Commission's release of Public Notices is critical to keeping the general public abreast of the licensees' discontinuance of telecommunications services.

Without this collection of information, licensees would be required to submit surrenders of authorizations to the Commission by letter which is more time consuming than submitting such requests to the Commission electronically. In addition, Commission staff would spend an extensive amount of time processing surrenders of authorizations received by letter.

The collection of information saves time for both licensees and Commission staff since they are received in MyIBFS electronically and include only the information that is essential to process the requests in a timely manner. Furthermore, the E-filing module expedites the Commission staff's announcement of surrenders of authorizations via Public Notice.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. E8–26178 Filed 10–31–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 08–214; DA 08–2269]

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

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document designates six program carriage complaints for a hearing to resolve the factual disputes with respect to the claims and to return a recommended decision and a recommended remedy, if necessary, to the Commission by December 9, 2008.

DATES: Each party to an above-captioned proceeding, in person or by its attorney, shall file with the Commission, by October 17, 2008, a written appearance stating that the party will appear on the date fixed for hearing and present evidence on the issues specified herein. Each party to an above-captioned proceeding must submit to the Commission, in writing within ten days of this *Order* (*i.e.*, by October 20, 2008), their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution. In each above-captioned proceeding, the Administrative Law Judge, within 60 days of this Order (*i.e.*, by December 9, 2008), will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Steven Broeckaert, *Steven.Broeckaert@fcc.gov*, or David Konczal, *David.Konczal@fcc.gov*, of the Media Bureau, Policy Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Memorandum Opinion and Hearing Designation Order, DA 08–2269, adopted and released on October 10, 2008, and the Erratum thereto, adopted and released on October 15, 2008. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis of the Order

I. WealthTV Complaints

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

2. WealthTV had filed program carriage complaints against Time Warner Cable Inc. (''TWC''), Bright House Networks, LLC (''BHN''), Cox Communications, Inc. (''Cox''), and Comcast Corporation (''Comcast''). WealthTV asks the Commission to order TWC, BHN, Cox, and Comcast to provide WealthTV carriage on all TWC, BHN, Cox, and Comcast systems without delay, pursuant to the terms of a carriage agreement similar to that accorded to MOJO. To the extent one or more of the systems claim to lack capacity to add an additional channel, WealthTV asks the Commission to order the system to delete an affiliated programming service to accommodate the addition of WealthTV.

3. We note that, at the time WealthTV requested carriage, the defendants carried MOJO in the relevant cable systems. Although iN DEMAND recently announced that MOJO will cease operations on December 1, 2008, this does not render moot or discredit WealthTV's discrimination claim. The fact that MOJO will cease operations in the future is not relevant to the issue of whether the defendants engaged in unlawful discrimination during the period that WealthTV sought carriage. Our conclusion is consistent with the Commission's finding in other contexts that steps taken by a licensee following a violation do not eliminate the licensee's responsibility for the period during which the violation occurred. In addition, if carriage of WealthTV is ultimately required, the fact that the defendants will no longer be carrying MOJO on the relevant cable systems indicates that they will have a vacant channel on which to accommodate WealthTV.

A. WealthTV v. TWC

4. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). TWC is an MVPD and the second largest cable operator in the nation as measured by number of subscribers. TWC is affiliated with MOJO, a video programming vendor. According to TWC, MOJO's orientation is ''exclusively male'' and its principal programming consists of sports, movies,

music concerts, and reality series. On May 7, 2007, WealthTV provided TWC with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing TWC of its intent to file a program carriage complaint. On December 20, 2007, WealthTV filed its complaint, alleging that TWC violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.

1. Background

5. WealthTV states that it has been seeking carriage on TWC systems since prior to its launch in June 2004. WealthTV explains that it proposed to provide its high definition (''HD'') video on demand (''VOD'') service to TWC free of charge provided that TWC grant it a ''hunting license'' and commit to launch WealthTV in its linear line-up in one TWC system. TWC rejected this proposal because it was unwilling to commit to a linear launch on even one system. In December 2007, TWC offered a compromise whereby it agreed not to launch WealthTV's free HD VOD service until after it launched WealthTV in its linear line-up in one system. According to TWC, this proposal was meant to address WealthTV's concern that TWC could launch its free HD VOD service without ever launching WealthTV on a linear basis. WealthTV rejected this proposal because it still did not guarantee a linear launch in even one system. TWC contends that it offered WealthTV a hunting license that was similar to the deals it has offered to dozens of other programmers, including some of its affiliated programmers, and that WealthTV has accepted a hunting license from other MVPDs that have no ownership interest in MOJO, such as Charter. As WealthTV explains, however, its agreement with Charter guarantees a linear launch in a set number of systems, whereas TWC refused to commit to linear carriage in even one system. Moreover, WealthTV states that TWC has launched MOJO on a nationwide basis while it has offered WealthTV only a hunting license, thereby demonstrating TWC's discriminatory treatment. WealthTV also states that a hunting license with TWC is meaningless given the reluctance of TWC's corporate programming group to agree to carriage of WealthTV even if individual systems desire to carry the network. In its Motion to Strike, TWC states that, after the filing of the WealthTV complaint, it acceded to WealthTV's demands and proposed a hunting license coupled with a firm commitment for linear carriage of WealthTV on TWC's San Antonio system. In its Reply, WealthTV admits that discussions between TWC and WealthTV have continued after the filing of the Complaint, but states that it cannot address these discussions because the Commission's rules require a Reply to be responsive to matters contained in the Answer and not contain new matters.

2. Similarly Situated

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

7. Similar programming. WealthTV provides examples of similar programming that both WealthTV and MOJO offer, regarding topics such as wine, automobiles, sports interviews, food, and electronics. For example, in June 2004, WealthTV launched Taste! The Beverage Show, which focuses on educating viewers about wine and spirits; in April 2007, MOJO launched Uncorked, which focuses on the same subject matter. In June 2004, WealthTV launched Wealth on Wheels, which focuses on the latest trends in automotive technology; in August 2007, MOJO launched Test Drive, which focuses on the same subject matter. In June 2004, WealthTV launched Charlie Jones, Live to Tape, which features interviews of sports figures; MOJO shows Timeless, which also features interviews of sports figures. In June 2004, WealthTV launched Taste of Life, which educates viewers about behind the scenes experiences with travel, spirits, and food; in June 2006, MOJO launched After Hours, which focuses on a behind the scenes look at Los Angeles restaurants. In April 2005, WealthTV launched Innov8, which educates viewers about new ''gadgets and gizmos''; in December 2006, MOJO launched Geared Up, which focuses on high-end electronics and technology. WealthTV also provides an affidavit from Jedd Palmer, a consultant with more than twenty-five years of experience in the cable industry, who reviewed the programming schedules of MOJO and WealthTV and concludes that ''the overwhelming majority of the programming on both networks is the same, or very, very similar, in subject, type, feel, look and target audience.'' We conclude that the Palmer Declaration adequately set forth the basis for its conclusions.

8. Similar target demographics. WealthTV provides evidence that WealthTV and MOJO both are focused on the same target demographic—affluent males aged 25 to 49. WealthTV provides the results of a survey demonstrating that the demographics of WealthTV's viewers are affluent males aged 25 to 49. We find that the survey results set forth in the Kersey Declaration adequately set forth the basis for its conclusions. The results of the survey indicate that 71 percent of WealthTV's audience is male and 55 percent have incomes greater than $75,000. TWC provides similar results for MOJO—72 percent of its audience is male and 61 percent have incomes greater than $75,000. WealthTV also provides an excerpt from a 2004 presentation where WealthTV described its programming as geared towards males 25 to 49. WealthTV notes that the CEO of iN DEMAND has stated that MOJO is for ''men making more than $100,000 per year.'' MOJO has also used the term ''active affluents'' to describe its target audience. In his declaration, Jedd Palmer concludes that WealthTV targets the same audience as MOJO based on his review of marketing materials, press releases, and the networks' schedules and programming. Descriptions of WealthTV and MOJO's programming found on their respective Web sites further suggests the two networks offer similar programming.

9. Similar focus on a targeted audience rather than on general entertainment. WealthTV explains that iN DEMAND announced the launch of MOJO in March 2007, almost three years after the launch of WealthTV. WealthTV notes that, upon the launch of MOJO, TWC agreed to offer the channel across all of its systems carrying HD. While TWC claims that the service now known as MOJO was originally launched in 2003 under the name INHD, before the launch of WealthTV, WealthTV provides evidence that MOJO did not result from merely a name change and that MOJO is a targeted programming service whereas INHD was a general entertainment service. WealthTV notes that the CEO of iN DEMAND stated that INHD could not survive as ''general entertainment programming,'' thus INHD was converted into a targeted programming service with similar programming to WealthTV. In his declaration, Jedd Palmer concludes that ''MOJO is not a general entertainment service, but rather a highly targeted niche programming service.''

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

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

3. Differential Treatment

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

4. Harm to Ability to Compete

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

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

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

15. Second, TWC claims that the video marketplace is competitive and that no MVPD can afford to keep ''a programming service with attractive pricing and content off its systems based on ownership if doing so would cost it subscribers.'' We reject this claim because it would effectively require a program carriage complainant to demonstrate that an MVPD's failure to carry its service will cause subscribers to switch to other MVPDs that do carry the service. This is not a requirement of the program carriage statute or our rules. In addition, because TWC carries an affiliated programming service, MOJO, that provides programming that is substantially similar to WealthTV, there is even less reason for TWC's subscribers to switch to a competitor that carries WealthTV.

16. Third, TWC states that its decision to carry a channel depends on capacity constraints; the proven track record of success of the channel; the experience of the channel's management team; the subscriber interest in the channel; input from TWC's division management; and the terms offered by the channel. TWC argues that WealthTV has no proven audience demand and is led by individuals with no experience in creating a national cable network. WealthTV, on its behalf, has provided evidence demonstrating that it is an established channel with experienced management and proven consumer appeal, as demonstrated by: (i) Its linear carriage on 75 MVPDs to date; (ii) a sampling of e-mails from viewers reflecting their support for the channel; (iii) the interest in the channel expressed by representatives of individual TWC systems; and (iv) the decision of TWC's San Antonio system to launch WealthTV's HD VOD service in March 2007.

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

6. Conclusion

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

B. WealthTV v. BHN

19. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established *prima facie* showing of discrimination under Section 76.1301(c). BHN is an MVPD and the sixth largest cable operator in the nation as measured by number of subscribers. BHN is affiliated with MOJO, a video programming vendor. According to BHN, MOJO's orientation is ''exclusively male'' and is principal programming consists of sports, movies, music concerts, and reality series. On May 15, 2007, WealthTV provided BHN with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing BHN of its intent to file a program carriage complaint. As discussed further below, on March 13, 2008, WealthTV filed its complaint, alleging that BHN violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.

1. Background

20. WealthTV states that it has been seeking carriage on BHN systems since the summer of 2004. WealthTV describes its visits with BHN representatives in leading markets and claims that representatives of several BHN systems, including those in the Tampa Bay market, expressed an interest in carrying WealthTV, especially because Verizon FIOS TV offered WealthTV in both standard digital and HD formats in Tampa Bay. WealthTV claims that Anne Stith, formerly BHN's Director of Product Marketing for the Tampa Division, told WealthTV's President in July 2006 that BHN would like to launch WealthTV as soon as WealthTV completed a deal with TWC. WealthTV also notes that it

was making its service available for free through 2008. BHN and Ms. Stith, however, state that Ms. Stith had no authority to make programming commitments on behalf of BHN and that most programmers understood that BHN was covered by the programming agreements negotiated by TWC. Moreover, Ms. Stith states that her inquiries of WealthTV were purely for purposes of research and that she never made statements indicating that BHN would be interested in carrying WealthTV. When WealthTV's Vice President of Affiliate Relations, John Scaro, contacted BHN's President, Steve Miron, Mr. Miron informed Mr. Scaro that BHN is covered by the programming agreements that TWC negotiates with national networks and that further direct negotiations with BHN would not be an efficient use of time. Based on this, WealthTV concludes that BHN was prepared to carry WealthTV but for the absence of a carriage agreement with TWC. WealthTV states that BHN thus completely refused to negotiate with WealthTV. WealthTV states the BHN is required to comply with the program carriage rules and cannot use its reliance on TWC to negotiate programming agreements as a defense.

2. Similarly Situated

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

3. Differential Treatment

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

4. Harm to Ability To Compete

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

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

5. Alleged Business and Editorial Justifications for BHN's Refusal To Carry WealthTV

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

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

27. Third, BHN claims that its negotiations reflect ''sound business and editorial judgment.'' Specifically, BHN states that its decision to carry a channel depends on capacity constraints; whether the channel is carried by competitors; the experience of the channel's management team; the overall product mix of the BHN system; subscriber demand for the channel; input from BHN's division management; and the terms offered by the channel. BHN contends that WealthTV has no proven consumer demand and is managed by individuals with no experience in launching successful networks. WealthTV, for its part, has provided evidence demonstrating that it is an established channel with experienced management and proven consumer appeal, as demonstrated by: (i) Its linear carriage on 75 MVPDs to date; (ii) a sampling of e-mails from viewers reflecting their support for the channel; and (iii) the interest in the channel expressed by representatives of individual BHN systems. WealthTV also provides the results of an independent survey which reports that WealthTV's HD VOD product ranked fourth out of twenty HD services.

28. Fourth, BHN contends that virtually all of the MVPDs that do not carry WealthTV are not affiliated with MOJO, again demonstrating that decisions regarding carriage of WealthTV are not based on affiliation. For example, BHN notes that DBS operators, DIRECTV and DISH Network, do not carry WealthTV. WealthTV explains that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either. Moreover, WealthTV notes that Verizon, BHN's wireline competitor in Tampa, carries WealthTV but not MOJO. In any event,

we agree with WealthTV that the salient fact is that each owner of the cable-affiliated MOJO network has refused to carry WealthTV, and a discrimination claim requires the Commission to assess why these cable operators have refused to carry WealthTV but have decided to carry MOJO.

6. Conclusion

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

C. WealthTV v. Cox

30. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV established a *prima facie* showing of discrimination under Section 76.1301(c). Cox is an MVPD and the third largest cable operator in the nation. Cox is affiliated with MOJO, a video programming vendor. According to Cox, MOJO's orientation is ''exclusively male'' and its principal programming consists of sports, movies, music concerts, and reality series. On May 7, 2007, WealthTV provided Cox with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing Cox of its intent to file a program carriage complaint. As discussed further below, on March 27, 2008, WealthTV filed its complaint, alleging that Cox violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.

1. Background

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

2. Procedural Issues

32. Cox contends that the WealthTV complaint is barred by the program carriage statute of limitations because the complaint does not allege any act by Cox occurring within one year of the Complaint or the pre-filing notice. Rather, according to Cox, the last formal contact between WealthTV and Cox alleged in the complaint occurred no later than a June 7, 2005 letter; thus, Cox claims that the statute of limitations required WealthTV to file its complaint no later than June 7, 2006. We reject Cox's claim for the following reasons. First, WealthTV states that Cox never expressed a final decision to deny carriage to WealthTV and provides evidence that communications between Cox and WealthTV continued after June 2005. To further support its claim that the Complaint was filed in accordance with the statute of limitations, WealthTV explains that it was not until May 2006, one year prior to the pre-filing notice, when Cox refused to carry the multicast stream of a Las Vegas CBS affiliate that proposed to broadcast WealthTV programming. Cox argues, however, that this incident did not involve direct communication between Cox and WealthTV. WealthTV, however, claims that Leo Brennan of Cox-Las Vegas informed WealthTV of this decision in mid-May 2006. Second, WealthTV states that it was not until the launch of MOJO in March 2007 and the failure of subsequent carriage discussions when it became obvious to WealthTV that Cox intended to favor its affiliated MOJO service. Third, the plain language of the Commission's rules provides that the statute of limitations is satisfied if the program carriage complaint is filed within one year of the pre-filing notice, which WealthTV has done in this case.

3. Similarly Situated

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

4. Differential Treatment

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

5. Harm to Ability To Compete

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

36. In response, Cox does not dispute that 20 million subscribers are needed for a channel to achieve long-term viability, but states that it serves approximately six million MVPD households, thereby making carriage on its systems not necessary in order to reach the 20 million subscriber benchmark. The program carriage rules, however, apply to all MVPDs, regardless of their subscriber base. Cox also claims that WealthTV could meet this benchmark through carriage agreements with other MVPDs, including MVPDs with no affiliation with MOJO, such as DIRECTV and DISH Network, but that WealthTV has failed to reach carriage agreements with these MVPDs as well. We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces. Cox also asserts that the 20 million subscriber benchmark cannot apply to

an HD network such as WealthTV because there are fewer than 20 million HD customers nationwide. WealthTV explains, however, that its HD feed is also available as a downconverted SD feed that can be viewed by all subscribers. While Cox notes that WealthTV has obtained carriage on a number of MVPDs despite the lack of a carriage agreement with Cox, we agree with WealthTV that the more pertinent consideration is its ability to compete over the long term absent a carriage agreement with Cox.

6. Alleged Business and Editorial Justifications for Cox's Refusal To Carry WealthTV

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

38. Second, Cox claims that it declined to carry WealthTV based on ''sound business considerations and reasonable editorial judgment.'' Specifically, Cox states that its decision to carry a channel depends on the following criteria: Likely viewer appeal; the quality of the programming; whether the channel has a proven track record of attracting viewers or is associated with an established brand; the likelihood of the channel's success considering its management team and business plan; bandwidth management; proposed terms of carriage; the local needs of Cox's cable systems; and whether the channel has a regional appeal that might be attractive to certain systems. Cox claims that WealthTV does not justify carriage based on these criteria. WealthTV argues that it satisfies Cox's selection criteria. For example, WealthTV asserts that it is an established channel with experienced management; offered very favorable terms for carriage; and that Cox's alleged concern regarding bandwidth constraints from carrying an HD channel are not a valid concern because WealthTV was offering SD digital and VOD products in addition to HD. WealthTV also provides evidence that it has proven viewer appeal, as demonstrated by: (i) Its linear carriage on 75 MVPDs to date; (ii) a sampling of e-mails from viewers reflecting their support for the channel; (iii) the interest in the channel expressed by representatives of various Cox systems; (iv) the interest expressed by Cox-San Diego and a Cox programming network in San Diego (4SD—High Definition) in carrying WealthTV-produced content; and (v) the interest expressed by a CBS affiliate in Las Vegas in carrying WealthTV as a multicast channel, which the General Manager of Cox-Las Vegas refused to carry because of the potential for negative customer reaction if the CBS affiliate were to drop the WealthTV programming.

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

7. Conclusion

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

D. WealthTV v. Comcast

41. After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* showing of discrimination under Section 76.1301(c). Comcast is an MVPD and the largest cable operator in the nation as measured by number of subscribers. Comcast serves over 24 million basic video subscribers in 39 states and the District of Columbia. Comcast is affiliated with MOJO, a video programming vendor. According to Comcast, MOJO is aimed at 18- to-49-year-old males and its principal programming consists of sports, movies, and concerts. On May 3, 2007, WealthTV provided Comcast with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing Comcast of its intent to file a program carriage complaint. As discussed further below, on April 21, 2008, WealthTV filed its complaint, alleging that Comcast violated Section 76.1301(c) by refusing to carry WealthTV while granting carriage to its affiliated MOJO service.

1. Background

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

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

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

2. Similarly Situated

45. WealthTV provides similar evidence submitted in connection with its complaint against TWC purporting to demonstrate that WealthTV and MOJO are similarly situated. Comcast notes some general dissimilarities between specific programming on WealthTV and MOJO. Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to

demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

3. Differential Treatment

46. WealthTV argues that Comcast has treated WealthTV differently by carrying MOJO on its systems but refusing to carry WealthTV on those same systems. While Comcast claims that it recently offered WealthTV a hunting license coupled with a firm commitment for linear carriage of WealthTV on a system in the Chicago DMA, the salient issue for our analysis is that Comcast has launched its affiliated MOJO network on a nationwide basis but it has refused to carry WealthTV on the same terms.

4. Harm to Ability To Compete

47. As required by the program carriage statute and our rules, WealthTV has provided evidence that Comcast's refusal to carry WealthTV restrains its ability to compete fairly. WealthTV explains that Comcast's decision to carry MOJO while denying carriage to WealthTV provides MOJO with a first mover advantage with respect to the viewers and advertisers each network targets. WealthTV also claims that an independent channel must be available to at least 20 million subscribers in order to attract national advertisers and to achieve financial viability. WealthTV states that the inability to obtain carriage on Comcast systems makes it more difficult for independent programmers to reach this level of subscribership. WealthTV also explains that obtaining carriage in major markets where Comcast owns or operates cable systems, such as Philadelphia, Chicago, San Francisco, Boston, Washington, and Houston, is essential for attracting advertisers. According to WealthTV, cable systems and satellite companies look to Comcast in making programming decisions, thereby making Comcast's refusal to carry WealthTV particularly harmful. In addition, Comcast's refusal to carry WealthTV has harmed WealthTV's ability to bargain with advertisers and other cable systems.

48. In response, Comcast claims that carriage on its competitors, such as DIRECTV, DISH Network, AT&T, and Verizon, would allow WealthTV to reach its subscriber goals. We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces. Comcast also states that WealthTV could distribute its programming on alternative distribution platforms, such as VOD or the Internet. The program carriage statute, however, does not excuse an MVPD's discriminatory conduct based on the possibility of alternative distribution platforms.

5. Alleged Business and Editorial Justifications for Comcast's Refusal To Carry WealthTV

49. Comcast offers a number of alleged business and editorial justifications for its refusal to carry WealthTV but to carry MOJO. First, Comcast states that it declined to carry WealthTV on terms similar to MOJO based on its business and editorial judgment. Specifically, Comcast states that its decision to carry a channel depends on capacity constraints; the type and quality of the programming; the channel's track record of producing programming; evidence of consumer appeal for the channel; the experience of the channel's management team; and the terms offered by the channel. Based on these factors, Comcast contends that it determined that WealthTV does not warrant extensive carriage. WealthTV argues that it meets Comcast's carriage criteria, explaining that it is an established channel with experienced management and proven consumer appeal, as demonstrated by: (i) Its linear carriage on 75 MVPDs to date; (ii) a sampling of e-mails from viewers reflecting their support for the channel; (iii) the interest in the channel expressed by representatives of various Comcast systems as well as favorable comments about WealthTV made by Madison Bond, Comcast's Executive Vice President for Content Acquisition; and (iv) the results of an independent survey which reports that WealthTV's HD VOD product ranked fourth out of twenty HD services. WealthTV also notes that it offered very favorable terms for carriage.

50. Second, Comcast contends that most MVPDs do not carry WealthTV, including those that have no affiliation with MOJO, again demonstrating that decisions regarding carriage of WealthTV are not based on affiliation. For example, Comcast notes that DBS operators, DIRECTV and DISH Network, do not carry WealthTV. WealthTV explains, however, that the decision of DBS operators to refrain from carrying WealthTV is irrelevant because they do not carry MOJO either. Moreover, WealthTV notes that AT&T, Verizon, and other Comcast competitors carry WealthTV but not MOJO.

6. Conclusion

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

E. Conclusion

52. In the *Second Report and Order,* the Commission stated that it would identify specific behavior that constitutes discrimination on a case-by-case basis ''because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.'' *Second Report and Order,* 58 FR 60390, November 16, 1993. Any complainant alleging a violation of the prohibition in Section 616(a)(3) on discrimination must demonstrate that the alleged discrimination is ''on the basis of affiliation or nonaffiliation'' of a vendor, and that ''the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.'' *Id.;* 47 CFR 76.1302(c)(3). After reviewing the pleadings and supporting documentation filed by the parties, we find that WealthTV has established a *prima facie* case in the above-referenced cases under Section 76.1301(c). We also find that the pleadings and supporting documentation present several factual disputes as to whether TWC, BHN, Cox, and Comcast discriminated against WealthTV in favor of their affiliated MOJO service. Accordingly, we direct the ALJ to make and return a Recommended Decision to the Commission pursuant to the procedures set forth below within 60 days after release of this *Order* (*i.e.*, by December 9, 2008).

II. NFL Enterprises v. Comcast

53. After reviewing the pleadings and supporting documentation filed by the parties, we find that the NFL has established a *prima facie* case that Comcast (i) discriminated against the NFL Network in violation of Section 76.1301(c) of our rules; and (ii) required a financial interest in the NFL's programming as a condition for carriage of the NFL Network, in violation of Section 76.1301(a) of the Commission's rules. The NFL owns the NFL Network, a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's rules. *See* 47 U.S.C. 536(b); 47 CFR 76.1300(e). The NFL Network was launched in 2003 as a fan development vehicle to offer football-related programming. In addition to offering eight live NFL regular season games, the NFL Network

offers pre-season live and tape-delayed games as well as coverage of the NFL Scouting Combine, the NFL Draft, team training camps, and other programming. The NFL states that the NFL Network is an independent network that is not owned by any cable or satellite operator. The NFL Network is currently carried by over 240 MVPDs to 36 million subscribers nationwide. Comcast is the largest MVPD in the nation, with approximately 24.7 million subscribers. Comcast is affiliated with Versus (previously named the Outdoor Life Network (''OLN'')), the Golf Channel, as well as other video programming vendors.

A. Background

54. On April 17, 2008, the NFL provided Comcast with a pre-filing notice pursuant to Section 76.1302(b) of the Commission's rules informing Comcast of its intent to file a program carriage complaint. As discussed further below, on May 6, 2008, the NFL filed its complaint, alleging that Comcast (i) discriminated against the NFL Network in favor of its affiliated video programming vendors, including Versus and the Golf Channel, in violation of Section 76.1301(c) of the Commission's rules; and (ii) required a financial interest in the NFL's programming as a condition for carriage of the NFL Network, in violation of Section 76.1301(a) of the Commission's rules. In its Complaint, the NFL requests the Commission to (i) Find Comcast in violation of Sections 76.1301(a) and (c) of the Commission's rules; (ii) enjoin Comcast from further program carriage discrimination; (iii) order Comcast to carry the NFL Network on equitable terms that do not unreasonably restrict its ability to compete fairly, as determined by the Media Bureau; and (iv) order any other relief that may be appropriate. In its Reply, the NFL specifies further that the Commission should require Comcast to carry the NFL Network on the same tier as its affiliated national sports networks, Versus and the Golf Channel, beginning with the commencement of the fall 2008 football season. The NFL also contends that an extensive evidentiary investigation is not needed and that the Commission should promptly enter an Order providing its requested relief.

55. According to Comcast, the NFL approached Comcast regarding carriage of the NFL Network in 2003. Comcast claims that it was not interested in carrying the NFL Network because consumer interest in a football-only network without any live NFL games appeared weak; Comcast had bandwidth constraints; and Comcast was concerned about the soaring costs of sports programming. Comcast claims that around the time the NFL was seeking carriage for the NFL Network, it was also seeking to make available to MVPDs its NFL Sunday Ticket package and a package of eight live NFL regular season games (the ''Eight-Game Package''). Comcast states that it was interested in acquiring the rights to telecast the NFL Sunday Ticket because it had lost subscribers to DIRECTV which had exclusive rights to NFL Sunday Ticket. Comcast states that it was also interested in licensing the Eight-Game Package for its Versus network. According to Comcast, the NFL sought to make carriage of the NFL Network more attractive by coupling carriage of the NFL Network on a widely distributed tier with an opportunity for Comcast to bid on NFL Sunday Ticket and the Eight-Game Package. Comcast was concerned, however, that it might be forced to carry the NFL Network on a widely distributed tier even if it did not acquire the licensing rights to NFL Sunday Ticket and the Eight-Game Package.

56. In August 2004, the NFL and Comcast entered into a Negotiating Agreement regarding the NFL Sunday Ticket and the Eight-Game Package and an Affiliation Agreement regarding carriage of the NFL Network. In the Affiliation Agreement, Comcast agreed to carry the NFL Network on its digital basic tier (called the ''D2'' tier). The Affiliation Agreement provided that, with one exception, no Comcast system could distribute the NFL Network solely in a sports tier. The exception provided that Comcast would have the right to move the NFL Network from the digital basic tier to any tier (including a premium sports tier) if Comcast and the NFL did not reach an agreement by July 31, 2006 concerning carriage of the NFL Sunday Ticket or the Eight-Game Package (the ''Conditional Tiering Provision''). The NFL alleges that Comcast ''forced'' it to agree to the Conditional Tiering Provision. Comcast states that this provision was meant to address its concern that it might be forced to carry the NFL Network on a widely distributed tier even if it did not acquire the licensing rights to NFL Sunday Ticket or the Eight-Game Package. Comcast claims that the Conditional Tiering Provision was a fundamental part of the parties' agreement and that it would not have agreed to carry the NFL Network without this provision. Pursuant to this Affiliation Agreement, Comcast began to carry the NFL Network on its digital basic tier in 2004. According to the NFL, from 2004 until the summer of 2007, approximately 8.6 million Comcast customers received the NFL Network on the digital basic tier.

57. In November 2004, the NFL renewed its exclusive contract with DIRECTV for the NFL Sunday Ticket through 2010, but Comcast and the NFL continued negotiations regarding the Eight-Game Package. During the negotiations regarding the Eight-Game Package, Comcast claims that it reminded the NFL on more than one occasion that the Conditional Tiering Provision would provide Comcast with the right to move the NFL Network to a sports tier if Comcast did not obtain the rights to the Eight-Game Package for its Versus network.

58. On January 24, 2006, Comcast's Chief Executive Officer Brian Roberts met with then-NFL Commissioner Paul Tagliabue and others from the NFL. The NFL states that Mr. Tagliabue told Mr. Roberts that the NFL's then-current thinking was that it would not license the Eight-Game Package to Comcast. According to the NFL, Mr. Roberts ''threatened that if the NFL did not license the package to Versus, Comcast would drop the NFL Network from the 'D2' tier and shift it to an undesirable premium sports tier * * *.'' According to Comcast, Mr. Roberts was simply reminding the NFL of Comcast's rights under the Conditional Tiering Provision. Following this meeting, the NFL awarded the Eight-Game Package to the NFL Network.

59. According to the NFL, on January 27, 2006, Mr. Roberts ''warned'' Mr. Tagliabue that, because of the NFL's failure to license the Eight-Game Package to Comcast, the NFL's ''relationships with the cable industry are going to get very interesting.'' Mr. Tagliabue states that he believes that this statement foreshadowed Comcast's retaliation against the NFL for refusing to license the Eight-Game Package to Comcast. Mr. Roberts states that he has no recollection of making this statement. Rather, Mr. Roberts states that he expressed his disappointment about the NFL's decision and said that he foresaw that the NFL would continue to face difficulties persuading cable operators to provide the NFL Network with broad distribution given that the Eight-Game Package would add significantly to the price of the network but would not improve the overall appeal of the content.

60. Pursuant to the Affiliation Agreement, Comcast would have the right to show the Eight-Game Package on the NFL Network on its cable systems only if Comcast agreed to an increase in the license fee for the NFL

Network of up to $0.55 per subscriber per month. If Comcast did not agree to pay this increase in the license fee, then the NFL Network would show alternate programming on Comcast's systems at the times these games would be shown. On July 27, 2006, Comcast agreed to the fee increase. Comcast claims that it agreed to this fee increase only after confirming with the NFL that the Conditional Tiering Provision was mutually understood to remain in effect.

61. On September 24, 2006, Comcast announced its plans to launch the NFL Network on a premium sports tier on systems it had acquired from Time Warner. In October 2006, the NFL sued Comcast in New York state court claiming that Comcast did not have the right under the parties' agreements to carry the NFL Network on a premium sports tier. In the NFL's view, the Conditional Tiering Provision in the Affiliation Agreement was not triggered because Comcast and the NFL reached an agreement concerning carriage of the Eight-Game Package when Comcast agreed to pay an additional $0.55 per subscriber per month to deliver the NFL Network's broadcast of the Eight-Game Package via Comcast's cable systems. In Comcast's view, Comcast and the NFL did not reach an agreement concerning carriage of the Eight-Game Package because the games were awarded to the NFL Network and not to Comcast's affiliated Versus network. In May 2007, the trial court granted Comcast's motion for summary judgment. Following release of the trial court's order, Comcast formally notified the NFL of its intent to shift NFL Network to a sports tier in most of its systems. The NFL states that Comcast's action to shift the NFL Network from a digital basic tier to a premium sports tier reduced the number of Comcast subscribers that received the NFL Network from 8.6 million to 1.4 million. On February 26, 2008, a New York appellate court reversed the lower court's ruling and found that the parties' agreement was sufficiently ambiguous to create a triable issue of fact. In May 2008, the parties agreed to pursue non-binding mediation at the request of the court.

B. Procedural Issues

62. Comcast argues that the NFL complaint should be dismissed on any of the following procedural grounds. For the reasons discussed below, we decline to dismiss the complaint on any of these grounds.

1. Program Carriage Statute of Limitations

63. Comcast argues that the NFL complaint is barred by the program carriage statute of limitations. Comcast contends that, of the events that trigger the running of the program carriage statute of limitations, only the date on which the parties entered into a carriage agreement for the NFL Network is applicable in this case. Comcast states that the Affiliation Agreement was executed on August 11, 2004, thereby causing the statute of limitations to expire on August 11, 2005. Comcast asserts that its exercise of its contractual right to retier the NFL Network cannot be the triggering event because that is a decision made under the Affiliation Agreement and any disagreement regarding the terms of the agreement must be addressed in state court. In response, the NFL states that its complaint does not allege that the Affiliation Agreement violates the program carriage rules. Rather, the NFL claims that the issue is the legality of Comcast's act of retiering the NFL Network to a premium sports tier between June 1, 2007 and July 15, 2007. The NFL states that it filed its complaint within days after its pre-filing notice and less than a year after Comcast's action to retier the NFL Network, in compliance with the statute of limitations in Section 76.1302(f)(3). Comcast argues that the statute of limitations period cannot run from the date of the NFL Network's pre-filing notice. Comcast alleges that such an interpretation would allow a programmer to bring a program carriage complaint simply by sending a ''trigger'' letter at any time. The NFL contends, however, that the statute of limitations cannot be interpreted to run only from the date an existing agreement was executed because that would preclude a programmer from seeking relief regarding discriminatory acts that occurred greater than one year after the agreement was executed.

64. We conclude that the NFL filed its program carriage complaint in compliance with the program carriage statute of limitations. The alleged act of discrimination about which the NFL complains is Comcast's act of moving the NFL Network from a digital basic tier to a premium sports tier. This act occurred no earlier than June 2007. The NFL filed its program carriage complaint within one year of this act and within one year of its pre-filing notice. Accordingly, the NFL filed its complaint in compliance with the statute of limitations. We reject Comcast's argument that the one-year statute of limitations is triggered by the execution of the agreement because that act did not give rise to the discrimination claim and treating that act as the triggering event here would render Section 76.1302(f)(3) of our rules superfluous and frustrate enforcement of the statute and rules.

2. Dismissal Pending Litigation

65. Comcast argues that the NFL complaint should be dismissed pending the outcome of the state court litigation. Comcast states that the NFL and Comcast are involved in contract litigation involving the same set of operative facts that underlie the complaint, and the resolution of which is inextricably intertwined with the resolution of the complaint. Comcast contends that, if the court rules that the Conditional Tiering Provision was triggered, then it would be difficult if not impossible for the Commission to decide that Comcast violated the program carriage rules by exercising a right granted to it by the NFL. According to the NFL, however, the issue of the interpretation of the contract is irrelevant to the program carriage dispute. In the NFL's view, even if the court finds that the Conditional Tiering Provision was triggered and Comcast had the ''right'' to retier the NFL Network, Comcast could not exercise that right in a discriminatory manner that violates the program carriage rules. According to the NFL, Section 616 protects independent programmers and the public regardless of the terms of a private agreement. Comcast asserts that dismissal of the complaint pending litigation is consistent with Commission precedent. The NFL disputes this and notes that the Commission addressed a program carriage complaint filed by TCR Sports Broadcasting Holding, L.L.P. against Comcast despite the pendency of related litigation in state court. Comcast also claims that it would be a waste of resources for the Commission to consider the complaint because the parties have already decided to mediate the issues in dispute. According to Comcast, the NFL agreed to a broad mediation that would encompass all issues between the parties, including those in the program carriage complaint proceeding. According to the NFL, the state court litigation does not address the issues of program carriage discrimination addressed in the program carriage complaint proceeding. The NFL also states that, even if the court were to address program carriage discrimination, it would not be ripe for resolution until after the next football season and likely the one that follows (2009–2010). The NFL also notes that the parties have not agreed to seek a stay of the program carriage proceeding pending the outcome of the mediation.

Thus, the NFL argues that the mediation should not affect the Commission's consideration of the program carriage issues in this proceeding.

66. We decline to dismiss the NFL complaint pending the outcome of the state court litigation. The act of alleged discrimination about which the NFL complains is Comcast's act of moving the NFL Network from a digital basic tier to a premium sports tier. Whether or not Comcast had the right to retier the NFL Network pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules. Because the state court litigation will not resolve the NFL's program carriage claim, we conclude that we can proceed with the program carriage complaint despite the pendency of the litigation. Moreover, the parties have not agreed to stay this proceeding pending the outcome of mediation, and we find no cause to do so on our own motion.

3. Specificity of Requested Relief

67. Comcast argues that the NFL complaint should be dismissed because the complaint failed to state ''with specificity'' the relief requested. 47 CFR 76.6(a)(1). Comcast states that the NFL's requested relief does not include specific proposals regarding price, tier placement, and other carriage terms. The NFL argues that its complaint was sufficiently specific in seeking carriage by Comcast on non-discriminatory terms, *i.e.*, on the same terms and conditions as Comcast's affiliated national sports networks, Versus and the Golf Channel, including carriage on the expanded basic tier. We conclude that the NFL's requested relief was sufficiently specific under our rules and did not deprive Comcast of an adequate opportunity to respond in its Answer.

4. Signature and Verification Requirements

68. Comcast states that the NFL complaint does not comply with the signature and verification requirements applicable to program carriage complaints. The NFL does not dispute these claims, but argues that other program carriage complaints that did not comply with the signature requirement have been accepted by the Commission and that its complaint included a Declaration of an NFL executive certifying the accuracy of the factual statements in the complaint. We agree with Comcast that these instances of non-compliance are of ''limited consequence.'' Accordingly, on our own motion, we waive these requirements in the interests of resolving the important issues raised in the complaint in an expeditious manner and due to the presence of the Declaration of an NFL executive referenced above.

C. Discrimination Claim

1. Similarly Situated

69. The NFL alleges that Comcast has discriminated against the NFL Network in favor of its affiliated video programming vendors, including Versus and the Golf Channel, in violation of Section 76.1301(c) of the Commission's rules. The NFL argues that the NFL Network is a national sports network and therefore is similarly situated to the national sports networks that Comcast owns (Versus and the Golf Channel). The NFL also argues that the NFL Network, Versus, and the Golf Channel compete for programming, advertising, or target viewers. Comcast claims that the NFL Network is not a direct competitor to Versus or the Golf Channel in terms of programming, advertising, or target viewers. Comcast appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.

2. Differential Treatment

70. The NFL alleges that Comcast has discriminated against the NFL Network in violation of Section 76.1301(c) by carrying the NFL Network on a premium sports tier (which costs subscribers an additional $5–7 per month and is subscribed to by approximately 2 million Comcast subscribers) while Comcast carries the national sports networks that it owns (Versus and Golf Channel) on an expanded basic tier which has approximately 24 million subscribers. Comcast admits that it carries the NFL Network on a premium sports tier but carries Versus and the Golf Channel on its expanded basic tier.

3. Harm to Ability To Compete

71. As required by the program carriage statute and our rules, the NFL Network has provided evidence purporting to demonstrate that Comcast's refusal to carry the NFL Network on an expanded basic tier restrains its ability to compete fairly. The NFL explains how Comcast's decision to exclude the NFL Network from a basic tier has prevented the network from achieving economies of scale and has blocked the network from the most efficient distribution channel for the provision of national sports programming and the sale of advertising. The NFL explains that carriage of the NFL Network on a widely distributed tier is better for the network, viewers, and advertisers than carriage on a premium tier and that carriage on a premium tier unreasonably impedes the NFL Network's ability to compete fairly. With respect to the benefits for the network, the NFL discusses how basic tier carriage results in more subscribers which results in greater advertising revenues, greater license revenues, and a greater ability to compete for national advertisers and for content, and relieves the network from having to incur promotional expenses to convince consumers to subscribe to the premium tier. Moreover, the NFL explains that basic tier carriage maximizes a network's subscribership and, thus, advertising revenues, which allows for reduced license fees. The NFL also submits that carriage of a network on a basic tier benefits consumers by allowing the network to discipline the license fees of rival networks. In addition, the NFL claims that basic tier carriage benefits advertisers by enabling the NFL Network to discipline advertising rates of rival networks. The NFL explains that Comcast's affiliated national sports networks, Versus and the Golf Channel, benefit from Comcast's decision to carry the NFL Network on a premium tier. Specifically, placing the NFL Network in a premium sports tier harms its ability to compete with Comcast's affiliated national sports networks by (i) increasing the NFL Network's promotional costs and by reducing its advertising revenues; and (ii) providing Comcast's affiliated national sports networks with a competitive advantage in attracting advertisers and obtaining new content because these networks have greater distribution than their rival the NFL Network. The NFL also notes that Comcast's behavior to favor its affiliated national sports networks is similar to behavior that has been found to be a violation of the program carriage rules in another case.

72. Comcast argues that the NFL Network can achieve a critical mass of subscribers without carriage on Comcast. Comcast claims that there are multiple competing MVPDs that offer the NFL Network in all areas served by Comcast, such as DIRECTV, DISH Network, RCN, Verizon, and AT&T. According to Comcast, if its subscribers do not like Comcast's decision to place the NFL Network on a premium sports tier, they can switch to an MVPD that

provides the NFL Network with wider carriage. Comcast also argues that the fact that it already makes the NFL Network available to 24 million households undermines the NFL's claim that Comcast is unreasonably restraining the ability of the NFL Network to compete fairly.

4. Alleged Business and Editorial Justifications for Comcast's Refusal To Carry NFL Network on an Expanded Basic Tier

73. Comcast offers a number of alleged business and editorial justifications for its decision to place the NFL Network on a premium sports tier while placing Versus and the Golf Channel on an expanded basic tier. First, Comcast notes that the license fee for Versus is approximately $0.25 per subscriber per month and the license fee for the Golf Channel is less than $0.35 per subscriber per month, whereas the license fee for the NFL Network with the Eight-Game Package is $0.70 per subscriber per month. The NFL contends that Comcast has failed to consider the record evidence that the NFL Network receives substantially higher ratings than Versus and the Golf Channel, despite the fact that the NFL Network is carried on a premium tier. The NFL notes that the relatively lower license fees for Versus and the Golf Channel reflect their lower popularity. Moreover, NFL provides evidence that the NFL Network is less expensive than some other sports networks, such as ESPN and some RSNs. While Comcast argues that it acted to protect its customers by placing expensive programming such as the NFL Network on a premium sports tier, the NFL alleges that Comcast's decision to move the NFL Network to a premium sports tier did not result in a reduction in the monthly fees for its digital basic service, thereby undermining its claim that its decision to retier the NFL Network was intended to protect consumers.

74. Second, Comcast claims that Versus and the Golf Channel offer far more live and same-day event programming than the NFL Network. The NFL responds that the record evidence demonstrates that the NFL Network receives substantially higher ratings than Versus and the Golf Channel, despite the amount of live sports programming on Versus and the Golf Channel.

75. Third, Comcast argues that different carriage histories justify wide distribution for Versus and the Golf Channel and more limited distribution for the NFL Network. Specifically, Comcast notes that Versus and the Golf Channel launched in 1995 when there were greater opportunities for launch of a network, even on expanded basic. The NFL argues, however, that basing carriage decisions on carriage histories unfairly favors affiliated networks that have enjoyed a history of preferential treatment from vertically integrated MVPDs and does not serve to distinguish discriminatory from nondiscriminatory treatment, as the Act and our rules require.

76. Fourth, Comcast contends that cable subscribers already have access to a substantial quantity of live NFL programming on broadcast television and ESPN. Moreover, Comcast notes that the out-of-market games offered by the NFL Network are available on local broadcast channels in the home markets of the participating teams. The NFL submits that the consistently high ratings for the NFL Network refute Comcast's claim that there is a lack of demand for football programming. The NFL also notes that Comcast's previous decision to place the NFL Network on its digital basic tier demonstrates Comcast's view that the programming on the NFL Network has broad appeal.

77. Fifth, Comcast notes that some MVPDs, such as Charter, Time Warner, Cablevision, Bright House, Suddenlink, and Mediacom, do not carry the NFL Network at all, while others, such as Cox, carry the NFL Network on a sports tier. According to Comcast, the fact that other MVPDs that are not vertically integrated with national sports networks have decided to carry the NFL Network on a premium sports tier (or not at all) demonstrates that Comcast's decision to place the NFL Network on a premium sports tier was based on legitimate business reasons. The NFL contends that this claim is rebutted by the record evidence that demonstrates substantial carriage of NFL Network by various MVPDs on widely distributed tiers. The NFL notes that all of Comcast's major competitors—DIRECTV, DISH Network, Verizon, and AT&T—carry the NFL Network on a more widely distributed tier than the digital basic tier that Comcast formerly carried the NFL Network on before it was shifted to a premium sports tier. Moreover, the NFL states that most of the approximately 240 MVPDs that carry the NFL Network carry it on widely distributed tiers that are available in at least 70 percent of the households served by these MVPDs. In addition, the NFL claims that Comcast is the only MVPD that carries the NFL Network on a tier taken by less than ten percent of subscribers.

78. Finally, Comcast argues that Versus and the Golf Channel are carried on widely distributed tiers of virtually every major MVPD, even though these MVPDs have no ownership interest in either network. The NFL argues that the conduct of other cable operators is irrelevant to the issue of whether Comcast carries its affiliated programmers on more favorable terms than the NFL Network, an unaffiliated programmer.

5. Conclusion

79. In the *Second Report and Order,* the Commission stated that it would identify specific behavior that constitutes discrimination on a case-by-case basis "because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation." *Second Report and Order,* 58 FR 60390, November 16, 1993. Any complainant alleging a violation of the prohibition in Section 616(a)(3) on discrimination must demonstrate that the alleged discrimination is "on the basis of affiliation or nonaffiliation" of a vendor, and that "the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly." *Id.;* 47 CFR 76.1302(c)(3). After reviewing the pleadings and supporting documentation filed by the parties, we find that the NFL has established a *prima facie* case in the above-referenced case under Section 76.1301(c). We also find that the pleadings and supporting documentation present several factual disputes as to whether Comcast discriminated against the NFL in favor of its affiliated services. Accordingly, we direct the ALJ to make and return a Recommended Decision to the Commission pursuant to the procedures set forth below within 60 days after release of this *Order* (*i.e.,* by December 9, 2008).

D. Financial Interest Claim

80. The NFL claims that Comcast retaliated against the NFL by dropping the NFL Network from the digital basic tier to a premium sports tier after the NFL refused to grant Comcast rights to the Eight-Game Package for Comcast's Versus network. The NFL alleges that this amounts to a violation of Section 76.1301(a) because Comcast has required a financial interest in the NFL's programming as a condition for program carriage. The NFL argues that Comcast's behavior here is similar to behavior that has been found to present a *prima facie* case of a violation of the program carriage rules in another proceeding.

81. Comcast states that it never required or even requested an equity interest in the NFL Network. Comcast states that Section 76.1301(a) does not prohibit an MVPD from seeking

licensing rights in programming as a condition for carriage. Rather, Comcast states that this rule only prohibits an MVPD from requiring a financial interest in a ''program service'' as a condition for carriage. According to Comcast, the NFL incorrectly conflates Comcast's interest in acquiring the licensing rights to the Eight-Game Package with a demand for equity in the NFL Network. Comcast notes that it has no financial interest in the NFL Network or the NFL and yet it still carries the NFL Network. Accordingly, Comcast argues that it has not conditioned carriage of the NFL Network on obtaining an equity interest in the NFL Network.

82. In response, the NFL argues that the statute precludes an MVPD from requiring any ''financial interest'' in a program service, not merely an ''equity interest,'' and thus includes an MVPD's demand that a programmer provide licensing rights, equity interests, or other financial interests in a program service. The NFL submits that narrowly construing the term ''financial interest'' to pertain only to demands for an equity interest would fail to curb many anticompetitive abuses of vertically integrated MVPDs during carriage negotiations. Moreover, the NFL notes that Section 76.1301(a) prohibits an MVPD from requiring a financial interest in ''any program service,'' not merely the program service for which carriage is sought and not only in a ''video programming vendor.''

83. In the *Second Report and Order,* the Commission emphasized that the statute ''does not explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are otherwise permissible,'' and thus, that ''multichannel distributors [may] negotiate for, but not insist upon such benefits in exchange for carriage on their systems.'' *Second Report and Order,* 58 FR 60390, November 16, 1993. The Commission stated, however, that ''ultimatums, intimidation, conduct that amounts to exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or exclusivity rights for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616.'' *Id.* We find that the NFL has 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. We further find that the pleadings and documentation present several factual disputes as to whether Comcast's retiering of the NFL Network is the result of Comcast's failure to obtain a financial interest in the NFL's programming. Accordingly, we direct an Administrative Law Judge to hold a hearing, issue a recommended decision on the facts underlying the financial interest claim and a recommended remedy, if necessary, and then return the matter to the Commission within 60 days.

III. MASN v. Comcast

84. After reviewing the pleadings and supporting documentation filed by the parties, we find that MASN has established a *prima facie* case under Section 76.1301(c). MASN is an RSN that owns the rights to produce and exhibit the games of the Baltimore Orioles and Washington Nationals, among other sporting events. MASN is a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's rules. Pursuant to the by-laws of Major League Baseball (''MLB''), each MLB team is assigned television rights to certain geographic regions based on its determination of which teams' baseball fans in certain areas would or would not support. The home territory for MASN consists of the entire states of Virginia, Maryland, Delaware, and Washington, DC, and certain parts of southern Pennsylvania, eastern West Virginia, and a substantial part of North Carolina (the ''MASN Territory''). Comcast is the nation's largest MVPD and holds an attributable ownership interest in Comcast SportsNet Philadelphia (''CSN–P'') and Comcast SportsNet Mid-Atlantic (''CSN–MA''), among other networks.

85. On March 7, 2008, MASN provided Comcast with its pre-filing notice. MASN filed its complaint on July 1, 2008, alleging that Comcast discriminated against MASN in violation of the program carriage rules. MASN asks the Commission to (i) Declare that Comcast's conduct is a violation of the program carriage obligations under the Act and the Commission's rules; (ii) order mandatory carriage of MASN on the Comcast systems in the MASN Territory that do not carry MASN; (iii) if necessary, require Comcast to delete its affiliated programming to clear capacity for MASN; (iv) require Comcast to provide a timetable for the upgrade of the former-Adelphia systems; (v) grant MASN substantial damages that have resulted from Comcast's misconduct; and (vi) grant MASN such other and further relief as the Commission deems just and proper. Comcast urges the Commission to find MASN in violation of the rules prohibiting frivolous pleadings and to impose appropriate penalties, including monetary forfeitures.

A. Background

86. MASN claims that since 2005 it has sought carriage on all of Comcast's cable systems located within the MASN Territory, including in the Harrisburg-Lancaster-Lebanon-York DMA (''Harrisburg DMA''), as well as the Roanoke-Lynchburg DMA and the Tri-Cities DMA (the later two DMAs are referred to as the ''southwestern Virginia DMAs''). Comcast denies that MASN ever specifically sought carriage in Harrisburg and southwestern Virginia during negotiations in 2005 or 2006. In fact, Comcast claims that MASN's primary focus was to obtain carriage in its core Washington, DC and Baltimore markets before the end of the 2006 baseball season, and at no point did MASN express any specific interest in Comcast's Harrisburg or southwestern Virginia systems.

87. The parties failed to reach a carriage agreement. In June 2005, MASN filed a program carriage complaint alleging discrimination and that Comcast illegally demanded a financial interest in MASN as a condition of carriage. MASN requested that the Commission order Comcast to provide carriage of MASN on all Comcast systems in the MASN Territory. On July 21, 2006, while MASN's program carriage complaint against Comcast was pending, the Commission adopted the *Adelphia Order,* which provided unaffiliated RSNs with the opportunity to pursue commercial arbitration of program carriage disputes with Comcast. On July 31, 2006, the Commission found that MASN had established a *prima facie* case of discrimination in its pending program carriage complaint and referred the matter to an ALJ. The Commission stayed the decision to give MASN an opportunity to decide whether to proceed with the complaint or with the expedited arbitration provided in the *Adelphia Order.* MASN claims that pursuant to the *Adelphia Order* conditions it had only five days—until August 4, 2006—to decide whether to file an arbitration demand with the American Arbitration Association (''AAA'') or to proceed with the carriage complaint before an ALJ. Comcast disputes this claim, arguing that MASN could have elected to file a simple notice with the AAA (or the Commission) and ask that the proceeding be held in abeyance while the parties continued to negotiate. With the deadline for filing for arbitration

approaching, the parties entered into further negotiations.

88. MASN claims that on August 2, 2006, it e-mailed a revised version of the Term Sheet the parties had been negotiating to Comcast. As with the previous versions, MASN claims that the Term Sheet contained an intentionally blank list of the Comcast systems on which Comcast would carry MASN (the ''List of Systems''). MASN claims that it understood and intended that Comcast would fill in the List of Systems with all of Comcast's cable systems within the MASN Territory. MASN claims that on August 2, 2006, Comcast for the first time expressed concern that it could not immediately commit to carry MASN on systems serving a number of subscribers in Roanoke/Lynchburg and other Virginia areas that were served by systems that Comcast acquired from Adelphia because these systems lacked sufficient capacity.

89. MASN states that on the afternoon of August 4, 2006—just three hours before the arbitration deadline—Comcast transmitted to MASN via e-mail a revised version of the Term Sheet the parties had been negotiating. MASN states that Comcast's e-mail provided Comcast's List of Systems for the first time. MASN explains that Comcast gave no indication that the list excluded any of its systems except for the former-Adelphia systems in Roanoke/Lynchburg and other Virginia areas. Comcast explains that its revised draft of the Term Sheet specifically deleted the language providing for carriage of MASN on ''all Comcast systems'' and inserted language limiting Comcast's carriage obligation to the specific systems listed in the List of Systems. Comcast claims that MASN never asked whether any Comcast systems were excluded from the List of Systems or otherwise raised any objections to the List of Systems. MASN states that Comcast's e-mail accompanying the Term Sheet stated that the revised version ''reflects the deal we've been discussing over the past two days as well as some other clean-up changes.'' MASN claims that this representation is clear that the Term Sheet would memorialize and not alter the parties' discussions, which concerned carriage of MASN to all Comcast subscribers within the MASN Territory with the sole exception of the former-Adelphia subscribers previously discussed. Comcast disagrees, claiming that the deal Comcast and MASN had been discussing was for carriage on most, but not all, of Comcast's systems. Comcast claims that it never committed to carry MASN on all of its systems.

90. MASN claims that it attempted to review the List of Systems, but it lacked any independent means of verifying the contents, particularly with only three hours before the arbitration deadline. In response, Comcast states that MASN never claimed during the negotiations that it did not have adequate time to review the List of Systems. In addition, Comcast states that, because the List of Systems is less than two pages long with only 60 systems listed, it should not have taken hours to review. Comcast also claims that there were multiple public sources available to MASN that would have allowed it to easily determine which Comcast systems were and were not included in the List of Systems. MASN claims that none of these public sources would have allowed MASN to verify the contents of the List of Systems.

91. MASN and Comcast signed the Term Sheet on August 4, 2006, less than one-half hour before the deadline to file for arbitration. The Term Sheet included a Release which required MASN to withdraw its pending program carriage complaint against Comcast. MASN filed a Motion to withdraw its complaint on August 9, 2006. On August 15, 2006, an ALJ released a decision granting the Motion and terminating the proceeding.

92. In January 2007, four months after Comcast's first launch in September 2006 of MASN on some of its systems, MASN learned that Comcast did not intend to launch MASN on certain systems around Harrisburg. MASN then initiated an effort to document the Comcast systems where Comcast did not launch MASN. MASN determined that it had not been launched on Comcast systems in the Harrisburg, Roanoke/Lynchburg, and Tri-Cities DMAs, and in other small systems in Virginia and Pennsylvania as well as in other areas (collectively, the ''Unlaunched Systems''). Some of these systems are not former-Adelphia systems, which MASN claims Comcast never raised as an issue during negotiations. Some of these systems are former-Adelphia systems, but MASN argues that Comcast has provided no indication as to when these systems will be upgraded. Moreover, some former-Adelphia systems have been upgraded but are still not carrying MASN.

93. Thus, the Unlaunched Systems on which MASN is not being carried fall into two relevant categories: (i) Unlaunched Comcast systems in the MASN Territory that Comcast did not acquire from Adelphia (the ''Unlaunched Non-Former-Adelphia Systems''); and (ii) unlaunched Comcast systems in the MASN Territory that Comcast acquired from Adelphia (the ''Unlaunched Former-Adelphia Systems'').

94. For approximately a year, the parties engaged in negotiations for carriage of MASN on the Unlaunched Systems. These negotiations have not resulted in an agreement.

B. Procedural Issues

95. Comcast argues that the MASN complaint should be dismissed on the following procedural grounds. For the reasons discussed below, we decline to dismiss the complaint on any of these grounds.

1. Program Carriage Statute of Limitations

96. Comcast argues that the MASN Complaint is barred by the program carriage statute of limitations. Comcast contends that, of the three events that trigger the running of the program carriage statute of limitations, only the first event—the date on which the parties entered into the Term Sheet—is applicable in this case. Comcast notes that the Term Sheet was executed on August 4, 2006, and thus argues that the statute of limitations expired one year later—on August 4, 2007. Comcast points out that the Complaint was filed on July 1, 2008, almost 11 months after that date. MASN disagrees. MASN notes that the Term Sheet commits future carriage decisions to Comcast's ''discretion,'' but any such discretion is constrained by the non-discrimination obligations of the Act and the Commission's rules. MASN states that its Complaint is based on Comcast's discriminatory refusal to carry MASN on the Unlaunched Systems since 2007.

97. Comcast argues that MASN's claim regarding post-Term Sheet conduct is a new claim which MASN raised for the first time in its Reply. MASN disagrees, explaining that its Complaint was clear that its legal claims focused on Comcast's post-Term Sheet conduct. Based on our examination of the pleadings, we agree with MASN that its claim regarding post-Term Sheet conduct was not raised for the first time in its Reply. MASN explains that from the time it discovered that Comcast would not carry MASN on the Unlaunched Systems until the filing of its Complaint in July 2008, MASN attempted to reach a carriage agreement with Comcast. Because those negotiations had appeared to reach an impasse in March 2008, MASN sent a notice letter to Comcast on March 7, 2008. MASN filed its Complaint on July 1, 2008, well within one year of notifying Comcast, as required by Section 76.1302(f)(3).

98. In any event, Comcast argues that there can be no ''refusal to negotiate'' or ''refusal to carry'' with respect to any Comcast system in the MASN Territory because a Term Sheet and Release were already executed between the parties in August 2006. MASN responds that this line of argument is a contract-based defense to MASN's carriage claims that is legally and factually unfounded. Comcast also claims that there is no ''refusal to carry'' because Comcast carries MASN in the vast majority of Comcast systems in the MASN Territory. MASN responds that there is no legal authority to support Comcast's view that carriage of MASN on some Comcast systems extinguishes MASN's legal right to enforce its program carriage rights with respect to other Comcast systems.

99. We conclude that MASN filed its program carriage complaint in compliance with the program carriage statute of limitations. MASN's claims regarding program carriage discrimination apply to Comcast's refusal to exercise its discretion to carry MASN on the Unlaunched Systems after the Term Sheet was signed. As MASN notes, the Term Sheet committed Comcast's future carriage decisions, including carriage on systems not included in the List of Systems, to Comcast's ''discretion.'' The Term Sheet, however, does not indicate that MASN waived its statutory program carriage rights with respect to Comcast's exercise of such discretion. Accordingly, MASN's claims based on Comcast's exercise of its discretion pursuant to the Term Sheet are not subject to the one-year limitations period in Section 76.1302(f)(1). MASN explains that its negotiations with Comcast for carriage of MASN on the Unlaunched Systems appeared to reach an impasse in March 2008. MASN filed its program carriage complaint within one year of this date and within one year of its pre-filing notice. Accordingly, MASN filed its complaint in compliance with the limitations period in Section 76.1302(f)(3). The EchoStar case cited by Comcast is inapposite. *EchoStar Communications Corp.* v. *Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C.,* Memorandum Opinion & Order, 14 FCC Rcd 9327 (CSB, 1999), *aff'd, EchoStar Communications Corp.* v. *Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C.,* Memorandum Opinion & Order, 16 FCC Rcd 4949 (2001). In that decision, the Commission did not hold that a refusal to sell claim is barred when the parties reached a carriage agreement over one year earlier.

2. Res Judicata

100. Comcast claims that MASN's complaint is barred by the doctrine of *res judicata.* As required by the Release, MASN voluntarily sought and received from the Commission dismissal of its 2005 Complaint. Comcast asserts that voluntary dismissal with prejudice of a complaint constitutes a final judgment on the merits as to all claims encompassed therein. MASN disagrees, arguing that *res judicata* only applies where the prior and subsequent actions share a ''common nucleus of operative facts.'' MASN's past complaint against Comcast concerned Comcast's discriminatory refusal to carry MASN in response to its carriage requests beginning in 2005. MASN claims that the current action, however, is forward-looking and concerns Comcast's discriminatory refusal to carry MASN after the August 2006 date of the Release.

101. We conclude that the MASN complaint is not barred by *res judicata.* MASN's claims regarding program carriage discrimination apply to Comcast's refusal to exercise its discretion to carry MASN on the Unlaunched Systems after the parties settled their previous disputes and signed the Term Sheet. This presents a different set of facts and circumstances than those presented in the 2005 Complaint.

C. Similarly Situated

102. MASN claims that it is similarly situated to CSN–MA in the southwestern Virginia DMAs and to CSN–P in the Harrisburg DMA because the networks are all RSNs and they compete head-to-head in the same geographic areas. MASN explains that it is an RSN that provides live sports programming of major professional sports teams (the Orioles and Nationals). Similarly, Comcast's affiliated RSNs carry major professional sports programming throughout Comcast's footprint (including the Washington Wizards and Capitals (in the case of CSN–MA) and the Philadelphia Phillies and Flyers (in the case of CSN–P)). Comcast has not attempted to demonstrate that MASN, CSN–MA, and CSN–P are not similarly situated.

D. Differential Treatment

103. MASN explains that Comcast treats CSN–MA and CSN–P differently than MASN: On the majority of the Unlaunched Systems, Comcast carries CSN–P and/or CSN–MA, but Comcast has refused to carry MASN on those same systems.

E. Harm to Ability To Compete

104. As required by the program carriage statute and rules, MASN has provided evidence that Comcast's refusal to carry MASN on the Unlaunched Systems restrains its ability to compete fairly by (i) Preventing MASN from achieving maximum subscribership; (ii) restraining MASN's ability to compete for advertising revenues; (iii) restraining MASN's ability to compete for sports programming rights; and (iv) increasing MASN's costs. MASN has put forth evidence demonstrating that as an RSN it needs access to the maximum number of subscribers within its geographic footprints in order to compete optimally for advertisers and sports programming rights. In response, Comcast explains that MASN is carried very broadly in its territory, including by Comcast, DIRECTV, DISH Network, Cox, Verizon, RCN, and many others. Moreover, Comcast explains that MASN reaches over 5 million MVPD subscribers, making it one of the largest RSNs in the country. Comcast notes that it is carrying MASN to a number of subscribers and there is no evidence that its refusal to carry MASN in the ''outer reaches'' of Harrisburg and southwestern Virginia has in any way harmed MASN or affected its ability to compete.

F. Alleged Contract-Based, Business and Editorial Justifications for Comcast's Refusal to Carry MASN on the Unlaunched Systems

105. Comcast offers a number of contract-based and alleged business and editorial justifications for its decision to refrain from carrying MASN on the Unlaunched Systems.

1. Contract-Based Justifications

a. Term Sheet

(i) Unlaunched Non-Former-Adelphia Systems

106. Comcast argues that the unambiguous terms of the Term Sheet do not obligate it to carry MASN on the Unlaunched Non-Former-Adelphia Systems because those systems are not included in the List of Systems attached to the Term Sheet. Comcast asserts that the exclusion of these systems from the List of Systems was ''an important part of the negotiated compromise'' that led to the settlement of the carriage dispute between Comcast and MASN. MASN notes that the Term Sheet, however, commits future carriage decisions to Comcast's ''discretion,'' which is constrained by the non-discrimination obligations of the program carriage rules. By signing the Term Sheet, MASN

claims that it did not forfeit its rights to insist that Comcast abide by its program carriage obligations with respect to any Comcast system within the MASN Territory.

(ii) Unlaunched Former-Adelphia Systems

107. Comcast argues that, under the unambiguous terms of the Term Sheet, it is not obligated to carry MASN on the Unlaunched Former-Adelphia Systems because those systems are not included in the List of Systems. MASN states that it agreed to Comcast's proposal to exclude certain former Adelphia systems in Roanoke/Lynchburg and other small Virginia communities based on Comcast's representation that there was not sufficient capacity to carry MASN on these systems at the time. MASN explains that Comcast represented to the Commission that it would rapidly upgrade the former Adelphia systems it acquired in 2006, a representation that was crucial to the Commission's approval of the Adelphia transaction. MASN states that, given assurances made by Comcast to the Commission that it would soon upgrade the Former-Adelphia systems, thereby providing sufficient capacity to MASN, MASN viewed Comcast's representations to the Commission as sufficient protection that MASN would eventually be launched on the Former-Adelphia systems. Comcast states that it never committed to launch MASN in Roanoke and other Former-Adelphia systems in Virginia once those systems were upgraded, nor is such a commitment reflected in the Term Sheet. MASN notes that, as with the Non-Former-Adelphia Systems, the Term Sheet commits future carriage decisions to Comcast's "discretion," which is constrained by the non-discrimination obligations of the program carriage rules. By signing the Term Sheet, MASN claims that it did not forfeit its rights to insist that Comcast abide by its program carriage obligations with respect to any Comcast system within the MASN Territory.

b. Release

108. Comcast argues that the Term Sheet and Release comprehensively settled MASN's 2005 program carriage complaint against Comcast, in which MASN requested carriage on "all Comcast systems," including the Harrisburg and the southwestern Virginia systems, and thereby relinquished any right MASN may have had to seek any different deal with Comcast covering Comcast's cable systems in the MASN Territory. MASN notes, however, that the Release covers only conduct "until the date of this Release clause"—that is, up until August 2006. MASN's complaint, however, concerns Comcast's refusal to exercise its discretion to carry MASN since 2007 when MASN discovered it was not being carried on the Unlaunched Systems, well after the date of the Release. Accordingly, MASN contends that the Release does not justify Comcast's decision to refuse to carry MASN on the Unlaunched Systems but to carry its affiliated RSNs.

2. Editorial and Business Justifications

109. Comcast argues that its refusal to carry MASN on the Unlaunched Systems was based on its editorial and business judgment that carriage on those systems was not justified in light of a number of factors, including MASN's carriage cost (both licensee fee and bandwidth) and its allegedly low consumer appeal.

a. License Fee

110. Comcast contends that MASN would be among the most expensive networks carried in its Harrisburg and southwestern Virginia systems. MASN contends that Comcast has submitted no evidence, however, demonstrating that the cost of carrying MASN is materially greater than the cost of carrying Comcast's affiliated RSNs in the relevant DMAs. MASN claims that Comcast provides no justification for applying a stricter cost standard to unaffiliated programming than to affiliated programming. Moreover, while Comcast claims that a network's license fee is a relevant consideration in making carriage decisions, MASN argues that Comcast has not submitted any evidence that its decision-makers compared the cost of MASN to the cost of its affiliated RSNs in deciding to deny carriage to MASN on the Unlaunched Systems but to grant carriage to Comcast's affiliated RSNs. MASN provides the following evidence which it claims justifies its license fee for carriage on the Unlaunched Systems: (i) The carriage rates proposed by MASN are fair and reasonable in light of the popularity and value of live sports programming that MASN offers; (ii) every other major MVPD in the relevant parts of the MASN Territory other than Comcast (such as Cox, DIRECTV, and DISH Network) has agreed to carry MASN on their basic or expanded basic tier (or equivalent) at the rates MASN has proposed for Comcast; (iii) Comcast has agreed to the same carriage terms for MASN on its systems in other areas (some of which are farther away from Baltimore and Washington than the Harrisburg and southwestern Virginia DMAs); and (iv) MASN's rate is comparable to what other RSNs charge and MVPDs pay for comparable extended inner-market programming.

b. Bandwidth

111. Comcast argues that, because the Term Sheet requires carriage of MASN on Comcast's expanded basic tier, Comcast would be required to devote scarce analog capacity to carriage of the network. Moreover, Comcast notes that MASN would require two analog channels to accommodate both the Orioles' and Nationals' games. MASN argues that Comcast has provided no evidence regarding its bandwidth constraints on the Unlaunched Systems. In addition, MASN contends that Comcast has failed to justify why its alleged bandwidth constraints on the Unlaunched Systems justified denying carriage to MASN but granting carriage to Comcast's affiliated RSNs.

c. Demand

112. Comcast argues that its refusal to carry MASN on the Unlaunched Systems is justified based on MASN's low consumer appeal. Comcast notes that, even in its core Baltimore and Washington, DC, markets, MASN has the lowest viewership ratings of any RSN in the country, attracting less than one-third the average number of households of any other RSN. MASN argues that Comcast has submitted no evidence, however, demonstrating that the demand for MASN is materially different than the demand for Comcast's affiliated RSNs in the relevant DMAs. MASN also alleges that Comcast provides no justification for applying a stricter demand standard to unaffiliated programming than to affiliated programming. Moreover, while Comcast claims that demand is a relevant consideration in making carriage decisions, MASN submits that Comcast has not provided any evidence that its decision-makers compared the demand for MASN to the demand for its affiliated RSNs in deciding to deny carriage to MASN on the Unlaunched Systems but to grant carriage to Comcast's affiliated RSNs. MASN argues that the following demonstrates consumer demand for its programming on the Unlaunched Systems based on the following factors: (i) The decisions of 21 other major MVPDs throughout the MASN Territory to carry MASN (including Charter, Cox, DIRECTV, DISH Network, RCN, and Verizon); (ii) Comcast's efforts to keep the rights to the Orioles games and to acquire the rights to the Nationals games, both of which are now shown on MASN; (iii) prior to the launch of MASN, Comcast's

affiliated RSN carried Orioles games in the Harrisburg DMA; (iv) every other major MVPD serving Harrisburg (*e.g.*, DIRECTV, DISH Network) except Comcast has agreed to carry MASN (while Comcast notes that some small cable operators in Harrisburg that do not carry MASN, we do not believe that the decisions of a few small cable operators cast doubt on MASN's value given the evidence of extensive carriage of MASN by other MVPDs in Harrisburg); (v) prior to the launch of MASN, Comcast's affiliated RSN carried Orioles games on systems in southwestern Virginia; (vi) other major MVPDs serving southwestern Virginia (Cox, DIRECTV, DISH Network) have agreed to carry MASN (while Comcast argues that, with the exception of Cox's carriage of MASN in Roanoke, most other cable operators serving southwestern Virginia have made the same decision as Comcast not to carry MASN, we do not believe that the decisions of certain cable operators cast doubt on MASN's value given the evidence of extensive carriage of MASN by other MVPDs in southwestern Virginia, such as DIRECTV and DISH Network); (vii) evidence that demand for MASN's programming is comparable to or eclipses demand for Comcast's affiliated programming in MASN's core markets on a per-game ratings basis; (viii) MASN is among the top RSNs in the country with respect to live major professional sports programming; and (ix) MASN carries other programming of interest to subscribers in the Harrisburg and southwestern Virginia DMAs, including sporting events of local colleges. MASN also argues that Comcast's claim that there is no demand for MASN in Harrisburg is contradicted by the fact that Comcast has launched MASN on other systems in southern Pennsylvania, such as in York, Pennsylvania (25 miles from Harrisburg). Moreover, MASN submits that Comcast's claim that there is no demand for MASN on the periphery of the MASN Territory is contradicted by the fact that it carries CSN–MA on the same cable systems in southwestern Virginia despite the fact that CSN–MA's core sports programming of Washington Wizards and Capitals games is also based in the Washington DMA.

G. Conclusion

113. In the *Second Report and Order,* the Commission stated that it would identify specific behavior that constitutes discrimination on a case-by-case basis ''because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.'' *Second Report* and *Order,* 58 FR 60390, November 16, 1993. Any complainant alleging a violation of the prohibition in Section 616(a)(3) on discrimination must demonstrate that the alleged discrimination is ''on the basis of affiliation or nonaffiliation'' of a vendor, and that ''the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.'' After reviewing the pleadings and supporting documentation filed by the parties, we find that MASN has established a *prima facie* case in the above-referenced case under Section 76.1301(c). We also find that the pleadings and supporting documentation present several factual disputes as to whether Comcast discriminated against MASN in favor of its affiliated services. Accordingly, we direct the ALJ to make and return a Recommended Decision to the Commission pursuant to the procedures set forth below within 60 days after release of this *Order* (*i.e.*, by December 9, 2008).

IV. Referral to Administrative Law Judge or Alternative Dispute Resolution

114. We direct that an Administrative Law Judge resolve the factual disputes with respect to the claims and return a recommended decision and a recommended remedy, if necessary, to the Commission within 60 days of the release of this *Order* (*i.e.*, by December 9, 2008). Pursuant to Section 76.7(g)(2) of the Commission's rules, the parties will have ten days following release of this *Order* (*i.e.*, by October 20, 2008) to elect to resolve this dispute through ADR. 47 CFR 76.7(g)(2). Each party will notify the Commission, in writing, of its election within 10 days of release of this *Order* (*i.e.*, by October 20, 2008) and, in the event that ADR is chosen, will update the Commission monthly on the status of the ADR process. If the parties elect to resolve the dispute through ADR, the 60-day period for review by an Administrative Law Judge will be tolled. In the event that the parties fail to reach a settlement through the ADR process, the parties shall promptly notify the Commission in writing, and the 60-day period will resume upon receipt of such notification.

115. Upon receipt of the Administrative Law Judge's recommended decision and remedy, the Commission will make the requisite legal determinations as to whether (i) the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c); and (ii) only in the case of NFL Network v Comcast, whether Comcast has demanded a financial interest in the NFL's programming in exchange for carriage in violation of Section 76.1301(a). If necessary, the Commission will then decide upon appropriate remedies.

V. Ordering Clauses

A. WealthTV v. TWC

116. Accordingly, *it is ordered,* that Herring Broadcasting, Inc. d/b/a/ WealthTV's Complaint against Time Warner Cable Inc. is *Designated for Hearing* at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) Whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) If the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

117. *It is further ordered,* that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. 536, and 47 CFR 76.1300–1302, Herring Broadcasting, Inc. d/b/a WealthTV and Time Warner Cable Inc. submit to the Commission, in writing within ten days of this *Order* (*i.e.*, by October 20, 2008), their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

118. *It is further ordered,* that the Administrative Law Judge, within 60 days of this *Order* (*i.e.*, by December 9, 2008), will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

119. *It is further ordered,* that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

B. WealthTV v. BHN

120. Accordingly, *it is ordered,* that Herring Broadcasting, Inc. d/b/a/ WealthTV's Complaint against Bright House Networks, LLC is *Designated for Hearing* at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) Whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) If the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried in defendant's systems and such other remedies as the Administrative Law Judge recommends.

121. *It is further ordered,* that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. 536, and 47 CFR 76.1300–1302, Herring Broadcasting, Inc. d/b/a WealthTV and Bright House Networks, LLC submit to the Commission, in writing within ten days of this *Order* (*i.e.*, by October 20, 2008), their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

122. *It is further ordered,* that the Administrative Law Judge, within 60 days of this *Order* (*i.e.*, by December 9, 2008), will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

123. *It is ordered,* that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

C. WealthTV v. Cox

124. Accordingly, *it is ordered,* that Herring Broadcasting, Inc. d/b/a/ WealthTV's Complaint against Cox Communications, Inc. is *Designated for Hearing* at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) Whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) If the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

125. *It is further ordered,* that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. 536, and 47 CFR 76.1300–1302, Herring Broadcasting, Inc. d/b/a WealthTV and Cox Communications, Inc. submit to the Commission, in writing within ten days of this *Order* (*i.e.*, by October 20, 2008), their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

126. *It is further ordered,* that the Administrative Law Judge, within 60 days of this Order (*i.e.*, by December 9, 2008), will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

127. *It is further ordered,* that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

D. WealthTV v. Comcast

128. Accordingly, *it is ordered,* that Herring Broadcasting, Inc. d/b/a/ WealthTV's Complaint against Comcast Corporation is *Designated for Hearing* at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) Whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) If the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

129. *It is further ordered,* that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. 536, and 47 CFR 76.1300–1302, Herring Broadcasting, Inc. d/b/a WealthTV and Comcast Corporation submit to the Commission, in writing within ten days of this *Order* (*i.e.*, by October 20, 2008), their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

130. *It is further ordered*, that the Administrative Law Judge, within 60 days of this *Order* (*i.e.*, by December 9, 2008), will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

131. *It is further ordered*, that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

E. NFL v. Comcast

132. Accordingly, *it is ordered*, that NFL Enterprises LLC's Complaint against Comcast Corporation is *Designated for Hearing* at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) Whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) Whether the defendant has demanded a financial interest in the complainant's programming in exchange for carriage in violation of Section 76.1301(a);

(c) If the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c) or demanded a financial interest in the complainant's programming in exchange for carriage in violation of Section 76.1301(a), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other

remedies as the Administrative Law Judge recommends.

133. *It is further ordered,* that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. 536, and 47 CFR 76.1300–1302, NFL Enterprises LLC and Comcast Corporation submit to the Commission, in writing within ten days of this *Order* (*i.e.*, by October 20, 2008), their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

134. *It is further ordered,* that the Administrative Law Judge, within 60 days of this *Order* (*i.e.*, by December 9, 2008), will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

135. *It is further ordered,* that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

F. MASN v. Comcast

136. Accordingly, *it is ordered,* that TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network's Complaint against Comcast Corporation is *Designated for Hearing* at a date and place to be specified in a subsequent order by an Administrative Law Judge for a recommended determination of the following issues:

(a) Whether the defendant has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.1301(c);

(b) If the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant's programming should be carried on defendant's systems and such other remedies as the Administrative Law Judge recommends.

137. *It is further ordered,* that pursuant to Section 616 of the Communications Act of 1934, as amended, 47 U.S.C. 536, and 47 CFR 76.1300–1302, TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network and Comcast Corporation submit to the Commission, in writing within ten days of this *Order* (*i.e.*, by October 20, 2008), their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, monthly update the Commission on the status of that process.

138. *It is further ordered,* that the Administrative Law Judge, within 60 days of this Order (*i.e.*, by December 9, 2008), will resolve all factual disputes and submit a recommended decision and remedy, if appropriate.

139. *It is further ordered,* that if the parties elect Alternative Dispute Resolution, the period for Administrative Law Judge review shall be tolled, until such time as the parties notify the Commission that they have failed to reach a settlement through Alternative Dispute Resolution.

G. General Ordering Clauses

140. *It is further ordered* that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), in order to avail itself of the opportunity to be heard, each party to an above-captioned proceeding, in person or by its attorney, shall file with the Commission, by October 17, 2008, a written appearance stating that the party will appear on the date fixed for hearing and present evidence on the issues specified herein. In light of the deadline for a Recommended Decision contained in this *Order,* the deadline for written appearances set forth in 47 CFR 1.221 is waived and replaced with the deadline set forth above.

141. *It is further ordered* that, if any complainant in an above-captioned proceeding fails to file a written appearance by the deadline specified above, or has not filed prior to that deadline, a petition to accept, for good cause shown, a written appearance beyond the deadline, the Presiding Administrative Law Judge shall dismiss the relevant above-captioned proceeding with prejudice for failure to prosecute.

142. *It is further ordered* that all parties to the above-captioned proceedings will be served with a copy of this Order and the Erratum thereto by e-mail and by certified mail, return receipt requested.

143. *It is further ordered* that the Chief, Enforcement Bureau, shall be made a party to each of the above-captioned proceedings without the need to file a written appearance and will determine the Enforcement Bureau's level of participation in the proceedings.

144. *It is further ordered* that a copy of this Hearing Designation Order and the Erratum thereto or a summary thereof shall be published in the **Federal Register**.

Federal Communications Commission.

Monica Shah Desai,

Chief, Media Bureau.

[FR Doc. E8–26147 Filed 10–31–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

[Docket No. OP–1337]

Federal Reserve Bank Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

SUMMARY: The Board has approved the private sector adjustment factor (PSAF) for 2009 of $62.2 million and the 2009 fee schedules for Federal Reserve priced services and electronic access. These actions were taken in accordance with the requirements of the Monetary Control Act of 1980, which requires that, over the long run, fees for Federal Reserve priced services be established on the basis of all direct and indirect costs, including the PSAF. The Board has also approved maintaining the current earnings credit rate on clearing balances.

DATES: The new fee schedules and earnings credit rate become effective January 2, 2009.

FOR FURTHER INFORMATION CONTACT: For questions regarding the fee schedules: Jeffrey C. Marquardt, Deputy Director (202/452–2360); Jeffrey S.H. Yeganeh, Manager, Retail Payments (202/728–5801); Linda S. Healey, Senior Financial Services Analyst (202/452–5274), Division of Reserve Bank Operations and Payment Systems. For questions regarding the PSAF and earnings credits on clearing balances: Gregory L. Evans, Deputy Associate Director (202/452–3945); Brenda L. Richards, Manager, Financial Accounting (202/452–2753); or Rebekah Ellsworth, Financial Analyst (202/452–3480), Division of Reserve Bank Operations and Payment Systems. For users of Telecommunications Device for the Deaf (TDD) only, please call 202/263–4869. Copies of the 2009 fee schedules for the check service are available from the Board, the Federal Reserve Banks, or the Reserve Banks' financial services Web site at *http://www.frbservices.org.*

SUPPLEMENTARY INFORMATION:

I. Private Sector Adjustment Factor and Priced Services

A. *Overview*—Each year, as required by the Monetary Control Act of 1980,