REDACTED – PUBLIC VERSION

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11-1151

TCR SPORTS BROADCASTING HOLDING, L.L.P.,
D/B/A MID-ATLANTIC SPORTS NETWORK,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

AAA	American Arbitration Association
Adelphia Order	*Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, 21 FCC Rcd 8203 (2006)
Arbitration Award	Decision & Award, *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, No. 71-472-E-00697-07 (Am. Arb. Ass'n June, 2, 2008) (Margolis, Arb.) (JA698)
Arvan Decl.	Declaration of Steve Arvan (JA528)
Bureau Order	*TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd 15783 (Med. Bur. 2008) (JA1031)
Conway Decl.	Declaration of Paul Conway (JA531)
Denison Decl.	Declaration of John Denison (JA819)
FCC	Federal Communications Commission
HD	high definition
Hevey Decl.	Declaration of Carol Hevey (JA136)
Hevey Supp. Decl.	Supplemental Declaration of Carol Hevey (JA333)
Horowitz Decl.	Declaration of Howard Horowitz (JA184)
Kelly Decl.	Declaration of Brian Kelly (JA339)

Kelly Supp. Decl.	Supplemental Declaration of Brian Kelly (JA550)
Kent Decl.	Declaration of Jerald L. Kent (JA394)
King Decl.	Declaration of Joe King (JA159)
MAP	Media Access Project
MASN	Mid-Atlantic Sports Network
MLB	Major League Baseball
MVPD	multichannel video programming distributor
Order	*TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099 (2010) (JA1060)
Portelli Supp. Decl.	Supplemental Declaration of Anthony Portelli (JA554)
Program Carriage Order	*Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 (1993)
PSPPE	per-subscriber-per-major-pro-event
Rosenberg Decl.	Declaration of Andrew Rosenberg (JA563)
RSN	regional sports network
Third Hevey Decl.	Third Declaration of Carol Hevey (JA541)

Tr.	Transcript of Arbitration Hearing, *TCR Sports Broadcasting, L.L.P. v. Time Warner Cable Inc.*, No. 71-472-E-0069707 (May 20, 2008) (JA628)
TWC	Time Warner Cable

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BRIEF FOR RESPONDENTS

Federal law prohibits a cable operator from discriminating in its distribution of video programming "on the basis of" a programming vendor's "affiliation or nonaffiliation" with the cable operator. 47 U.S.C. § 536(a)(3). The Mid-Atlantic Sports Network ("MASN"), a programming vendor that is unaffiliated with Time Warner Cable ("TWC"), contends that TWC violated that law when it declined MASN's demand for carriage on TWC's most widely distributed tier of cable programming in North Carolina. After reviewing an extensive evidentiary record, however, the Federal

Communications Commission ("Commission" or "FCC") determined that TWC did not unlawfully discriminate against MASN. The Commission concluded that TWC rejected MASN's carriage proposal for legitimate and nondiscriminatory reasons – not because MASN was unaffiliated with TWC, but because the sparse demand in North Carolina for MASN's programming (principally baseball games of the Baltimore Orioles and Washington Nationals) did not justify the [redacted] cost of carrying the network on MASN's terms. In this case, MASN asserts that the FCC abused its discretion and improperly weighed the evidence in denying MASN's discrimination claim.

JURISDICTIONAL STATEMENT

The FCC released the order on review on December 22, 2010. *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099 (2010) (JA1060) ("*Order*"). MASN filed a timely petition for judicial review of the *Order* on February 17, 2011, within the 60-day deadline established by 28 U.S.C. § 2344. This Court has jurisdiction to review the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUE PRESENTED

Whether the FCC acted within its discretion in concluding, based on substantial record evidence, that TWC did not discriminate on the basis of affiliation when it refused to accept MASN's terms for carriage on TWC's North Carolina cable systems.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to MASN's brief.

COUNTERSTATEMENT OF THE CASE

In 2007, TWC declined MASN's demand for carriage throughout North Carolina on TWC's most widely distributed tier of cable service (known as the "analog" tier). TWC did so after MASN refused to consider alternative proposals by TWC, including carriage of MASN on TWC's "digital" tier (a tier with about [redacted] of subscribers) or carriage of MASN on TWC's analog tier only in eastern parts of North Carolina. After negotiations broke down, MASN filed for arbitration under a procedure established by the FCC. In June 2008, an arbitrator ruled that TWC had unlawfully discriminated against MASN on the basis of MASN's lack of affiliation with TWC. *Arbitration Award* (JA698).

TWC filed a petition for FCC review of the *Arbitration Award*. The FCC's Media Bureau denied TWC's petition and affirmed the arbitrator's decision. *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports*

Network v. Time Warner Cable Inc., 23 FCC Rcd 15783 (Med. Bur. 2008) (JA1031) ("*Bureau Order*").

After TWC sought further administrative review of the *Bureau Order*, the FCC granted TWC's application for review, reversed the *Bureau Order*, and ruled that TWC did not unlawfully discriminate against MASN. *Order* ¶ 1 (JA1060). The agency found substantial evidence that very few cable subscribers in North Carolina were interested in watching the games of the professional baseball teams from Baltimore and Washington – MASN's core programming. *Order* ¶¶ 13-18 (JA1067-74). For example, [redacted] of households with televisions in any of the major North Carolina viewing areas watched MASN during the relevant period, as compared with [redacted] of households in Baltimore. The record also showed that TWC would incur costs of approximately [redacted] per year if it carried MASN. *Order* ¶¶ 19-20 (JA1074-76). And TWC's executives submitted sworn – and unrefuted – testimony that "[c]onsiderations of affiliation never played a role" in their decision-making. *Order* n.117 (JA1076) (quoting Hevey Decl. ¶ 10 (JA139)). Based on the full record, the FCC concluded that TWC had provided legitimate and nondiscriminatory reasons for rejecting MASN's carriage proposal. MASN now petitions this Court to vacate the FCC's *Order*.

COUNTERSTATEMENT OF FACTS

A. Statutory And Regulatory Background

In the early 1990s, Congress observed that cable operators and cable programmers often have common owners. *See* Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), § 2(a)(5), 106 Stat. 1460; S. Rep. No. 102-92, at 24-27 (1991). This "vertical integration" between producers and distributors of cable programming gave cable operators "the incentive and ability to favor their affiliated programmers" and to "make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act, § 2(a)(5), 106 Stat. 1460.

To address concerns about the potentially anticompetitive effects of such integration, Congress in 1992 directed the FCC to establish regulations to prevent cable operators and other multichannel video programming distributors ("MVPDs") from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors." 47 U.S.C. § 536(a)(3). The Commission complied with this statutory mandate in 1993 by promulgating rules for adjudicating cable program carriage complaints. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC

Rcd 2642 (1993) (*Program Carriage Order*); *see also* 47 C.F.R. §§ 76.1300-76.1302 (FCC's implementing rules).

In adopting these rules, the Commission recognized that Congress carefully balanced the public interest in preventing unfair and exclusionary conduct by vertically integrated MVPDs against the public interest in allowing legitimate business practices in a competitive marketplace. *See Program Carriage Order*, 9 FCC Rcd at 2643 ¶ 1 ("we have endeavored to serve the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace"). "In implementing the provisions of" the program carriage statute, the Commission explained, "our regulations must strike a balance that not only pr[o]scribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations." *Id.* at 2648 ¶ 14. Thus, the Commission "follow[ed]" Congress's "directive to 'rely on the marketplace, to the maximum extent feasible, to achieve greater availability' of the relevant programming." *Id.* at 2648 ¶ 15 (quoting 1992 Cable Act, § 2(b)(2), 106 Stat. 1463).

In 2006, the FCC took further action to deter unlawful discrimination on the basis of affiliation when it granted applications to transfer control of Adelphia's cable systems to TWC and Comcast. *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*"). As a condition for approving those transactions, the Commission required TWC and Comcast "to engage in commercial arbitration" with any unaffiliated regional sports network ("RSN") "that is unable to reach a carriage agreement with either firm, should the RSN elect to use the arbitration remedy." *Id.* at 8287 ¶ 189.[1]

Under the *Adelphia Order*'s new arbitration procedure, if Comcast or TWC denies carriage to "an RSN unaffiliated with any MVPD," the RSN "may submit its carriage claim to arbitration." *Adelphia Order*, 21 FCC Rcd at 8287 ¶ 190. The arbitrator must decide whether carriage is required under the FCC's program carriage rules and, if so, which party's final offer will govern the terms of carriage. *Id.* at 8288 ¶ 190. Within 30 days after

[1] For purposes of this arbitration condition, the FCC defined an RSN as "any non-broadcast video programming service" that (1) "provides live or same-day distribution within a limited geographic region of sporting events" of any team that is a member of various specified sports leagues (including, *inter alia*, Major League Baseball and the National Basketball Association), and (2) "in any year, carries a minimum of either 100 hours of programming" covering such events or "10% of the regular season games of at least one sports team" that satisfies the first criterion. *Adelphia Order*, 21 FCC Rcd at 8336.

publication of the arbitrator's decision, any "party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award." *Id.* at 8339.

The Commission offered this arbitration remedy only to RSNs because it recognized the unique appeal of those networks to cable subscribers. "RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game." *Adelphia Order*, 21 FCC Rcd at 8259 ¶ 124.[2]

B. The Carriage Dispute Between TWC And MASN

MASN owns the rights to televise nearly all the games of two Major League Baseball ("MLB") teams: the Baltimore Orioles and the Washington Nationals. MASN began televising Nationals games in 2005 and Orioles games in 2007. *Bureau Order* ¶¶ 7-8 (JA1034-35). MASN is not affiliated with any MVPD.

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[2] The Commission suspended the arbitration remedy in September 2007, "with the exception of those disputes in which" the remedy had "already been invoked." *Comcast Corp.*, 22 FCC Rcd 17938, 17946-47 ¶ 24 (2007). Because MASN requested arbitration before the FCC suspended the remedy, the suspension did "not affect" the arbitration between MASN and TWC. *Id.* at 17947 n.66.

TWC owns multiple cable systems in several states. It is the largest provider of pay television service in North Carolina, *Bureau Order* ¶ 5 (JA1034), and is affiliated with several RSNs, *Order* ¶ 6 & n.68 (JA1063-64, 1069).

In March 2005, MASN approached TWC with a proposal for carriage of MASN on TWC's North Carolina cable systems. *Bureau Order* ¶ 10 (JA1036). During negotiations with MASN, TWC was open to "discussing carriage of MASN on a digital sports tier in North Carolina." Letter from Michelle Kim, Vice President, TWC, to David C. Frederick, Counsel for MASN, July 27, 2006, at 1 (JA70); *see also* Rosenberg Decl. ¶ 3 (JA564). TWC also inquired whether MASN would be willing to consider carriage on an analog tier in TWC's cable systems in eastern North Carolina.[3] Rosenberg Decl. ¶ 5 (JA564-65). MASN rejected both suggestions, insisting that it was entitled to carriage on one of TWC's two analog tiers throughout the state.

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[3] Analog tiers are dedicated to the transmission of programming in an analog (as opposed to digital) format. TWC offers two analog tiers: a "basic" tier, which includes broadcast stations and public access services; and a "cable programming services" or "expanded basic" tier, which includes a number of cable programming networks as well as the basic tier channels. All of TWC's customers subscribe to the basic tier, and approximately [redacted] of TWC's customers subscribe to the expanded basic tier. *Order* ¶ 5 (JA1063). "[R]oughly [redacted] of TWC's customers" in North Carolina – *i.e.*, more than [redacted] – "subscribe to TWC's digital basic tier, which features a multitude of additional programming services." *Id.*; *see also* Third Hevey Decl. ¶ 21 (JA549).

Id. ¶¶ 3, 5 (JA563-65). MASN asserted that TWC's carriage of MASN on a digital tier "would be discriminatory" because TWC carries its affiliated RSNs on analog tiers, which reach more subscribers. Letter from David C. Frederick, Counsel for MASN, to Michelle Kim, Vice President, TWC, August 2, 2006, at 1 (JA134).

In May 2007, after it became clear that MASN "refused to consider carriage on a tier other than an analog tier," TWC rejected MASN's demand for carriage. Letter from Henk Brands, Counsel for TWC, to David C. Frederick, Counsel for MASN, May 16, 2007, at 1 (JA77). TWC explained that it was "unconvinced that MASN's programming" would be "sufficiently popular in North Carolina to justify adding [MASN] to an analog tier." *Id.* at 2 (JA78). Nonetheless, TWC reiterated its willingness to discuss carriage of MASN on a digital tier. *Id.* at 1-2 (JA77-78); *see also Order* n.6 (JA1061).

Less than a month later, MASN filed a formal arbitration demand with the American Arbitration Association ("AAA"), invoking the *Adelphia Order*'s arbitration remedy. Arbitration Demand, June 5, 2007 (JA11). MASN contended that, by refusing to carry MASN on an analog tier, TWC was discriminating against MASN. *Id.* at 19-24 (JA29-34).

The following year, an arbitrator upheld TWC's claim, *Arbitration Award* at 11-16 (JA708-13), and awarded MASN carriage on TWC's North Carolina cable systems on the terms proposed by MASN. *Id.* at 22 (JA719).[4]

C. The *Bureau Order*

In October 2008, the FCC's Media Bureau denied a petition by TWC requesting *de novo* review of the arbitrator's decision. *Bureau Order* ¶ 1 (JA1032). In affirming the arbitrator's decision, the Bureau determined that MASN had made a *prima facie* showing of unlawful discrimination on the basis of affiliation, and that TWC's refusal to carry MASN on an analog tier throughout North Carolina unreasonably restrained MASN's ability to compete fairly. *Id.* ¶¶ 26-31 (JA1041-46). Although the Bureau acknowledged that TWC had "produced some evidence to buttress its claim" that it did not deny carriage on the basis of affiliation, *id.* ¶ 32 (JA1046), the Bureau nonetheless concluded that the company had failed to produce sufficient evidence to rebut MASN's *prima facie* case. *Id.* ¶¶ 32-41 (JA1046-51). In particular, the Bureau faulted TWC for failing to produce what it regarded as sufficient "contemporaneous" documentary evidence

[4] The arbitrator who issued the *Arbitration Award* was the second arbitrator assigned to this case. The AAA removed a previous arbitrator after TWC filed a motion raising "doubts about" that arbitrator's "impartiality" and his "appearance of bias." *Arbitration Award* at 3 n.2 (JA700).

memorializing TWC's decision-making regarding MASN's demand for carriage. *Id.* n.127 (JA1046). The Bureau reasoned that this "dearth" of contemporaneous documentary evidence "calls into question whether TWC accorded any serious consideration to MASN's proposal." *Id.*

Concluding that MASN's final offer – rather than TWC's – more closely approximated the "fair market value" of the right to carry MASN, the Bureau ordered TWC to begin carrying MASN on an analog channel on its North Carolina cable systems. *Id.* ¶¶ 42, 48, 55 (JA1051-52, 1055-56, 1059).[5]

D. The Order On Review

In December 2010, the FCC granted TWC's application for review, reversed the *Bureau Order*, and concluded that MASN had "failed to demonstrate that TWC has impermissibly discriminated pursuant to [47 U.S.C. § 536(a)(3)] and its implementing rules." *Order* ¶ 10 (JA1065). The Commission found that the Bureau "fail[ed] to give due credit to TWC's proffered reasons for declining to carry MASN on an analog tier." *Order* ¶ 12 (JA1067). The Commission explained that "although MASN has proven

[5] Under the terms of the *Adelphia Order* and the FCC's rules, TWC was not required to commence carriage of MASN (nor has it done so to date) while the Commission reviewed the arbitrator's decision and the *Bureau Order*. *See Adelphia Order*, 21 FCC Rcd at 8339; 47 C.F.R. § 76.1302(g)(1); *Order* n.7 (JA1061).

a *prima facie* case of program carriage discrimination, TWC has provided evidence establishing legitimate and non-discriminatory reasons for its decision." *Order* ¶ 10 (JA1065-66).[6]

In addition to contemporaneous e-mail correspondence reflecting a TWC executive's concern about lack of customer interest in the Orioles games that MASN carried, *see* MASN Exh. 13 (JA201-02), TWC submitted sworn testimony from executives who affirmed that "[c]onsiderations of affiliation never played a role" in TWC's carriage decision. *Order* n.117 (JA1076) (quoting Hevey Decl. ¶ 10 (JA139)).

After reviewing the entire record *de novo*,[7] the Commission found substantial evidence that, as part of an overarching cost-benefit analysis, TWC's carriage decision was motivated by three legitimate and

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[6] The Commission noted that the parties disagreed about "the appropriate legal framework for assessing program carriage discrimination" (*Order* ¶ 11 (JA1066)) – specifically, the applicable burden of proof once a claimant establishes a *prima facie* case of discrimination. MASN contended that, after a claimant makes such a showing, the burdens of production and persuasion shift to the defendant to establish legitimate and nondiscriminatory reasons for its carriage decision. By contrast, TWC argued that, after the claimant establishes a *prima facie* case, the defendant must "produce evidence of legitimate and non-discriminatory reasons for its carriage decision," and the claimant "would then have the burden of showing" that the defendant's asserted reasons "constitute pretexts for discrimination." *Id.* The Commission found it unnecessary to resolve this burden-shifting question, concluding that "TWC would prevail under either framework." *Id.*

[7] *See Order* n.5 (JA1060-61) (citing, *inter alia*, 47 U.S.C. § 155(c)(5)).

nondiscriminatory considerations: (1) the weak demand for MASN's programming in North Carolina; (2) the substantial rights fees that TWC would incur in carrying MASN on an analog tier; and (3) the opportunity cost of dedicating analog channel capacity to MASN. *Order* ¶¶ 13-20, 23 (JA1067-77). In light of this evidence, the Commission accepted TWC's explanation that it "determined that the benefits of adding MASN to an analog tier in North Carolina would not outweigh the substantial costs." *Order* ¶ 12 (JA1067). This "refute[d] MASN's claim of unlawful program carriage discrimination" because TWC's challenged carriage decision was "not based on [MASN's] affiliation or non-affiliation." *Order* ¶ 11 (JA1066). Rather, TWC's rejection of MASN's demand for analog carriage on all of TWC's North Carolina cable systems "was motivated by a variety of factors . . . unrelated to MASN's affiliation status," including "MASN's lack of strong appeal to North Carolina residents and the high cost of carrying MASN." *Order* ¶ 12 (JA1067).

First, record evidence supported TWC's assertion that "limited demand for MASN's programming in North Carolina" played a critical role in TWC's "refusal to carry MASN on an analog tier." *Order* ¶ 13 (JA1067). The record established that, despite carriage of MASN in North Carolina by four MVPDs, MASN's Nielsen ratings in the state (a widely used measure of the

size of MASN's audience) were very low. In each of the major markets in North Carolina, MASN scored ratings of less than [redacted]. In other words, less than [redacted] percent of households with a television in the principal North Carolina markets watched MASN. That negligible rating was less than one fifteenth of the [redacted] rating that MASN achieved in Baltimore, the home of the Orioles. *Id.* (JA1068). Even if MASN's North Carolina ratings were tripled to account for the fact that MASN was only available to about [redacted] in the state, those ratings would remain very low, [redacted]. *Id.*

The Commission further noted that "almost every other cable system in North Carolina has declined to carry MASN." *Order* ¶ 18 (JA1073). Even cable operators that were unaffiliated with RSNs – and therefore had no incentive to engage in affiliation-based discrimination – had rejected MASN's proposal for carriage in North Carolina. For example, TWC submitted evidence that Suddenlink – a cable operator with no ownership interest in any programming service – refused to carry MASN on an analog tier in North Carolina for many of the same reasons given by TWC. *See* Kent Decl. ¶¶ 1-2, 4-5, 7 (JA394-96). The fact that cable operators with no affiliated RSNs reached the same conclusion as TWC provided "independent

evidence that TWC did not engage in discrimination on the basis of affiliation." *Order* ¶ 18 (JA1073).

Second, the Commission found credible evidence that "the high cost" of carrying MASN played a role in TWC's rejection of MASN's proposal. *Order* ¶ 19 (JA1074). MASN demanded a monthly rights fee of [redacted] for each subscriber who received MASN. That translated into roughly [redacted] per year for TWC to carry MASN on an analog tier. *Order* ¶ 19 & n.104 (JA1074). TWC pointed out that this substantial rights fee "would cause TWC to incur a loss absent either an increase in rates" – which could lead some subscribers to drop TWC's service – "or MASN's attraction of a large number of new TWC subscribers, an unlikely event given the thin demand for MASN in North Carolina." *Order* ¶ 19 (JA1074-75).

The record thus supported TWC's assessment that MASN's "unremarkable ratings" could not justify its "considerable price." *Order* ¶ 19 (JA1074). In particular, TWC produced evidence that "MASN provides significantly less value to TWC's North Carolina subscribers than do other RSNs." *Id.* For example, "MASN is more [redacted]," which carries the [redacted] and [redacted] in the state than MASN does. *Order* n.105 (JA1074-75). Evidence also showed that while RSNs generally charge

"about [redacted] per subscriber per month for a full ratings point," MASN is "about [redacted] as expensive." *Id.* (JA1074) (quoting Petition for Review at 27 (JA750)).

Third, the Commission credited TWC's evidence that it considered "the channel capacity demanded by MASN" when assessing the cost of MASN's proposal. *Order* ¶ 20 (JA1075). Analog carriage of MASN "would require a full 6 MHz channel on TWC's analog tier for MASN as well as a second 'overflow' channel for MASN2, the service that carries games when the Orioles and Nationals play simultaneously." *Id.* The record showed that in the face of increasing competition from other MVPDs, TWC "is seeking to free up as much spectrum as possible to add new HD [*i.e.*, high definition] services." *Id.* TWC explained that "allocating a full analog channel to MASN" would "place TWC at a competitive disadvantage by imposing an opportunity cost of two or three fewer HD services." *Id.*

The Commission rejected the Bureau's finding that TWC unlawfully discriminated by treating MASN differently from News 14, a TWC-affiliated news channel that for a brief time devoted a small fraction of its airtime to televising games played by the National Basketball Association's Charlotte Bobcats. *Order* ¶ 14 & n.70 (JA1069-70). The Bureau had found that although MASN's Orioles telecasts and News 14's Bobcats broadcasts were

"comparable in terms of demand" in North Carolina, TWC carried News 14 – but refused to carry MASN – on an analog tier. *Bureau Order* ¶ 29 (JA1044). The Commission pointed out that the Bureau's finding of discrimination ignored substantial disparities in the cost of carrying News 14 and MASN. The record demonstrated that it would cost TWC considerably more – "both in terms of money and bandwidth" – to carry MASN on an analog tier than it cost to carry Bobcats games on News 14. *Order* ¶ 14 (JA1070). For one thing, after TWC purchased the Bobcats rights for [redacted], it did not incur any additional [redacted] when carrying those games. By contrast, carriage of MASN would impose on TWC [redacted] per subscriber per month. *Id.* (JA1069-70).

Moreover, unlike carriage of MASN, carriage of the Bobcats games did not require TWC to allocate a full analog channel. A mere "two percent" of News 14's air time – which consisted overwhelmingly of news and weather reporting – was devoted to Bobcats games. *Id.* (JA1070). In light of this evidence, the Commission concluded that legitimate concerns about cost – not impermissible considerations of affiliation – caused TWC to treat MASN differently from News 14.

The Commission also rejected MASN's argument that TWC applied a different standard to MASN than it applied to its own affiliates. The agency

found evidence that TWC "evaluated MASN's demand for carriage in the same manner that it has evaluated other such requests." *Order* ¶ 13 (JA1069). Specifically, the Commission determined that TWC based its decisions to carry its own affiliated RSNs on the same cost-benefit considerations that informed its decision to reject MASN's proposal. *Order* n.68 (JA1069).

On the basis of its *de novo* review of the evidence, the Commission concluded that TWC "has established legitimate reasons for its carriage decision that are borne out by the record and are not based on" MASN's nonaffiliation with TWC. *Order* ¶ 11 (JA1066). The Commission therefore vacated "the Bureau's directive that TWC carry MASN on an analog tier in its North Carolina systems." *Order* ¶ 2 (JA1061).[8]

SUMMARY OF ARGUMENT

I. Congress enacted the program carriage statute to guard against anticompetitive conduct that could "unreasonably restrain the ability" of unaffiliated video programming vendors "to compete fairly." 47 U.S.C. § 536(a)(3). For that reason, the statute bans only discrimination "on the basis of" a programmer's "affiliation or nonaffiliation." *Id.*

[8] Because the Commission found no unlawful discrimination by TWC, it did not reach the merits of any other issues raised in this proceeding. *Order* ¶ 23 (JA1077).

Contrary to MASN's suggestion, the program carriage statute does not require vertically integrated cable operators to treat *all* affiliated and unaffiliated networks equally. In particular, the statute does not foreclose vertically integrated cable operators from declining to carry unaffiliated programming services for legitimate business reasons having nothing to do with affiliation. For example, a cable operator could reasonably conclude that the benefits of carrying a particular unaffiliated network do not justify the costs because the network has little appeal to the cable operator's subscribers. Carriage decisions of this sort do not unreasonably restrain a programmer's ability to compete fairly. They simply reflect the normal workings of the competitive market for video programming.

II. In this case, MASN claims that TWC's refusal to give MASN analog carriage throughout North Carolina was unlawfully based on MASN's lack of affiliation with TWC. But TWC produced substantial evidence – including sworn testimony from its executives and contemporaneous evidence – that it based its carriage decision on legitimate business considerations, including the limited demand for MASN in North Carolina, the high cost of carrying MASN, and the opportunity cost of allocating scarce channel capacity to MASN. The Commission reasonably determined that

even if TWC had the burden of rebutting MASN's *prima facie* case, it provided sufficient evidence to carry that burden.

Regional sports programming is often regarded as "must-have" programming because it provides live coverage of games played by local or popular teams. But the teams featured by MASN (the Baltimore Orioles and the Washington Nationals) are neither located in North Carolina nor popular there – a conclusion that is not altered by MLB's decision to deem them "home teams." The record documented a lack of demand for MASN's programming in the state. While coverage of Orioles and Nationals games may be in demand in the Baltimore and Washington areas, it simply is not "must have" programming in North Carolina. The record further demonstrated that analog carriage on MASN's terms would impose substantial costs on TWC: an annual rights fee of almost [redacted] and an impediment to the launch of additional HD services that subscribers prefer. In light of that evidence, the FCC reasonably determined that TWC based its carriage decision on legitimate and nondiscriminatory business judgments.

None of MASN's challenges to TWC's evidence has merit. MASN primarily contends that the Commission could not reasonably accept TWC's sworn testimony in the absence of contemporaneous evidence. The Commission rightly rejected that argument. The record in fact contains

contemporaneous evidence: An e-mail exchange between TWC executives in 2006 buttresses TWC's testimony that the limited demand for MASN in North Carolina played a key role in TWC's rejection of MASN's proposal. In any event, the Commission properly rejected the claim that TWC's testimony should be disregarded because it did not constitute contemporaneous documentation of TWC's decision. As the Commission noted, nothing in the record suggests that cable operators typically document their carriage deliberations, and nothing in the program carriage statute or FCC rules requires such documentation. Indeed, in analogous cases, courts have rejected arguments that only contemporaneous evidence will suffice to rebut allegations of pretextual discrimination.

III. The Commission reasonably found that TWC applied the same cost-benefit analysis to MASN that it uses to make all of its carriage decisions. In particular, the agency concluded that the same considerations that justified TWC's refusal to give MASN analog carriage on all of its North Carolina cable systems also supported TWC's carriage of its affiliated RSNs.

MASN asserts that TWC applied a more stringent "ratings standard" to MASN than to News 14, a TWC affiliate carried on an analog tier. It points to evidence that Orioles games achieved marginally higher ratings in some North Carolina markets than Charlotte Bobcats telecasts on News 14. But the

Commission explained that TWC had a legitimate reason for distinguishing between MASN and News 14. The cost of analog carriage of MASN far exceeded the cost of carrying Bobcats games on News 14, both in terms of money and bandwidth.

IV. Contrary to the assertions of MASN and its amici, the Commission's *Order* does not harm competition or consumers. In enacting the program carriage statute, Congress carefully balanced the public interest in preventing unfair and exclusionary conduct by vertically integrated MVPDs against the public interest in allowing legitimate business practices in a competitive market. Because the statute prohibits only discrimination "on the basis of affiliation or nonaffiliation," 47 U.S.C. § 536(a)(3), and because the FCC reasonably concluded that TWC did not engage in any such discrimination here, the FCC's decision fully comports with the public interest.

STANDARD OF REVIEW

The FCC's *Order* must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). The Court

may not "substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). "Deference is due where the agency has examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made." *Ohio Valley*, 556 F.3d at 192 (internal quotation marks omitted).

MASN challenges the FCC's factual findings concerning TWC's rejection of MASN's carriage proposal. The Court "must affirm" these findings "as long as they are supported by substantial evidence on the record as a whole." *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1043-44 (4th Cir. 1997) (internal quotation marks omitted); *see also* MASN Br. 29 (acknowledging that "[t]he FCC's factual findings are reviewed under the 'substantial evidence' standard"). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It constitutes more than a scintilla but less than a preponderance of evidence." *NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 260 (4th Cir. 2008) (internal quotation marks omitted).

This is the same deferential standard that applies when courts determine whether there is sufficient evidence to justify a refusal to direct a jury verdict. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359,

366-67 (1998) (in assessing whether an agency's decision is supported by substantial evidence, the court "must decide whether on this record it would have been possible for a reasonable jury to reach the [agency's] conclusion"); *Kasey v. Sullivan*, 3 F.3d 75, 79 (4th Cir. 1993) ("If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is substantial evidence.") (internal quotation marks omitted); *see also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 428 (4th Cir. 2001).

Accordingly, the "possibility of drawing two inconsistent conclusions from" the same evidentiary record "does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. FMC*, 383 U.S. 607, 620 (1966). Even assuming that the FCC could reasonably "have reached a different conclusion" based on the record in this case, "it is not [the Court's] task to reweigh the evidence and determine which of the competing views is more compelling. It is instead to ensure that substantial evidence supports the [Commission's] judgment." *Ngarurih v. Ashcroft*, 371 F.3d 182, 189 (4th Cir. 2004) (internal quotation marks omitted).

ARGUMENT

I. THE COMMISSION CORRECTLY CONCLUDED THAT THE PROGRAM CARRIAGE STATUTE DOES NOT PROHIBIT CABLE OPERATORS FROM REJECTING CARRIAGE PROPOSALS FOR REASONS UNRELATED TO A PROGRAMMING VENDOR'S AFFILIATION.

By its terms, the cable program carriage statute only prohibits discrimination "on the basis of" the "affiliation or nonaffiliation" of video programming vendors. 47 U.S.C. § 536(a)(3). It does not require cable operators to accept requests for carriage by unaffiliated RSNs such as MASN in all circumstances. Rather, as the Commission recognized, a cable operator may treat an unaffiliated programmer differently from affiliated networks, "so long as it can demonstrate that such treatment did not result from the programmer's status as an unaffiliated entity." *Order* ¶ 12 (JA1067).

MASN appears to argue for a much broader ban on discrimination. According to MASN, "[t]reating an unaffiliated network worse than a cable-affiliated network reflects discrimination 'on the basis of affiliation or non-affiliation' that Congress prohibited." MASN Br. 34 (quoting 47 U.S.C. § 536(a)(3)). This categorical statement suggests that cable operators can *never* differentiate between their affiliated networks and unaffiliated programmers in any way that would benefit the affiliates.

MASN misconstrues the law. Under the program carriage statute, a cable operator may permissibly choose to carry an affiliated network rather than an unaffiliated network for reasons independent of the networks' affiliation status – for example, because the affiliated network is more popular or less costly to carry than the unaffiliated network. In other words, as two economists acknowledged in an amicus brief supporting MASN, drawing distinctions between affiliated and unaffiliated programmers "may be permissible if justified by legitimate business considerations." Litan-Hahn Amicus Br. 3.

That conclusion not only comports with the text of the statute and the Commission's corresponding regulation, *see* 47 C.F.R. § 76.1301(c), but also with "the congressional intent to prohibit unfair or anticompetitive actions without . . . precluding legitimate business practices common to a competitive marketplace." *Program Carriage Order*, 9 FCC Rcd at 2643 ¶ 1.

MASN nonetheless implies that the program carriage statute bars cable operators from making *any* carriage decisions that tend "to favor the interests of [their] affiliated networks" – even if such decisions are fully justified by legitimate business judgments and are *not* based on affiliation. MASN Br. 55. In MASN's view, the statute and the FCC's rules impose a "federal equal-treatment obligation" on vertically integrated cable operators. MASN

Br. 37.[9] In this context, however, "equal treatment" cannot mean that vertically integrated cable operators must treat affiliated and unaffiliated networks identically, regardless of any differences in their popularity or carriage costs. If that were the case, TWC, which carries all of its affiliated RSNs on analog tiers, would be compelled to allocate analog channels to *any* unaffiliated RSNs that requested carriage in North Carolina – even the networks of the Seattle Mariners and the Los Angeles Dodgers, baseball teams located thousands of miles from North Carolina.

The law does not require such a counterintuitive result. Cable operators need not treat all programmers equally. Congress has specified that no cable system shall "be subject to regulation as a common carrier . . . by reason of providing any cable service." 47 U.S.C. § 541(c). Thus, unlike a regulated common carrier, which must "serve indifferently all potential users,"[10] a cable operator has no obligation to treat all cable programming

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[9] The amicus brief filed by Media Access Project ("MAP") suffers from the same misconception. *See, e.g.,* MAP Amicus Br. 22-23 (cable operators must treat their affiliated programmers and their "non-affiliate competitors equally"); *see also Arbitration Award* at 8 n.5 (JA705) (opining that, to the extent employment-law standards apply, "the law that has developed around 'disparate impact,' or indirect, discrimination in employment would seem to offer the closer analogy").

[10] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

services "indifferently." It is free to exercise its discretion to carry or not carry any cable networks it chooses, so long as it does not discriminate "on the basis of" video programmers' "affiliation or nonaffiliation," 47 U.S.C. § 536(a)(3), and otherwise complies with relevant statutory and regulatory requirements.

Therefore, to engage in prohibited program carriage discrimination, TWC would have had to treat MASN differently from TWC-affiliated networks *because MASN was not affiliated with TWC*. The FCC found that MASN established "a *prima facie* case of program carriage discrimination." *Order* ¶ 10 (JA1066). But after conducting a careful examination of the record, the Commission reasonably concluded that TWC "provided evidence establishing legitimate and non-discriminatory reasons for" its rejection of MASN's carriage demand – reasons unrelated to MASN's lack of affiliation with TWC. *Id.* In the Commission's considered judgment, TWC's evidence was "sufficient to refute MASN's *prima facie* case." *Order* ¶ 12 (JA1067).

MASN argues that the record does not support the FCC's finding of no affiliation-based discrimination. For the reasons discussed below, MASN's claims lack merit.

II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN FINDING THAT TWC BASED ITS REJECTION OF MASN'S PROPOSAL ON A COST-BENEFIT ANALYSIS UNRELATED TO AFFILIATION.

A. Record Evidence, Including Sworn Testimony And Contemporaneous Documentation, Supported The Commission's Finding That TWC Did Not Refuse Carriage "On The Basis Of Affiliation Or Nonaffiliation."

During the arbitration, TWC submitted substantial evidence that it rejected MASN's carriage demand based on an evaluation of the relative costs and benefits of carrying MASN. Carol Hevey, the TWC executive who oversees the company's North Carolina cable systems, testified that "[c]onsiderations of affiliation never played a role" in the decision. Hevey Decl. ¶ 10 (JA139). She explained that "TWC makes carriage decisions on the basis of a host of factors," including "present subscriber interest in individual programming services," "channel-capacity constraints," and "cost factors." *Id.* ¶ 9 (JA139). In a series of sworn declarations, Hevey described how those factors led TWC to reject MASN's demand for analog carriage throughout North Carolina.

After "discussions with TWC employees who are charged with marketing in North Carolina," Hevey and her staff "determined that MASN's programming would not be appealing to a large number of North Carolina subscribers." Hevey Decl. ¶ 14 (JA141); *see also* Hevey Supp. Decl. ¶¶ 7-8

(JA335). A number of considerations informed that determination. Hevey noted that "when Orioles games were carried on FSN-South in past years, ratings in North Carolina were low – considerably lower than ratings for [Atlanta] Braves games" carried on FSN-South in North Carolina. Hevey Decl. ¶ 15 (JA141). Furthermore, at the time MASN requested carriage, no broadcast television or radio station in North Carolina carried Orioles or Nationals games, and no North Carolina newspaper gave the games special coverage. *Id.* ¶ 16 (JA141). The poor performance of the Orioles and Nationals in recent years raised additional questions about the teams' ability to spark fan interest in North Carolina. *Id.* ¶ 17 (JA142).[11]

Contrary to MASN's assertion that TWC failed to "produce a single contemporaneous document supporting even one" of the reasons offered by Hevey (MASN Br. 45), contemporaneous e-mail correspondence corroborates Hevey's testimony that the limited demand for Orioles games in North Carolina played a key role in TWC's decision-making.

[11] Hevey noted that the Orioles "have not reached the playoffs since 1997" and (particularly at the time of the carriage discussions between TWC and MASN) the Nationals were "a new team without much of a following even in Washington, D.C." Hevey Decl. ¶ 17 (JA 142). The Nationals have yet to enjoy a winning season since the team moved to Washington from Montreal in 2005.

In August 2006, Mickey Carter, TWC's director of programming, e-mailed Tom Smith, a marketing executive for TWC's cable systems in eastern North Carolina. *See* MASN Exh. 13 (JA202). Carter asked Smith whether his systems received Baltimore Orioles games on FSN-South. Smith replied in a September 2006 e-mail that his systems received Orioles games but not Atlanta Braves games. MLB black-out rules required FSN-South to black out Braves games in eastern North Carolina because MLB had awarded exclusive television rights for that region to the Orioles and Nationals. *See Order* n.79 (JA1070). Smith complained that the black-out rule – precluding coverage of the Braves – was "a big sore spot" for TWC's systems in eastern North Carolina: "We are in the Baltimore footprint [designated by MLB] and have NO Baltimore fans to speak of. There is a HUGE Atlanta fan base here, and we have no way to deliver what they want." MASN Exh. 13 (JA201); *see also* Hevey Supp. Decl. ¶ 8 (JA335).

In another e-mail to Carter later that day, Smith expressed skepticism that the Orioles could "create a fan base" in North Carolina: "[W]e've given them 30 years to do so. In Wilmington, we even started carrying the old Home Team Sports" – a network that previously televised Orioles games – "back in 1985," yet the Orioles "have not ever been able to develop a following" in North Carolina. MASN Exh. 13 (JA201).

MASN argues that TWC, in rejecting MASN's proposal, relied solely "on a 'gut' reaction that North Carolina 'can't have many Orioles fans.'" MASN Br. 47 (quoting MASN Exh. 13 (JA201)). To the contrary, as the e-mail exchange makes clear, Smith confirmed Carter's impression that North Carolina has few Orioles fans even in the eastern part of the state (which is closest to Baltimore). MASN Exh. 13 (JA201). This contemporaneous documentary evidence is consistent with – and bolsters – TWC's testimonial evidence.[12]

In her sworn testimony, TWC executive Hevey also recounted that she and her staff "took account of the cost of MASN's programming." Hevey Decl. ¶ 22 (JA144). She projected that if TWC had agreed to pay the rights fee demanded by MASN – "[redacted] per subscriber per month" – cable bills would have significantly increased for the vast majority of TWC's subscribers, even though "very few of them are interested in watching MASN." *Id.* Hevey estimated that TWC would have to pay MASN "almost [redacted] per year" for analog carriage, and that MASN would not generate enough revenue to cover this substantial rights fee "unless its carriage would

[12] Smith sent his e-mails to Carter in September 2006, long before MASN requested arbitration. Thus, MASN is wrong in asserting (Br. 47) that "TWC waited until after MASN initiated this proceeding to make any attempt" to verify the lack of demand for Orioles games in North Carolina.

result in the addition or retention of almost [redacted] [TWC] subscribers" – an unlikely prospect given the minimal interest in MASN's programming in North Carolina. Third Hevey Decl. ¶ 16 (JA547).

Finally, Hevey and her staff considered the opportunity cost associated with analog carriage of MASN. Hevey Decl. ¶¶ 11-13 (JA139-40); Third Hevey Decl. ¶¶ 8-10 (JA543-44). Hevey pointed out that because TWC had no vacant channels on its analog tiers in North Carolina, analog carriage of MASN would require TWC to delete an existing programming service (at the risk of disappointing viewers of that service). Hevey Decl. ¶ 11 (JA139-40). Moreover, if TWC allocated an analog channel to MASN, it would be unable to use that channel to add two or three HD services to its program lineup at a time when its competitors are expanding their HD offerings in response to subscriber interest in such services. Third Hevey Decl. ¶¶ 9-10 (JA544).

In another sworn declaration, Brian Kelly (a TWC executive who reports to Hevey) confirmed that he, Hevey, and other TWC employees "participated in numerous discussions" concerning the weak demand in North Carolina for MASN's telecasts of Orioles and Nationals games. Kelly Decl. ¶ 17 (JA344). They concluded that there was "relatively little interest in the Orioles" in North Carolina "and even less in the Nationals." *Id.* (JA344-45). When Kelly "personally made inquiries concerning the ratings" for FSN-

South's North Carolina telecasts of Orioles games in past seasons, he discovered that those "ratings were low." *Id.* (JA345).

The FCC reasonably "credit[ed]" Hevey's and Kelly's testimony. *Order* ¶ 21 (JA1076). Indeed, the agency found substantial support in the record for each of the three reasons TWC offered for denying MASN analog carriage throughout North Carolina: (1) the low demand for MASN in the state; (2) the high cost of carrying MASN on an analog tier; and (3) the costs of allocating scarce channel capacity. *Order* ¶¶ 13-20 (JA1067-76).[13]

1. The Record Reflected Low Demand For MASN's Programming In North Carolina.

Consistent with TWC's sworn testimony, the Commission found substantial evidence that the demand for MASN in North Carolina was low. In each of the state's major markets, MASN scored a rating of [redacted] – a tiny fraction of MASN's [redacted] rating in Baltimore, the Orioles' home city. *Order* ¶ 13 (JA1068). Even if MASN's North Carolina ratings were tripled to account for the fact that MASN was only available to about [redacted]

[13] Citing a case involving a First Amendment claim under 42 U.S.C. § 1983, MASN suggests that this Court has viewed with skepticism "post hoc" explanations for a defendant's conduct. MASN Br. 43 (citing *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000)). In the case MASN cites, however, the Court accepted such explanations because they were "substantiated by the balance of the record." *Goldstein*, 218 F.3d at 357. Here, as in *Goldstein*, the record supports the proffered explanation.

[redacted] in the state, those ratings would remain at an anemic level: [redacted]. *Id.*; Portelli Supp. Decl. ¶ 8 (JA556).

MASN complains that the Commission should have compared MASN's North Carolina ratings to the ratings of other RSNs in "extended inner" markets (*i.e.,* markets outside the networks' home markets). MASN Br. 59. But MASN offers no evidence that such a comparison would have compelled the Commission to revise its assessment of consumer demand for MASN in North Carolina. To the contrary, TWC submitted evidence showing that other RSNs' ratings outside their home markets far exceed MASN's ratings in North Carolina.[14]

Furthermore, TWC was not alone in rejecting MASN's carriage request. "[T]he fact that almost every other cable system in North Carolina [had] declined to carry MASN" confirmed "a lack of interest in MASN's programming statewide." *Order* ¶ 18 (JA1073). Even cable operators that were not vertically integrated chose not to carry MASN in North Carolina. One of those cable operators, Suddenlink, rejected MASN's carriage demand

[14] For example, the Pittsburgh Pirates' RSN scored a [redacted] rating in Erie, Pennsylvania; and the New York Mets' RSN posted a [redacted] rating in Albany, New York. *See* Portelli Supp. Decl. Exh. 1 (JA561). These ratings are over seven times greater than MASN's North Carolina ratings during the relevant period.

for many of the same reasons given by TWC. Kent Decl. ¶¶ 1-2, 4-5, 7 (JA394-96).

MASN emphasizes that two cable operators – Charter and Mediacom – "*do* carry MASN on an analog tier in North Carolina." MASN Br. 56. But their carriage agreements with MASN confirm that demand for MASN in North Carolina is [redacted]. Charter and Mediacom – which are unaffiliated with any RSNs – are [redacted] of their North Carolina cable systems. Those systems are located in the northeastern part of the state, a popular vacation destination for residents of the Baltimore-Washington area.[15] Although Charter and Mediacom have [redacted] As a result, MASN reaches only [redacted] of Charter's [redacted] subscribers and [redacted] of Mediacom's [redacted] subscribers in North Carolina. *Order* ¶ 18 & n.94 (JA1073); TWC Reply at 32-33 and Exhibit 3 (JA981-82, 1030).

[15] Similarly, the record showed that TWC "inquired as to MASN's willingness to agree to carriage of MASN on an analog tier only in its Eastern North Carolina systems" (*Order* n.6 (JA1061)), but MASN insisted on analog carriage on *every* TWC system in the state (Rosenberg Decl. ¶ 5 (JA565)).

The record thus established that cable operators with no programming affiliates – and no incentive to discriminate on the basis of affiliation – independently "made the same decision as TWC to either distribute MASN to only a limited percentage of [North Carolina] subscribers or to refrain from distributing MASN at all." *Order* n.101 (JA1074). The Commission reasonably took account of that undisputed evidence. *See Order* ¶ 18 (JA1073).[16]

According to MASN (Br. 56), the fact that DirecTV and DISH Network carry MASN on a widely distributed programming tier in North Carolina "confirms the strong demand" for MASN in the state. Not so. The Commission noted that DirecTV and DISH were the only two MVPDs that distributed MASN broadly to their North Carolina subscribers: "[A]ll other MVPDs [in the state] have made the same decision as TWC to either distribute MASN to only a limited percentage of subscribers or to refrain from distributing MASN at all." *Order* n.101 (JA1074). Moreover, DirecTV and DISH have a strong incentive to carry MASN because they have many subscribers in Baltimore and Washington, MASN's home markets. The

[16] MASN claims that after the record closed, it reached agreements with more cable operators in North Carolina. MASN Br. 13 n.6, 56. Even if true, that development is irrelevant. This Court's review of the FCC's *Order* "is limited to the administrative record before the agency when it makes its decision." *Trinity Am. Corp. v. EPA*, 150 F.3d 389, 401 n.4 (4th Cir. 1998).

Commission found evidence that when these satellite service providers make their signals available to subscribers in the Baltimore and Washington areas, the same signals – and the same programming – also become "available to subscribers in North Carolina." *Order* ¶ 18 (JA1073) (citing King Decl. ¶ 42 (JA173)).[17]

MASN also makes much of DirecTV's claim that its North Carolina advertising campaign featuring MASN triggered an increase in DirecTV's subscriptions. MASN Br. 57-58 (citing MASN Exh. 78 (JA626-27)). The record, however, indicated that TWC's failure to carry MASN has not increased the level of customer defections to DirecTV or DISH. Hevey Supp. Decl. ¶ 13 (JA337). If Orioles and Nationals games were "must have" programming for North Carolinians, one would expect TWC subscribers to have defected to DirecTV or DISH in droves.

MASN next argues that MLB's "home team" designation of the Orioles and Nationals in North Carolina reflected the "actual and potential demand for MASN's programming." MASN Br. 58. Yet the record

[17] MASN speculates that if DirecTV and DISH believed that MASN could not find an audience in North Carolina, they could have declined to pay MASN for carriage rights in that state and used "spot beams" to carry MASN only in the Baltimore-Washington area. MASN Br. 57. But the record showed that neither DirecTV nor DISH has "a spotbeam that targets the Baltimore/Washington area without covering North Carolina." TWC Pre-Hearing Br. 39 n.132 (JA299).

demonstrated that neither team inspires much enthusiasm among North Carolinians. A survey submitted by TWC showed that when 500 North Carolina residents were asked which sports teams they follow, "only four mentioned the Orioles, none mentioned the Nationals, and 25 other professional sports teams received more mentions than the Orioles." *Order* ¶ 16 (JA1072) (citing Horowitz Decl. ¶¶ 9-13 (JA187-89)). Even a survey commissioned by MASN itself yielded similar results. When 100 North Carolina sports fans were asked to identify their favorite MLB team, 25 fans responded that they "[d]on't really follow MLB." Among the 75 fans who identified a favorite MLB team, the Atlanta Braves ranked first with 20 votes. The Orioles, with only 9 votes, finished third – behind the Braves and the New York Yankees. The Nationals received just one vote. MASN Exh. 36 (JA245).[18] In light of this evidence, the FCC justifiably declined to find significance in MLB's "home team" designations. *Order* ¶ 16 (JA1072).

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[18] This evidence is consistent with the e-mail from TWC executive Tom Smith, observing in September 2006 that TWC's subscribers in eastern North Carolina include "a HUGE Atlanta fan base" and "NO Baltimore fans to speak of." MASN Exh. 13 (JA201). Unlike the Baltimore Orioles, the Atlanta Braves have been one of the most successful MLB franchises over the past two decades, winning 14 straight division titles (an MLB record) and a World Series championship. It is thus not surprising that North Carolinians prefer the Braves over the Orioles and Nationals.

MASN's observation that the Orioles have been televised in North Carolina for more than two decades (Br. 58-59) is no more compelling. The long history of Orioles telecasts in the state has not translated into robust interest among fans. *See* MASN Exh. 13 (JA201) (although TWC started carrying Orioles games in North Carolina in 1985, the Orioles "have not ever been able to develop a following" there). Indeed, the record indicated that "TWC received no appreciable subscriber complaints regarding either FSN-South's cessation of Orioles telecasts or the absence of MASN" from TWC's programming lineup. *Order* ¶ 15 (JA1070-71) (citing Hevey Decl. ¶ 21 (JA143) and Kelly Decl. ¶ 18 (JA345)).

2. The Record Demonstrated That TWC Would Incur High Costs If It Carried MASN On An Analog Tier.

Further buttressing the sworn testimony of TWC's executives, substantial evidence confirmed that analog carriage of MASN would be expensive for TWC. The Commission found that, to acquire the rights to carry MASN, TWC would have to pay [redacted] per subscriber per month, or approximately [redacted] per year for analog carriage. *Order* ¶ 19 & n.104 (JA1074). TWC explained that it could not recover that cost unless it raised rates (at the risk of losing subscribers) or MASN attracted a large number of new TWC subscribers – a dubious prospect given the meager demand for

MASN in North Carolina. *See* Hevey Decl. ¶ 22 (JA144); Third Hevey Decl. ¶ 16 (JA547); *Order* ¶ 19 (JA1074-75).

The record also showed that, "comparing MASN's considerable price to its unremarkable ratings, MASN provides significantly less value to TWC's North Carolina subscribers than do other RSNs." *Order* ¶ 19 (JA1074). "On average, RSNs charge about [redacted] per subscriber per month for a full ratings point. . . . MASN is about [redacted] as expensive." *Order* n.105 (JA1074) (quoting Petition for Review at 27 (JA750)). TWC noted that "MASN is [redacted]." *Id.* (JA1074-75). The Commission further observed that "[redacted]" *Id.* (JA1075).

MASN maintains that the FCC improperly "discounted" evidence that MASN's license fees were "a relative bargain given the *quantity* of professional sports programming MASN carries." MASN Br. 52, 59-60 (emphasis added). The cost evidence submitted by MASN calculated MASN's market value by employing a "per-subscriber-per-major-pro-event" ("PSPPE") metric – *i.e.*, simply dividing the network's "annual per-

subscriber license fee by the total number of live major professional sporting events" MASN presents. *Order* n.106 (JA1075).

The FCC was justified in concluding that MASN's methodology was a flawed proxy for value. The agency noted that MASN's PSPPE analysis "appraises the value of RSNs based on the number of games carried, not whether consumers actually watch those games." *Order* n.106 (JA1075). By focusing on the sheer number of professional games it televises, MASN's cost analysis considerably overstates the network's value to North Carolina subscribers. MASN presents more than 300 MLB games every year. Half of those games feature the Washington Nationals. Yet MASN has not even attempted to argue that North Carolinians have any interest in the Nationals (a team that has yet to register a winning season since moving to Washington in 2005). Because the quantity of games presented by MASN did not translate into quality programming, it provided an unreliable barometer of MASN's value.

The Commission reasonably concluded that "ratings evidence" offers a "far better" measure of MASN's value than "PSPPE." *Order* n.106 (JA1075). Using that benchmark, the agency acted well within its discretion in affording greater weight to TWC's cost evidence, which compared the fees

MASN charged with the actual ratings it achieved. *See Order* n.105 (JA1074).

MASN contends that because its "regression analysis included a number of independent variables specifically designed to control for demand," the Commission was wrong to assume that "MASN's analysis did not adequately address consumer demand." MASN Br. 60. MASN concedes, however, that its regression analysis did not include a ratings variable. *Id.* at 60-61. Although it attempted to account for demand indirectly, MASN's analysis included no component that reflects the level of demand as precisely as ratings do. It was reasonable for the Commission to give greater weight to cost evidence that accounted for consumer demand more directly than MASN's regression analysis did.

3. The Record Confirmed TWC's Concerns About Bandwidth Constraints.

The Commission found evidence that cable operators are "seeking to free up as much spectrum as possible to add new HD services" in response to competition from other MVPDs and subscriber interest in those services. *Order* ¶ 20 (JA1075) (citing Third Hevey Decl. ¶ 17 (JA547-48) and Kent Decl. ¶ 7 (JA396)); *see also* Conway Decl. ¶ 17 (JA537). The record also established that TWC could use a single analog channel for two or three HD services if it converted the channel to digital transmission. Third Hevey

Decl. ¶ 10 (JA544). The FCC reasonably determined that this evidence supported TWC's assertion that "allocating a full analog channel to MASN" would impose on TWC "an opportunity cost of two or three fewer HD services." *Order* ¶ 20 (JA1075).

MASN does not directly challenge the evidence documenting TWC's bandwidth constraints. Instead, it argues that TWC could have made room for MASN on an analog tier by bumping its own existing programming to TWC's digital tier. MASN Br. 61-62; *see also id.* at 33 (TWC could have "ma[de] room for MASN's programming on the analog tier"). This argument ignores the substantial cost to TWC of displacing an existing service. As TWC explained, migrating services to a digital tier "is always problematic: any service carried on an analog tier over time acquires a following, and any deletion therefore causes some subscribers to be dissatisfied." Hevey Decl. ¶ 11 (JA139-40). Moreover, the law does not require TWC to disrupt its current programming to accommodate MASN. The program carriage statute forbids discrimination in video programming on the basis of affiliation (see Section I, *supra*); it does not require cable operators to grant *preferential* treatment to unaffiliated programmers.

MASN complains that "TWC offered no data" about the "HD channels it could have offered if it denied MASN analog carriage." MASN Br. 62.

But the Commission reasonably rejected the premise that TWC had an obligation to "put forth evidence quantifying the opportunity cost" associated with analog carriage of MASN. *Order* n.111 (JA1075). The record showed that HD services generally are in great demand. *See* Conway Decl. ¶¶ 17-18 (JA537); Kent Decl. ¶ 7 (JA396). And analog carriage of MASN – a network with scant appeal in North Carolina – would deprive TWC of an opportunity to add two or three new HD services. *See* Third Hevey Decl. ¶¶ 10, 17 (JA544, 547-48). The Commission reasonably concluded that this evidence demonstrated that concerns about bandwidth constraints were "a legitimate and non-discriminatory reason for TWC's carriage decision." *Order* ¶ 20 (JA1075).

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The evidence supporting TWC's explanation for its carriage decision is plainly "more than a mere scintilla"; indeed, the evidence would be more than enough "to justify a refusal to direct a verdict were the case before a jury." *Kasey*, 3 F.3d at 79 (internal quotation marks omitted). Substantial evidence therefore supports the FCC's conclusion that the reasons TWC gave for rejecting MASN's carriage demand "are borne out by the record and are not based on the programmer's affiliation or non-affiliation." *Order* n.111 (JA1076). Even if there were sufficient evidence in the record to permit the

contrary conclusion, "it is not [the Court's] task to reweigh the evidence and determine which of the competing views is more compelling. It is instead to ensure that substantial evidence supports the [Commission's] judgment." *Ngarurih*, 371 F.3d at 189 (internal quotation marks omitted). Applying that deferential standard of review, the Court should affirm.

B. MASN's Challenges To TWC's Sworn Testimony Are Meritless.

MASN asserts that there is "grave doubt" whether the reasons TWC gave for rejecting MASN's proposal "were actually the considerations that motivated TWC's decision." MASN Br. 48. MASN's challenges to TWC's sworn testimony are meritless, and the FCC reasonably credited TWC's explanation for its decision.

1. MASN's Quibbles With The Substance Of TWC's Testimony Are Unavailing.

MASN first attacks the veracity of Carol Hevey's declaration that "[c]onsiderations of affiliation never played a role" in TWC's carriage decision. Hevey Decl. ¶ 10 (JA139). Although MASN points to nothing in the record refuting this sworn statement, it claims that Hevey's assertion "cannot be credited" because Hevey testified during the arbitration hearing "that she was unaware of the FCC rules prohibiting reliance on" affiliation.

MASN Br. 44 (citing Tr. 255:1-13 (JA639)). MASN's argument is unfounded.

To begin with, MASN mischaracterizes Hevey's testimony. In the portion of the hearing transcript cited by MASN, the arbitrator asked Hevey whether she was aware of the FCC's *Adelphia Order*. Hevey, a TWC business executive (and not a lawyer), responded that she "wasn't familiar with the details or the potential implications" of that order (Tr. 255:1-13 (JA639)). Hevey never testified, however, that she was unaware of the federal prohibition on affiliation-based discrimination – a ban that had been in place for years before the *Adelphia Order*'s arbitration mechanism was adopted.

Even if Hevey had testified that she did not know about the ban, the testimony in her declaration is evidence about a fact – that "[c]onsiderations of affiliation never played a role" in TWC's refusal to give MASN analog carriage. Hevey Decl. ¶ 10 (JA139). That fact is true regardless of Hevey's understanding of the legal obligations of cable operators under the program carriage statute and the FCC's implementing rules and precedents. By analogy, an employer who submits unrebutted testimony that "considerations of gender never played a role" in his decision to fire a female employee

would not be liable for sex discrimination even if the employer had never heard of Title VII and had no idea about its "potential implications."

Moreover, in response to one of the arbitrator's questions concerning the *Adelphia Order*, Hevey testified that TWC's decision whether to carry MASN "was really related to subscriber interest and the various business aspects of potential carriage. . . . [T]he primary considerations were business considerations." Tr. 256:1-9 (JA640). Thus, Hevey's live testimony was fully consistent with her sworn declarations that TWC's decision rested on legitimate business judgments, not impermissible considerations of affiliation. *See* Hevey Decl. ¶¶ 11-22 (JA139-44); Hevey Supp. Decl. ¶¶ 6-11 (JA334-36); Third Hevey Decl. ¶¶ 15-19 (JA546-49).[19]

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[19] MASN asserts (Br. 44) that the arbitrator who heard Hevey's live testimony "did not accept her account of TWC's reasons for rejecting MASN's carriage proposal." The arbitrator, however, made no findings regarding Hevey's credibility. The arbitrator's *sole* credibility finding concerned a different TWC witness (TWC's expert, Joe King) and involved no conclusions based on King's demeanor. The arbitrator concluded that King's testimony should receive less "weight" than that offered by MASN's expert (Mark Wyche) simply because "Mr. King's testimony was offered more for the purpose of attacking Mr. Wyche's theories rather than advancing TWC's own arguments regarding demand." *Arbitration Award* at 14 n.12 (JA711). Under the arbitrator's flawed reasoning, any witness who presents rebuttal evidence is deemed less credible than the witness whose testimony he is rebutting. The Commission rightly rejected the arbitrator's conclusion, noting that "it is not unreasonable for TWC's witnesses to assume a purely defensive posture in refuting claims of unlawful discrimination." *Order* n.84 (JA1071).

MASN next posits that TWC could not plausibly have considered all of the factors identified by Hevey because TWC executives concededly did not engage in "extended discussion[s]" about the demand for MASN's programming and "quickly concluded" that MASN would have little appeal in North Carolina. MASN Br. 45-46 (quoting Hevey Supp. Decl. ¶ 7 (JA335) and Kelly Decl. ¶ 17 (JA344)). MASN's conclusion does not follow from its premise. Busy executives are required to make quick cost-benefit decisions all the time, and there is no reason to believe that TWC's executives were incapable of reaching a "quick[]" decision without "extended discussion" in light of MASN's limited appeal to subscribers and its high cost (both in terms of money and bandwidth).

Nor is there any basis for MASN's assertion (Br. 45) that factual "errors" in Hevey's declaration "undercut the FCC's reliance" on her testimony. This Court has recognized that "mere mistakes of fact are not evidence of unlawful discrimination." *Price v. Thompson*, 380 F.3d 209, 214 n.1 (4th Cir. 2004). The "errors" identified by MASN do not undermine Hevey's credibility.

MASN points out (Br. 45) that Hevey's initial declaration incorrectly stated the total amount that TWC would have to pay MASN annually for analog carriage. *See* Hevey Decl. ¶ 22 (JA144) (stating amount as [redacted]

[redacted] rather than [redacted]). But that declaration correctly stated that MASN demanded a monthly rights fee of "[redacted]." *Id.* And there is no sound basis for doubting TWC's honest – and well founded – belief that a rights fee of [redacted] per subscriber per month was too much to pay for a programming service that very few North Carolina subscribers would watch. *Id.* In any event, the Commission did not rely on the [redacted] amount, *see Order* ¶ 19 (JA1074), and it was justified in declining to disregard Hevey's entire declaration on the basis of the error.[20]

The second "error" cited by MASN was not an error at all. Hevey did not err when she "asserted that the satellite video providers that carry MASN in North Carolina have not advertised" that fact. MASN Br. 46 (citing Hevey Decl. ¶ 20 (JA143)). That statement was accurate when Hevey made it. The DirecTV advertising campaign described by MASN (Br. 46) was launched later. *See* Hevey Supp. Decl. ¶ 12 (JA336).

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[20] In a subsequent declaration, Hevey accurately stated that TWC's annual rights payment to MASN would amount to "[redacted]." Third Hevey Decl. ¶ 16 (JA547). MASN claims that this figure "overstates the true cost, because TWC may sell advertising time on MASN's programming and would receive [redacted]." MASN Br. 45. As TWC explained, however, advertising spots on MASN "[redacted]." *Order* n.104 (JA1074) (citing TWC Reply at 36 (JA985)).

MASN's next target is TWC executive Brian Kelly's declaration. MASN maintains that Kelly's representations regarding the Orioles' low ratings do not reflect the "actual reasons" for TWC's decision because Orioles games garnered higher ratings in some North Carolina markets than the Charlotte Bobcats basketball games carried on an analog tier by TWC's affiliate, News 14. MASN Br. 47-48. But TWC never claimed that it declined to give MASN analog carriage solely because of the Orioles' poor ratings. TWC also took into account the cost of carrying MASN on an analog tier. *See* Hevey Decl. ¶¶ 11-13, 22 (JA139-40, 144); Third Hevey Decl. ¶¶ 8-19 (JA543-49). That cost far exceeded the cost of carrying Bobcats games on News 14, "both in terms of money and bandwidth." *Order* ¶ 14 (JA1069-70); see also Part III, *infra*.

2. MASN Is Wrong In Arguing That The FCC Should Have Disregarded TWC's Sworn Testimony Because It Was Not Contemporaneous Evidence.

MASN suggests that the Commission should have disregarded TWC's sworn testimony because it was not "contemporaneous evidence" but instead what MASN characterizes as "*post hoc*" explanation for its carriage decision.

MASN Br. 48. The cases cited by MASN do not support its argument.[21] In fact, courts have repeatedly held in the analogous context of employment discrimination cases that the absence of contemporaneous evidence does *not* diminish the credibility of a defendant's proffered reasons for an employment decision. *See, e.g.*, *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (rejecting argument that an employer's reasons for not promoting an employee "lack[ed] credibility" because they "were not documented until after the commencement of" litigation); *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1228 (D.C. Cir. 2008) ("declin[ing] to find any significance in the timing of [the defendant's] explanation" or "the absence of contemporaneous

[21] MASN states that "[a] company accused of unlawful discrimination may not seek to justify its conduct based on a 'post hoc rationale' that is 'invented for the purposes of litigation.'" MASN Br. 42 (quoting *EEOC v. Sears Roebuck & Co*., 243 F.3d 846, 853 (4th Cir. 2001)). In *Sears*, however, the defendant "offered different justifications at different times." *Sears*, 243 F.3d at 852. Unlike the defendant in *Sears*, TWC has not offered shifting explanations for its decision. Rather, it has consistently maintained that it denied MASN analog carriage throughout North Carolina because the costs of carriage exceeded the benefits. Nor is this a situation in which the defendant's asserted reason for its decision did not actually "motivate it at the time of the decision," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion), or where it is impossible for the defendant to have acted for the reason it offered, *see McKennon v. Nashville Banner Publ'g Co*., 513 U.S. 352, 359-60 (1995) (because employee's "misconduct was not discovered until after she had been fired," employer "could not have been motivated by knowledge it did not have" at the relevant time).

evidence," and rejecting plaintiff's argument that the defendant had "manufactured its justifications after the fact").

As these courts have noted, "the absence of contemporaneous evidence is hardly unusual" in discrimination cases. *Adeyemi*, 525 F.3d at 1228. Nor is it unusual for a company to "wait[ ] to memorialize the reasons" for a challenged employment decision until after litigation is commenced. *Merrick*, 892 F.2d at 1438; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 n.5 (1993) (it would be "highly fanciful" to assume that employers maintain contemporaneous records of their reasons for not hiring someone). Just as "Title VII has never been understood to impose" a requirement that employers "publish a contemporaneous statement of reasons every time they make a hiring or firing decision," *Jackson v. Gonzales*, 496 F.3d 703, 710 (D.C. Cir. 2007), the program carriage statute and the Commission's implementing rules do not require cable operators to produce contemporaneous documentation of their carriage decisions. *Order* ¶ 21

(JA1076).[22] Nor was there any evidence in the record "that cable operators typically document their internal carriage discussions." *Id.* Therefore, it was reasonable for the FCC in this case to reject MASN's claim that the lack of contemporaneous documentation cast doubt on TWC's testimonial evidence.

III. SUBSTANTIAL EVIDENCE SUPPORTED THE COMMISSION'S FINDING THAT TWC APPLIED THE SAME COST-BENEFIT ANALYSIS TO MASN THAT IT APPLIED TO ITS OWN AFFILIATED NETWORKS.

TWC explained that it "makes carriage decisions on the basis of a host of factors" that it uses to assess "the relative value associated with the service or services under consideration." Third Hevey Decl. ¶ 2 (JA541). "Although each decision takes into account the unique facts and circumstances of each individual situation," the same basic considerations guide TWC's analysis in every case. *Id.* Like most other business decisions, the decision whether to carry a particular service hinges on whether the benefits of doing so (in terms of increased subscriber and advertising revenues) outweigh the attendant costs (including out-of-pocket costs and opportunity costs). *Id.* ¶ 3 (JA542).

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[22] MASN argues that the Commission "misse[d] the point" in noting that TWC was under no obligation to "'memorialize any aspect of [its] decision making process'" because "MASN has never argued that TWC violated a regulatory, record-keeping obligation." Br. 48 (quoting *Order* ¶ 21 (JA1076)). It is MASN, not the Commission, that misses the point. The FCC was not required to draw an adverse inference from TWC's failure to produce more contemporaneous documentation where there was no requirement to create and maintain such documentation in the first place.

Here, TWC "determined that the benefits of adding MASN to an analog tier in North Carolina would not outweigh the substantial costs." *Order* ¶ 12 (JA1067).

MASN's assertion (Br. 49-55) that TWC did not apply the same criteria to its affiliated networks that it applied to MASN is baseless. As the FCC noted, TWC "evaluated MASN's demand for carriage in the same manner that it has evaluated other such requests." *Order* ¶ 13 (JA1069). In particular, "TWC provided testimonial evidence that it routinely considers 'present subscriber interest in individual programming services' as a factor in its carriage decisions concerning both affiliates and non-affiliates" alike. *Id.* (citing Hevey Decl. ¶¶ 9-10 (JA139)). Thus, the same legitimate business considerations that supported TWC's refusal to give MASN statewide analog carriage also justified TWC's analog carriage of its affiliated RSNs. *Order* n.68 (JA1069).

TWC's analog carriage of each of its affiliated RSNs was justified because it generates high revenues or entails low costs. Some of TWC's affiliated RSNs carry popular professional teams in markets with a large fan base. For example, SportsNet New York carries New York Mets games in New York City, and Turner South carried Atlanta Braves games in central and western North Carolina. *Order* n.68 (JA1069). Those networks have

generated much higher ratings and revenues than MASN could muster in North Carolina. Other TWC-affiliated RSNs, such as Metro Sports and Time Warner Cable SportsNet–Rochester, cost much less to carry than MASN because they cover minor league and local high school sports. *Id.* By contrast, analog carriage of MASN throughout North Carolina would have yielded low revenues and imposed high costs – a combination of factors that made carriage unprofitable under the same overall cost-benefit analysis that applies to TWC's affiliated RSNs. See Part II.A.1-3, *supra*. In light of this evidence, the Commission reasonably found that TWC did not apply more stringent standards to MASN than it applied to its own affiliates. *See Order* ¶ 13 & nn.66-68 (JA1067-69).[23]

In support of its assertion that TWC held MASN to a "minimum ratings" standard that TWC allegedly does not apply to its own affiliates (MASN Br. 50), MASN emphasizes that Orioles games achieved higher

[23] Because the FCC found that TWC applied the same cost-benefit criteria to its affiliated networks that it applied to MASN, the premise underpinning the argument of MASN's economist amici – *i.e.*, that the FCC erred in failing to apply its economic analysis to a "control group" consisting of TWC's own RSNs (*see* Litan/Hahn Amicus Br. 11-15) – is flawed. The Court should not consider that argument in any event because MASN never presented it to the Commission or the Court. *See* 47 U.S.C. § 405(a); *Globalstar, Inc. v. FCC,* 564 F.3d 476, 483 (D.C. Cir. 2009) (courts lack jurisdiction to review claims that have not first been presented to the FCC); *Snyder v. Phelps*, 580 F.3d 206, 216 (4th Cir. 2009) (an issue waived by appellant cannot be raised by amicus curiae), *aff'd,* 131 S. Ct. 1207 (2011).

ratings in some North Carolina markets than the Charlotte Bobcats basketball games carried on an analog tier by TWC's affiliate, News 14. MASN Br. 51. But TWC never maintained that it based its rejection of MASN's proposal solely on the Orioles' low ratings. Nor is there any evidence that it applied a "minimum ratings" test to MASN. Rather, TWC explained that in this case – as in all of its carriage decisions – it weighed a number of factors, including not only the network's potential for raising revenues (as reflected by ratings), but also the out-of-pocket and opportunity costs of carrying the network. *See* Hevey Decl. ¶¶ 9-13, 22 (JA139-40, 144); Third Hevey Decl. ¶¶ 4-19 (JA542-49).

Because TWC bases its carriage decisions on several interrelated factors – not just ratings – the evidence that Orioles games posted higher ratings in North Carolina than News 14's Bobcats broadcasts does not itself establish discrimination "on the basis of affiliation or nonaffiliation," 47 U.S.C. § 536(a)(3). *Cf. Harris v. Mayor of Baltimore*, 2011 WL 1739994, *7 (4th Cir. May 6, 2011) (when employer bases a promotion decision on multiple factors, disappointed applicant cannot prove discrimination under Title VII merely by presenting evidence that she is more experienced than employees who received promotions); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 319 (4th Cir. 2005) (same).

Although the record contained evidence that ratings for Orioles games slightly exceeded ratings for Bobcats games in some North Carolina markets in 2006, the record also showed that analog carriage of MASN would entail much greater costs than carriage of Bobcats games on News 14. After TWC purchased the Bobcats rights [redacted], it incurred no additional [redacted] in carrying Bobcats games. By contrast, carriage of MASN would involve a [redacted] – a rights fee of [redacted] per subscriber per month. *Order* ¶ 14 (JA1069-70); Kelly Supp. Decl. ¶ 6 (JA552). And unlike Bobcats games, which occupied a mere two percent of News 14's air time (which was overwhelmingly devoted to news and weather), carriage of MASN would require allocation of a full analog channel *and* an "overflow" channel for MASN2 (the service that carries games when the Orioles and Nationals play simultaneously). *Order* ¶¶ 14, 20 (JA1070, 1075); Kelly Supp. Decl. ¶ 6 (JA552). The FCC reasonably concluded that this evidence of significant cost disparities substantiated TWC's assertion that it had legitimate and nondiscriminatory business reasons for distinguishing between MASN and News 14.

MASN next challenges the FCC's reliance on carriage costs as a nondiscriminatory justification for TWC's decision. According to MASN (Br. 52), cost considerations inherently favor affiliated networks over

unaffiliated networks because "once a cable operator has purchased the rights to sports programming, it will have a powerful incentive to carry [that] programming *regardless* of the price it paid or the programming's popularity." This argument wrongly assumes that the cost of carrying an affiliated network does *not* include the costs incurred by the cable operator in establishing and operating the network – including substantial licensing fees. Because MASN's proposed approach discounts a major up-front component, the FCC and TWC rightly declined to adopt it. Indeed, when TWC compared the carriage costs of News 14 and MASN, it explained that "because TWC owns News 14 and itself produces News 14's programming, the cost of carriage for TWC is the service's net annual cost" – roughly "[redacted]." Kelly Supp. Decl. ¶ 5 (JA551). This cost estimate refutes MASN's suggestion that a cable operator's carriage of an affiliated network entails little or no cost.

MASN is also incorrect in asserting that "TWC offered no evidence or analysis" comparing the costs of carrying MASN with "the costs TWC incurs in obtaining and producing affiliated sports programming." MASN Br. 52. TWC submitted several sworn statements analyzing the comparative costs of its affiliates and MASN. *See* Kelly Supp. Decl. ¶¶ 5-6 (JA551-52); Arvan Decl. ¶ 3 (JA529); Denison Decl. ¶ 4 (JA820); *see also Order* ¶ 14 (JA1069-

70); *id.* n.68 (JA1069). Based on that evidence, the FCC reasonably concluded that "the high cost" of carrying MASN on an analog tier was "a legitimate and non-discriminatory reason for TWC's carriage decision." *Order* ¶ 19 (JA1074).

Finally, MASN argues that the FCC erred in finding that the opportunity cost of allocating channel capacity to MASN provided a legitimate and nondiscriminatory reason for rejecting MASN's proposal. MASN implies (Br. 53) that TWC did not apply "the same 'opportunity cost' test to its affiliated channels" that it applied to MASN. But MASN cites no evidence to support its supposition. Moreover, MASN fails to appreciate the uniquely burdensome bandwidth demands that its demand for carriage would place on TWC. Analog carriage of MASN would require TWC to set aside *two* analog channels: "a full 6 MHz channel" for MASN and "a second 'overflow' channel for MASN2, the service that carries games when the Orioles and Nationals play simultaneously." *Order* ¶ 20 (JA1075). MASN has not identified a single TWC affiliate that places such heavy demands on TWC's channel capacity. Accordingly, MASN cannot plausibly argue that TWC's consideration of bandwidth constraints in this case was impermissibly discriminatory.

MASN maintains that if TWC had "applied the same 'opportunity cost' test to its affiliated channels" that it applied to MASN, "TWC presumably would have moved News 14 to a digital tier." MASN Br. 53. This argument ignores the significant differences between News 14 and MASN. *See Order* ¶ 14 (JA1069-70). Among other things, TWC "allocated an analog channel" to News 14 "at a time when TWC's analog tier was not full." *Id.* (JA1069). By the time MASN requested carriage, however, "none of TWC's North Carolina systems [had] vacant channels on their analog tiers." Hevey Decl. ¶ 11 (JA139). Consequently, analog carriage of MASN would have required TWC to delete an existing network (at the risk of displeasing subscribers who watch that network). *Id.* (JA139-40). In addition, unlike carriage of MASN, News 14's carriage of Bobcats games did not require the allocation of *two* analog channels. *Order* ¶¶ 14, 20 (JA1070, 1075).

Even if MASN could show that a TWC affiliate that received analog carriage occupied more channel capacity than MASN would require, such a showing would not establish impermissible discrimination because TWC bases its carriage decisions on multiple factors, not just bandwidth constraints. *See Diamond*, 416 F.3d at 319. The record established that TWC rejected MASN's proposal after weighing the costs and benefits of carrying

MASN on an analog tier – the same cost-benefit analysis it applies to affiliates and nonaffiliates alike.

IV. THE COMMISSION'S *ORDER* DOES NOT HARM COMPETITION OR CONSUMERS.

MASN and its supporting amici argue that the Commission's *Order* will harm competition and consumers. MASN Br. 63-64; MAP Amicus Br. 27-29; MLB Amicus Br. 10-13. They are mistaken.

In crafting the program carriage statute, Congress carefully weighed the public interest in preventing unfair and exclusionary conduct by vertically integrated MVPDs against the public interest in allowing legitimate business practices in a competitive marketplace. *See Program Carriage Order*, 9 FCC Rcd at 2643 ¶ 1 (emphasizing "the congressional intent to prohibit unfair or anticompetitive actions without . . . precluding legitimate business practices common to a competitive marketplace"); *see also id.* at 2648 ¶ 15 (noting Congress's "directive to 'rely on the marketplace, to the maximum extent feasible, to achieve greater availability' of . . . programming") (quoting 1992 Cable Act, § 2(b)(2), 106 Stat. 1463).

In weighing the public interest, Congress did not mandate that RSN programming be made as widely available as possible – even where, as here, the demand in the relevant market is demonstrably weak and carriage on an analog tier would have hampered the launch of additional HD channels that

viewers prefer. *See* Third Hevey Decl. ¶ 17 (JA548). Rather, Congress chose to ban only discrimination "on the basis of" a programming vendor's "affiliation or nonaffiliation" with an MVPD. 47 U.S.C. § 536(a)(3). Congress did *not* preclude vertically integrated cable operators from declining to carry unaffiliated networks for legitimate business reasons – as TWC did here when it rejected MASN's proposal. Such legitimate business decisions harm neither competition nor consumers.[24]

In any event, the record shows that TWC was willing to negotiate with MASN over digital carriage of its programming throughout North Carolina, as well as analog carriage in eastern parts of the state. *See* Rosenberg Decl. ¶¶ 3, 5 (JA563-65). Those terms – which MASN rejected out of hand (*id.*) – would have given thousands of TWC subscribers access to MASN.

In sum, the FCC's fact-bound decision in this case was firmly anchored in the evidentiary record and the governing law, and will have none of the dire consequences that MASN and its amici predict.

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[24] To the contrary, record evidence showed that consumers would be harmed if the FCC mandated analog carriage of MASN on all of TWC's North Carolina systems. To cover the [redacted] cost of such carriage, TWC would have to raise cable rates for the vast majority of its subscribers, even though "very few of them are interested in watching MASN." Hevey Decl. ¶ 22 (JA144).

CONCLUSION

Ample evidence – far "more than a scintilla," *HQM of Bayside*, 518 F.3d at 260 – supported the Commission's finding that TWC denied MASN's carriage proposal for legitimate and nondiscriminatory reasons unrelated to MASN's status as a non-affiliate. Accordingly, the Court should deny the petition for review and affirm the Commission's *Order*.[25]

Respectfully submitted,

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June 27, 2011

[25] In the unlikely event that the Court grants MASN's petition and remands the case to the Commission, it should decline MASN's invitation (Br. 64-65) to impose a 60-day time limit on FCC proceedings on remand. Such an extraordinary remedy is not warranted.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TCR SPORTS BROADCASTING HOLDING, L.L.P., D/B/A MID-ATLANTIC SPORTS NETWORK, PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 11-1151

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13,974 words.

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June 27, 2011

11-1151

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TCR Sports Broadcasting Holding, LLP, Petitioner

v.

Federal Communications Commission and the United States of America, Respondents.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on June 27, 2011, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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