's order directed the parties to submit in 12 calendar days any additional arguments or evidence on three factual issues, provide all documents on two other factual issues, and attached a protective order under the parties could seek to protect competitively sensitive parts of their submissions.

The three factual issues were: (a) whether MOJO programming was materially different from INHD programming, (b) whether there is less consumer demand for WealthTV than MOJO programming, and (c) the reasons that led to iNDEMAND's decision to shut down MOJO. The document requests were for "all documents" (d)(i) discussing the cable defendant's analysis and assessment of WealthTV, including potential value to the defendant's subscribers, and (ii) the reasons for the decision whether to carry WealthTV.

In the event the Bureau were to find liability, the order required the parties to submit along with the above materials their "best and final offer for the price of the complainant's network on the defendant's systems and explain the justification." On the basis of this narrowed and highly expedited fact-gathering procedure and narrowly limited briefs,[61] the Bureau pledged to "resolve" the Wealth TV complaints 16 calendar days after those submissions. The order made no effort to address prior statements by the ALJs or the defendants regarding the purported need for wider-ranging document discovery, depositions, expert witnesses, live hearing testimony, and evaluations of witness credibility. Nor was there any explanation as to why now a previously Bureau-desired ALJ-conducted adjudicative process (albeit only 60 days long by the Bureau's reckoning) to arrive at a mere "recommended decision" could so easily be supplanted and foreshortened to a paper process leading to a full-blown Bureau decision in only 28 days. What changed?

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inter alia, witness credibility . . . ." *Id.* at 4. He noted with obvious discomfort the "unique state of confusion on jurisdiction" and "the parties'[being] justifiably concerned about complying with parallel and conflicting directives." *Id.* ¶ 8 at 4.

[61] Short briefs "focus[ed] only on the significance of information submitted in response to" the order could be submitted no later than the 7th day before the promised Bureau decision. *Id.* ¶ 11.

6. *NFL Enterprises v. Comcast Cable*

In this proceeding, the NFL complains that Comcast violated the program carriage rules by (i) discriminating against the NFL Network (and in favor of Comcast-owned Versus and Golf Channel) by moving the service to a less widely available tier and (ii) requiring a financial interest in the NFL's programming as a condition for carrying the NFL Network.[62]

Launched in 2003, the NFL Network is an independent national network not owned by any cable or satellite operator and is carried by over 240 MVPDs to 36 million subscribers nationwide. Although it was conceived initially as football-related programming without any live games, the NFL Network currently telecasts 8 live NFL regular season games (the Eight-Game Package), some pre-season games live or tape-delayed, as well as programming about scouting, the draft, training camps, and other subjects to build fan interest in the NFL. In a 2004 agreement, Comcast agreed to carry the NFL Network on its digital basic tier, but reserved the right to move the network to any less widely distributed tier (including a premium sports tier) (the so-called "Conditional Tiering Provision") if by mid-2006 the two parties did not reach an agreement for carriage by Comcast of either the NFL Sunday Ticket (then exclusive to DirecTV) or the NFL's Eight-Game Package (eight live regular season games that were not then part of the NFL Network).

As it happened, in late 2004 the NFL renewed DirecTV's exclusive rights to the NFL Sunday Ticket through 2010. Comcast continued to negotiate for the Eight-Game Package until the NFL instead decided to award that programming to its own NFL Network. With the addition of those games, the NFL Network's charge to Comcast increased up to 55 cents per

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[62] See *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, File No. CSR-7876-P, Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, DA 08-290, ___ FCC Rcd ___ ¶¶ 60-90 (rel. Oct. 10, 2008)("*NFL HDO*" but also the same document as *WealthTV HDO, supra*).

subscriber and, after objecting, Comcast agreed to pay that fee rather than have the 8 games blacked out. Approximately 8.6 million Comcast subscribers continued to received the NFL Network on the digital basic tier. In September 2006, however, Comcast announced plans to take advantage of the Conditional Tiering Provision and shift the Network to a sports tier received by only 1.4 million subscribers, a shift was accomplished in mid-2007. The NFL sued in state court, which granted summary judgment for Comcast; the appellate court overturned in February 2008 and sent the matter back for trial. At this writing, the parties may still be engaged in non-binding mediation in response to the trial court's request. Meanwhile, on May 6, 2008, the NFL filed its FCC complaint.

On October 10, 2008, the Media Bureau Chief issued a memorandum opinion and hearing designation order ("*HDO*") finding that the NFL had established a *prima facie* case of discrimination and requiring a financial interest in violation of the program carriage rules, requesting the ALJ to conduct a hearing to resolve "several" unspecified "factual disputes," and to return a recommended decision in 60 days.[63]

Statute of Limitations: The Bureau rejected Comcast's argument that the complaint needed to be filed within one year of the original 2004 contract and agreed instead with the NFL that a filing within a year of Comcast's alleged discriminatory act of re-tiering was timely.[64]

Pending Litigation: The Media Bureau declined to dismiss the complaint pending the outcome of the state court suit on the ground that the issue in litigation – whether Comcast had the contractual right to retier – is "not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules."[65] "Parties to a contract cannot insulate themselves

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[63] *Id.* ¶¶ 59, 85.
[64] *Id.* ¶ 70.
[65] *Id.*¶ 72.

from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules," the Bureau opined.[66]

Similarly Situated: Comcast submitted expert economic and programmer declarations to show that Versus, a channel carrying a wide variety of sports, and the Golf Channel were so different from the NFL Network that they could not possibly benefit from tiering discrimination against the NFL Network. Strangely, the Bureau accused Comcast of misreading the statute as requiring that the favored programming be "identical." Other than to recite the NFL's assertions that all three are " national sports networks" that "compete for programming, advertising, or target viewers," the Bureau did not further explain why it felt a *prima* facie showing was made on the similarity point or whether the ALJ was to consider particular unresolved factual issues on this topic.[67]

Differential Treatment: The Bureau order said that Comcast admitted it carries Versus and Golf Channel on its expanded basic tier which has 24 million subscribers and that it bumped the NFL Network to a premium sports tier that costs subscribers $5-7 more per month and reaches only about 2 million subscribers.[68] The HDO dis not explain what more, if anything, the ALJ is to do with this topic.

Harm to Ability to Compete: Similarly here, the HDO simply recited the parties' contentions but did not explain the specific basis for the Bureau's conclusion that a *prima facie* case had been made. Nor did the *HDO* indicate whether and to what degree the ALJ was to explore this subject matter. The Bureau's order noted without comment Comcast's argument that the NFL Network already reached 24 million households, could seek or

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[66] *Id.* In an effort to distinguish an arguably similar situation where the Commission had declined to consider Speedvision's refusal to license programming to Echostar while the programmer's breach of contract suit against Echostar was still pending, the Bureau said "the interpretation of the contract [here] has no bearing on a determination of whether Comcast discriminated against the NFL Network." *Id.*

[67] *Id.* ¶ 75. Comcast did indicate that it had tried to license the Eight-Game Package for its Versus network. *Id.* ¶ 61.

[68] *Id.*¶ 76.

already had wider-than-sports-tier carriage on Comcast's DBS, telco, and broadband overbuilder competitors, and could achieve a critical mass of subscribers without Comcast.[69] The order similarly recited the NFL's showing that lack of access to Comcast's basic digital tier prevented the NFL Network from achieving efficiencies and economies of scales available to Versus and Golf Channel, by imposing on the NFL Network promotional costs and by depriving it of an equivalent ability to compete for greater advertising, more subscriber revenues, and new content.[70]

Alleged Business and Editorial Justifications: Bearing on the subject of Comcast's purported justifications, the Bureau went on to recite various facts offered by both parties (which do not seem to conflict) and arguments about the facts' significance (which do conflict). But the Bureau did not explain what specifically led it to conclude at this stage that the NFL had made out a *prima facie* case, nor did the Bureau specify particular conflicts that the ALJ was to resolve.

In any case, Comcast said it was trying to keep down the cost of its basic digital tier once the NFL Network with the Eight-Game Package would cost Comcast 70 cents per subscriber per month, as compared to Versus at 25 cents and Golf Channel at 35 cents. The NFL responded that its Network was less expensive than other Comcast basic network services such as ESPN and some RSNs and, moreover, Comcast did not reduce its basic price when it moved NFL to the sports tier. Comcast claimed Versus and Golf were worth more because they carried more live and same-day programming than the NFL Network; but the NFL retorted that its programming received higher ratings. Comcast said it was unfair to base a discrimination claim on carriage of services that it had been on basic since 1995, but the NFL said determining carriage preferences on the basis of histories unfairly favors Comcast-affiliated networks over new independents.

Comcast said that the NFL Network's games are already available on local broadcasts of home market participating

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[69] *Id.*¶ 78.
[70] *Id.* ¶ 77.

teams, but the NFL replied that its Network's ratings demonstrated high demand. Comcast pointed out that other major cable MVPDs with no ownership interests in Versus or Golf Channel carry those networks on their most widely available tiers and carry the NFL Network on a sports tier or not at all. The NFL responded that 240 MVPDs carry the NFL Network on widely distributed tiers and that Comcast's four major telco and DBS competitors all carry the NFL Network on a tier more widely distributed than even Comcast's digital basic tier.[71]

The full significance of all of the foregoing competing arguments presumably was left to the ALJ to sort through, including whether Comcast's movement of the NFL Network to the sports tier was "on the basis" of the NFL Network (unlike basic tier Versus and Golf) not being owned by Comcast.

Financial Interest Claim: The Bureau concluded "that the NFL had presented sufficient evidence to make a *prima facie* showing that Comcast indirectly and improperly demanded a financial interest in the NFL's programming in exchange for carriage."[72] The Bureau said "negotiat[ing] for" but not "insisting upon" an interest is permissible, but "ultimatums, intimidation, conduct that amounts to exertion of pressure beyond good faith negotiations,"and "behavior that amounts to an unreasonable refusal to deal" are impermissible under Section 616.[73]

Comcast claimed that it never sought an interest in the NFL Network but only the Eight-Game Package before those games were licensed to that Network. The NFL contended that the rule applied as well to efforts to obtain from the same vendor programming not then part of the network seeking carriage. That may explain why the Bureau's order spoke of Comcast "indirectly" seeking an interest. Additionally the opinion referred to conflicting testimony as to just what Comcast said to the NFL on the subject of financial or equity interest.[74] Among other things covered by this whole topic, the ALJ was to resolve "factual

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[71] *Id.* ¶¶ 79-84.
[72] *Id.*¶ 89.
[73] *Id.*
[74] *Id.* ¶¶ 62-65.

disputes as to whether Comcast's retiering of the NFL Network was *the result of* Comcast's failure to obtain a financial interest in the NFL's programming."[75]

Subsequent ALJ and Bureau Proceedings: As with the *WealthTV* matters, *supra* (and the *MASN v. Comcast* complaint relating to systems in Pennsylvania and Virginia, *infra*), the ALJ said he would consider all matters *de novo* and would render his recommended decision expeditiously, but not within the 60 days set initially by the Bureau.[76] On New Year's Eve, the Bureau issued a decision clarifying that its Christmas Eve order (finding the ALJ's authority under the *HDO* had expired) applied to this case as well.[77]

During the pendency of Comcast's and the other cable companies' motions for stay by and expedited appeal to the Commission, the Bureau issued its January 16, 2009 order containing a limited request for additional information from Comcast and the NFL by January 28 and promising a resolution a month later, February 27, 2009.

The parties were required to provide information on these five factual issues: (a) comparing the popularity of NFL Network to Versus and Golf Channel programming, particularly the latter's flagship professional programming involving golf,

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[75] *Id.* ¶ 89. The NFL claimed that the situation was similar to another case in which the Commission purportedly found the programmer (MASN) had established a *prima facie* case that Comcast refused to carry MASN as a retaliatory action for MLB's decision to award distribution rights for the Washington Nationals baseball games to MASN. *Id.* n.388 *citing TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, MB Docket No. 06-148, File No. CSR-6911-N, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8995, ¶ 12 (2006).

[76] *ALJ HDO modification order.* The ALJ also denied Comcast's request to certify to the full Commission the question of whether the Bureau should have dismissed the complaint pending the completion of the ongoing contract litigation between the parties or because the complaint allegedly was filed outside the applicable statute of limitations. *Id.* ¶ 9 n.11.

[77] Chief, Media Bur., MO&O, MB Docket No. 08-214, DA 08-2819 (rel. Dec. 31, 2008).

hockey, bull riding, cage fighting, and cycling; (b) whether there is substantial consumer demand for out-of-market NFL games; (c) comparing the license fees for the NFL Network with other sports networks; (d) whether Comcast reduced monthly fees to subscribers who were no longer receiving the NFL Network because it was moved to a sports tier; and (f) whether any Comcast representative ever stated or implied to any NFL representative that Comcast might move the NFL Network to the premium sports tier if the NFL did not license a package of 8 live NFL regular season games to Versus. The document requests were for "all documents" (e)(i) discussing Comcast's analysis and assessment of WealthTV, including potential value to Comcast's subscribers, and (ii) the reasons for Comcast's decision to move the NFL Network to a sports tier. In the event the Bureau were to find liability, the Bureau order required the parties to submit along with the above materials their "best and final offer for the price" of the NFL Network on Comcast's systems and "explain the justification."

7. ***MASN v. Comcast*** **(Harrisburg, PA & SW VA)**

On July 1, 2008 MASN filed a Section 616 complaint against Comcast for discriminatorily refusing to carry MASN on systems in the Harrisburg-Lancaster-Lebanon-York DMA and in two southwestern Virginia regions, the Roanoke-Lynchburg DMA and the Tri-Cities DMA. The Media Bureau, on October 10, 2008, found that MASN had made out a prima facie case and designated the proceeding for hearing before an ALJ, requiring a recommended decision in 60 days.[78]

After the *Adelphia* proceeding, in which MASN had been focused most prominently in seeking carriage on Comcast's Washington-Baltimore area systems, MASN had to decide quickly whether to proceed with arbitration or enter into an agreement for carriage. In the instant complaint, MASN claimed it did not realize that Comcast's term sheet did not include carriage on these particular systems, some of which were being acquired by

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[78] *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Comcast*, File No. CSR-8001-P, MD Docket No. 08-214, Memorandum Opinion and Hearing Designation Order, DA 08-2269, ___ FCC Rcd ___, ___¶¶ 90-119 (rel. Oct. 10, 2008)("*MASN v. Comcast PA/VA HDO*").

Comcast from Adelphia and some of which were acquired otherwise. Consequently, according to MASN, these systems around Harrisburg, Pennsylvania and southwestern Virginia fell through the cracks.

Statute of Limitations: The Bureau determined that Comcast had retained discretion to determine whether to carry MASN on systems that were not listed on the 2006 term sheet and release. The one year statutory limitations period did not begin to run until March 2008 when the negotiations regarding how Comcast should exercise that discretion with respect to these particular systems reached an impasse. Consequently, the July 2008 complaint was timely.[79]

Res Judicata: Although Comcast argued MASN had voluntarily dismissed with prejudice its 2005 complaint, the Bureau decided that the issue of exercise of discretion as to the Unlaunched Systems was not barred by the doctrine of *res judicata.*[80]

Similarly Situated: The Bureau concluded that MASN adequately alleged and Comcast did not dispute that MASN was an RSN similar to the Comcast-owned RSNs, namely Comcast SportsNet Pennsylvania ("CSN-P") carried on the Harrisburg area systems and Comcast SportsNet Middle Atlantic ("CSN-MA") carried on southwestern Virginia systems.[81]

Differential Treatment: Because Comcast concededly was not carrying MASN and was carrying its own RSN on these systems, the differential treatment showing was adequate.[82]

Harm to Ability to Compete: Comcast argued that MASN was obtaining carriage in its core areas thus making the absence of carriage in the "outer reaches" of Pennsylvania and southwestern Virginia immaterial. The Bureau evidently

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[79] *Id.*¶ 105.
[80] *Id.*¶¶ 106-07.
[81] *Id.* ¶ 108.
[82] *Id.* ¶ 109.

concluded that there was an adequate showing that MASN needed access to the maximum number of subscribers in its authorized footprint in order to compete effectively.[83]

Alleged Contract-Based Justifications: The Bureau order simply recited the parties' conflicting views on the proper interpretation of the 2005 term sheet and release.[84]

Alleged Business and Editorial Justifications: Comcast explained its decision not to carry MASN despite carrying its own RSN as due to materially greater license fee cost, scarce bandwidth (given MASN's need for 2 analog channels), and lower consumer appeal. MASN responded that (i) all the other MVPDs in the relevant areas were carrying the service at the same proposed rates, (ii) Comcast had agreed to those rates for systems even further from Baltimore-Washington than the Harrisburg and southwestern Virginia systems, (iii) the claimed bandwidth constraints had not prevented carriage of the Comcast-owned RSN, (iv) there was insufficient evidence that Comcast actually made its carriage decisions based on specific comparative demand data, (v) MASN was carried by numerous other MVPDs in the relevant areas, and (vi) certain Comcast systems in the relevant areas carried MASN and previously had carried Orioles games (now featured on MASN).[85]

Subsequent ALJ and Bureau Proceedings: As already noted, the ALJ ruled that he would decide the issues *de novo* and would allow some limited discovery, but could not adhere to a 60-day deadline.[86] Like WealthTV, MASN asked the Bureau to reconsider the *HDO*, reclaim jurisdiction, and render a prompt decision on the merits.[87] MASN argued that due weight

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[83] *Id.* ¶ 110.
[84] *Id.* ¶¶ 112-114.
[85] *Id.* ¶¶ 115-18.
[86] *ALJ HDO modification order.* The ALJ also denied Comcast's request to certify to the full Commission the question of whether the Bureau should have dismissed the MASN's complaint as allegedly filed outside the applicable statute of limitations. *Id.* ¶ 9 n.11.
[87] TCR Sports' Motion for Reconsideration of Hearing Designation Order, MB Docket No. 08-214 (Nov. 26, 2008)(the motion refers to Chief ALJ

must be given to the Bureau's *prima facie* violation finding, the burden in any subsequent hearing had shifted to Comcast, and the only remaining issues related to Comcast's purported business justifications and the reasonableness of MASN's proposed rates.

The *Christmas Eve Bureau Order* held that the ALJ's authority had terminated once the 60 days had elapsed. Comcast's joint effort with the other cable companies to overturn and stay the Bureau order at the Commission level also encompassed this *MASN* proceeding. The Media Bureau's January 16, 2009 order contained a limited request for additional information from Comcast and MASN by January 28 and promising a resolution three weeks later, February 20, 2009.

The parties were required to provide supplemental information on these two topics: (a) comparing the MASN license fee with the fees charged by Comcast Sports Net Philadelphia and Mid-Atlantic; (b) whether there is consumer demand for MASN programming in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs, including whether programming currently carried by MASN was previously carried by Comcast-affiliated RSNs in those DMAs and the extent to which other MVPDs carry MASN in those DMAs. They were also asked to produce (c) all documents discussing (i) Comcast's analysis and assessment of MASN, including potential value to Comcast's subscribers in those three DMAs, and (ii) the reasons for Comcast's decision whether to carry MASN on its systems in those DMAs. In the event the Bureau were to find liability, the Bureau order required the parties to submit along with the above materials their "best and final offer for the price" of MASN on Comcast's systems in those DMAs and "explain the justification."

8. Spinoff of TWC from Time Warner

Several independent programmers have also raised Section 616 program carriage issues in the pending FCC review of the proposed spinoff of Time Warner Cable ("TWC") by Time Warner ("TW"). Under that spinoff, interests in national

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Sippel assuming jurisdiction for the retiring ALJ Steinberg and ruling that he would not give weight to the Bureau's *prima facie* violation finding.)

programming networks would stay with TW but regional and local programming interests (as well as interests in SportsNet New York, inDEMAND which offers on-demand services and also operates MOJO, and Music Choice) would be owned by TWC.

The National Association of Independent Networks ("NAIN") and WealthTV argued that the FCC should condition its approval upon two requirements that would run for the duration of TWC's existing TW programming service carriage contracts and the renewal thereof, or for five years, whichever is longer. The conditions would be: (1) TW, TWC, and their respective subsidiaries and affiliates would be deemed "affiliated," and (2) any TWC discrimination against an unaffiliated programmer based on a presently existing TWC contract to carry TW programming shall be deemed discrimination based on affiliation or non-affiliation, for Section 616 purposes. The proponents' rationale is that the current contracts are a legacy of vertical integration entrenching the TW programming's market power. Moreover, immediately after the spinoff, the common owners of TW and TWC allegedly will have the same incentive and ability to favor TW programming as existed prior to the spinoff, and it will take approximately five years for that commonality on interest to diminish sufficiently.[88]

NAIN and WealthTV also argue that the pending discrimination complaints against TWC, i.e., MASN's arbitration case against TWC for carriage in North Carolina (at this writing pending at the full Commision level) and WealthTV's complaint against TWC (currently pending at the Media Bureau), should be resolved before the spinoff. They contend that this follows the precedent set when the FCC approved the merger of XM and Sirius only upon those parties agreeing to consent decrees resolving their long-standing violations of interoperability obligations.

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[88] Reply of National Association of Independent Networks to RCN's Petition to Condition Consent or to Deny Application, and Reply of WealthTV to RCN's Petition to Condition Consent or to Deny Application, *Time Warner Application for Consent to Assignment of Licenses,* MB Docket No. 08-120 (both August 15, 2008).

TWC opposed these requests on the ground that any purported incentive to favor TW programming would cease upon the spinoff. TWC's independent management and board would have fiduciary obligations only to TWC, making favoritism to a former programming affiliate based on those prior ties irrational and counter-productive. Any temporary overlap in public ownership would be irrelevant, TWC argued. Nor is a transfer proceeding the place to resolve unrelated pending complaints about violations of the programming carriage rules. According to TWC, the XM/Sirius precedent was not pertinent to the instant situation. There the proposed transaction was between two licensees that had admitted to long-standing and systematic violations of FCC rules allegedly undermining their qualifications as licensees, whereas here the programming carriage allegations were not specific to or critical to the license transfer involved in the spinoff.[89]

[89] Letter, Arthur H. Harding to Marlene Dortch, FCC Sec'y, MB Docket No. 08-120 (Aug. 8, 2008).

9. Pending Rulemaking on Complaint Procedures

As mentioned above in the *Comcast v. TAC* discussion, a proposed rulemaking (MB Docket No. 07-42) was launched in mid-2007 to consider possible changes in the procedures for processing program carriage complaints, as well as to make changes in the leased commercial access rules.[90]

Under 47 CFR §1302(c)(3) of the FCC's rules, the FCC observed, a complainant alleging a violation of Section 616(a)(3) must demonstrate that the alleged discrimination was "on the basis of affiliation or nonaffiliation" of a programming vendor and that the "effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to fairly compete." The FCC noted that, under 47 CFR §76.1301(c), if on the basis of the pleadings the Commission staff finds the complainant has established a *prima facie* case, the staff may direct an ALJ to hold a hearing and issue a recommended decision and remedy, if necessary, "and return the matter to the Commission."

The rulemaking notice asked (1) "whether the elements of a *prima* facie case should be clarified." The notice also asked whether the FCC should (2) establish specific time limits for resolution of complaints, (3) rules to address the complaint process, (4) rules to protect programmer complainants from retaliation, (5) increased penalties for frivolous complaints, (6) provisions that would enable programmers to insist upon nationwide rather than system-by-system negotiations, and (7) procedures for mandatory or elective arbitration, including determinations as to who bears the costs and what standard of review applies.

10. Conclusion

The newly constituted FCC has its work cut out for it in the programming carriage area. Programmers denied carriage have long claimed that the rules did not work for them as

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[90] In the Matter of Leased Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, FCC 07-18 (rel. June 15, 2007).

Congress intended and that procedures were intolerably slow. The cable operators now have claims of their own that Commission processes threaten to deny them fundamental due process rights in the rush to reach a judgment in a timely manner. What is the quality of a quasi-judicial regulatory system that has: (1)long delays in acting on proposed procedural reforms, (2) imposes arbitration on some cable companies as conditions of merger approvals but has no arbitration with respect to other cable companies, and (3) allows a three-ring circus of ALJ, Media Bureau, and full Commission addressing the same matters simultaneously. This is no way to run a railroad. Sudden reversals in the allocation of fact-finding responsibilities and sharply changing views on the need for evidentiary proceedings before a neutral fact-finder able to judge credibility are an embarrassment.

On top of all the procedural turmoil, there remain very serious and difficult issues regarding the meaning of Section 616, viz.: (1) who has the burden of proof and the burden of going forward and on what issues at what juncture, (2) what constitutes discrimination, (3) is motive relevant, (4) how does one determine whether the reasoning behind a carriage decision turned on affiliation or non-affiliation of the programmer with the MVPD, (5) what room must be left for MVPD editorial discretion and business judgment in carriage and tier placement and related pricing decisions, and (6) how does one determine if failure to obtain carriage on some or all of a single MVPD's operations or on the widest subscribed-to tier of that operator "unreasonably restrains the ability of the complainant to fairly compete?"

Stay tuned. We are condemned to live in interesting times.