Pantelis Michalopoulos
202 429 6494
pmichalo@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

Steptoe
STEPTOE & JOHNSON LLP

REDACTED—FOR PUBLIC INSPECTION

April 29, 2019

By ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Attn: Media Bureau

Re: **Application for Review*, beIN Sports, LLC v. Comcast Cable Communications and Comcast Corporation*, MB Docket No. 18-384, File No. CSR-8972-P**

Dear Ms. Dortch:

beIN Sports, LLC ("beIN") submits the enclosed public redacted version of its Application for Review dated April 29, 2019. beIN has denoted with [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] passages where it has redacted Confidential Information. A confidential version of this filing is being simultaneously filed with the Commission.

Please contact me with any questions.

Respectfully submitted,

/s/
Pantelis Michalopoulos
Counsel to beIN Sports, LLC

Enclosures

cc: Michael D. Hurwitz, Willkie Farr & Gallagher LLP (via electronic mail)

REDACTED—FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
beIN Sports, LLC.,	)	MB Docket No. 18-384
Complainant,	)	
	)	File No. CSR-8972-P
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC,	)	
and	)	
COMCAST CORPORATION,	)	
Defendants.	)	

APPLICATION OF BEIN SPORTS, LLC FOR REVIEW

April 29, 2019

TABLE OF CONTENTS

REDACTED—FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	
	)	File No. CSR-8972-P
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC,	)	
and	)	
COMCAST CORPORATION,	)	
Defendants.	)	

APPLICATION OF BEIN SPORTS, LLC FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules,[1] beIN Sports, LLC ("beIN") respectfully requests that the Federal Communications Commission ("FCC" or "Commission") review the Media Bureau's March 29, 2019 order in the above-captioned proceeding ("*Order*").[2] The Bureau's decision dismisses with prejudice beIN's February 5, 2019 complaint (the "Third Complaint" or "refusal to deal complaint") against Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast").[3] The Third Complaint alleges that Comcast violated Section 616 of the Communications Act of 1934, as amended (the "Act"), and the

[1] 47 C.F.R. § 1.115.

[2] *See* beIN Sports, LLC v. Comcast Cable Communications, LLC, and Comcast Corporation, *Order*, MB Docket No. 18-384, DA 19-234 (Mar. 29, 2019) ("*Order*").

[3] Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384 (Feb. 5, 2019) ("Third Complaint").

Commission's program carriage rules by unreasonably and discriminatorily refusing to deal with beIN.

On December 13, 2017 and on certain subsequent occasions, Comcast made carriage offers to beIN that discriminated against beIN's networks and in favor of Comcast's own NBC Sports and Universo programming affiliates. beIN has filed a still pending program carriage complaint arising from this discriminatory conduct (the "Second Complaint" or "discriminatory offer complaint").[4] On [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]], [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]], and [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] Comcast refused to deal with beIN altogether, even as it continued to carry programming of its affiliates. beIN filed a complaint arising from that conduct, and suggested that the two complaints be consolidated. The *Order* held that the refusal to deal complaint was an impermissible additional pleading in the proceeding commenced by the discriminatory offer complaint.[5] The *Order* also held that the *MASN* decision on claim preclusion is inapposite, meaning that beIN's refusal to deal claim is not separate from its discriminatory offer claim.[6] The *Order* finally held that refusal to deal is not a cause of action in itself under the program carriage rules.[7]

[4] Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384 (Dec. 13, 2018) ("Second Complaint").

[5] *Order* ¶¶ 6-7.

[6] *Id.* ¶ 9.

[7] *Id.* ¶ 4 n.21.

The foregoing holdings are wrong as a matter of law. Accordingly, the Commission should reverse the *Order*, deny with prejudice Comcast's motion to strike, and ask the Bureau to adjudicate beIN's unreasonable and discriminatory refusal to deal claim.

I. SUMMARY

The Bureau's decision makes a number of legal errors, which can be demonstrated without need to evaluate any disputed facts in this proceeding. First, the *Order* distinguishes the controlling Bureau precedent governing whether a new claim can stand on its own, the *MASN* decision,[8] based on a difference that is explicitly contemplated under the applicable legal standard, and indeed a necessary *part* of that standard. Specifically, the *Order* states that the two claims found to be separate in *MASN* were different from the facts here because the first set of claims in *MASN* had been settled; but the relevant "claim-splitting" test *assumes* that the earlier claim (here, the discriminatory offer claim) has been settled or disposed of and then asks whether the second claim (here, the refusal to deal claim) is precluded, making *MASN* directly applicable. In other words, the *Order* distinguishes the Bureau's controlling claim preclusion decision based on a difference that is in fact a key part of the applicable legal test.

Second, the *Order* erroneously applies the "common nucleus of operative fact" prong of the "claim-splitting" test. The *Order* wrongly emphasizes that Comcast's discriminatory refusal to deal with beIN occurred prior to the filing of its December 13, 2018 discriminatory offer complaint against Comcast, and entirely ignores key questions the Commission has previously asked when determining whether two actions arise from a "common nucleus of operative fact."

[8] *See* TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network v. Comcast Corp., *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787 (2008) ("*MASN*").

The answers to these questions demonstrate the claims in the Second Complaint and Third Complaint do not arise from a common nucleus of fact.

Third, the *Order* holds that the Third Complaint is an impermissible amendment to the Second Complaint, but restrictions on amending pleadings do not matter if the complaint was based on a separate claim and can stand on its own in the first place. In that regard, the Bureau misstates and misapplies the Commission's rules addressing additional pleadings filed in a program carriage complaint proceeding. The rules do not state that complainants are required to "plead all claims 'fully and with specificity,'" but rather that "[a]ll matters concerning *a claim* . . . should be pleaded fully and with specificity."[9]

Finally, while the Third Complaint properly alleges that Comcast's refusal to deal constituted unlawful discrimination in violation of Section 616 of the Act and the Commission's program carriage rules,[10] the *Order* concludes that there is no stand-alone cause of action for a refusal to deal. This is wrong. Here is what the Commission has actually ruled: one event triggering the limitations period for bringing a program carriage complaint is when the "defendant unreasonably refuses to negotiate with complainant."[11] And here is what the Court of Appeals has stated commenting on the FCC's rules: "as promulgated, subsection (f)(3) plainly applied only when an MVPD denied or refused to acknowledge a request to negotiate for

[9] 47 C.F.R. § 76.6(a)(1) (emphasis added).

[10] 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-76.1302.

[11] 1998 Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules, *Order on Reconsideration*, 14 FCC Rcd. 16433, 16435 ¶ 5 (1999) ("*1999 Order on Reconsideration*").

carriage," and "[t]he 1999 Order on Reconsideration thus confirms that subsection (f)(3) applies only to refusals to negotiate for carriage."[12]

II. BACKGROUND

beIN is a sports programming network that primarily distributes top-flight European soccer, currently including games of the Spanish La Liga, French Ligue 1, and Turkish League, as well as the Copa Libertadores and the Copa Sudamericana. beIN's English-and Spanish-language programming also includes, or has recently included, sports-related news and original programming, motor sports, college sports, rugby, track and field, combat sports, Conference USA football matches, and multiple boxing promotions. beIN is unaffiliated with any multichannel video programming distributor ("MVPD"). Today, beIN receives distribution from the largest non-vertically-integrated MVPDs, including Charter, DISH Network, Verizon, Cablevision, and Cox.

beIN first launched on Comcast in August 2012. The initial agreement was for [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] beIN submitted a renewal proposal to Comcast. After about seven months, Comcast responded on December 13, 2017 with a renewal offer that would, among other things, [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] beIN believes that these terms were discriminatory compared with those Comcast makes available to its own programming affiliates, NBC Sports and Universo.

[12] *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 1001 (D.C. Cir. 2013) (Edwards, J., concurring).

On February 13, 2018, beIN provided Comcast with written notice of its intent to file a program carriage complaint. On March 15, 2018, beIN filed a complaint, alleging that Comcast's December 13, 2017 offer for carriage constituted unlawful discrimination in violation of Section 616 of the Act, Section 76.1301(a) of the Commission's rules, and conditions placed on Comcast by the *Comcast-NBCU Order*.[13] On August 2, 2018—one day after expiration of the beIN-Comcast carriage agreement—the Bureau issued an order dismissing beIN's complaint without prejudice, on the grounds that beIN failed to provide a sufficient "degree of certainty about the programming that would be featured" to support its claim that it is "similarly situated" to Comcast-affiliated networks NBC Sports and Universo and that Comcast treated beIN differently from these affiliated networks with respect to the selection, terms, or conditions of carriage.[14]

Subsequent to this dismissal, beIN continued to seek a carriage agreement renewal with Comcast. This effort included beIN [[BEGIN CONFIDENTIAL]]

[13] Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-90 (Mar. 15, 2018).

[14] beIN Sports, LLC v. Comcast Cable Communications, LLC, and Comcast Corporation, *Memorandum Opinion and Order*, 33 FCC Rcd. 7476, 7480-81 ¶¶ 14-15 (2018).

[[END CONFIDENTIAL]]

Ultimately, the continuing harm from Comcast's behavior caused beIN to reconsider its intention to not to refile. beIN notified Comcast in a further prefiling notice sent on December 3, 2018 of its intention to file with the FCC a program carriage complaint based on Comcast's December 13, 2017 discriminatory offer. This letter pled with Comcast that the partners re-engage in good-faith dialogue and declared beIN available day and night to that end. Comcast responded to that further notice on December 13, 2018, by a letter that strongly discouraged beIN from bringing a complaint but ignored beIN's request for further dialogue. beIN filed later that day the Second Complaint, which was tailored to address specifically the concerns expressed by the Media Bureau in the *Order*.[15]

On December 24, 2018, beIN notified Comcast of an additional cause of action: that Comcast unlawfully refused to deal with beIN. On January 3, 2019, Comcast responded that beIN should have included the refusal to deal claim in that complaint, but otherwise reaffirmed that it would refuse to deal with beIN.[16]

[15] Second Complaint ¶ 7.

[16] Third Complaint, Exhibit 18 (Letter from Francis Buono, Senior Vice President and Senior Deputy General Counsel, et al., Comcast, to Pantelis Michalopoulos, Steptoe & Johnson, LLP, Counsel for beIN Sports (Jan. 3, 2019)).

beIN responded to Comcast's letter on January 10, 2019.[17] beIN requested that Comcast consent to the consolidated consideration of the two causes of action, which would be in the interests of the Commission, the parties, and efficiency. beIN also responded that it had good reason to refrain from including the refusal to deal claim in the December 13, 2018 complaint. That complaint was designed to address Comcast's discriminatory offer, which was the subject of the Bureau's dismissal order; additionally, including a refusal to deal count would have detracted from beIN's continuing attempt to convince Comcast to end its refusal to deal and resume negotiations. beIN explained that, if Comcast were not to agree to consolidation, beIN would file a new complaint based on Comcast's unreasonable and discriminatory refusal to deal with the Bureau, and would leave it to the Bureau to convene a status conference to determine the "necessity for or desirability of" consolidating the two complaints.

Comcast responded to this letter on January 18, 2019. Comcast appeared to agree with beIN's idea of a status conference to be convened by the Bureau.[18] Comcast also asked that the parties jointly request that the Bureau toll the deadline for Comcast's Answer to the Second Complaint and/or any subsequent or amended complaint until the later of 60 days after the issuance of a Bureau decision following the proposed status conference or the filing of any subsequent pleading beIN may be permitted to submit.[19]

[17] Third Complaint, Exhibit 19 (Letter from Pantelis Michalopoulos and Georgios Leris, Steptoe & Johnson, LLP, Counsel for beIN Sports, to Francis Buono, Senior Vice President and Senior Deputy General Counsel, et al., Comcast (Jan. 10, 2019)).

[18] Third Complaint, Exhibit 20 at 2 (Letter from Francis Buono, Senior Vice President and Senior Deputy General Counsel, et al., Comcast, to Pantelis Michalopoulos, Steptoe & Johnson, LLP, Counsel for beIN Sports (Jan. 18, 2019)).

[19] *Id.* at 2-3.

beIN responded by offering to request jointly with Comcast a status conference with Bureau staff on consolidation of the Second and Third Complaints, and agreeing to an extension of the deadline for Comcast's answer to the Second Complaint, meaning that Comcast would be able to answer beIN's complaints on the same day—60 days from the later filing.[20] Comcast rejected beIN's offer.[21] beIN filed the Third Complaint on February 5, 2019 alleging that, separate from Comcast's prior discriminatory offer, Comcast also discriminatorily and unreasonably refused to deal with beIN commencing in [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] The Third Complaint included a request that the Bureau hold a status conference with the parties to determine a path for obtaining expedited resolution to beIN's claims.[22]

The next day, February 6, 2019, Comcast's counsel emailed the Bureau (copying beIN's counsel), and expressed a different view on the notion of a status conference than it had expressed previously to beIN. Comcast noted that it was focused on completing its answer to beIN's Second Complaint, which it had been working on since the Second Complaint was filed, and that it did not believe it was appropriate or realistic to expect the Bureau to arrange for a status conference involving all of the necessary Bureau and client representatives in the three business days before its answer was due, or for Comcast to take time and attention away from finalizing its answer during this period. Comcast stated it would seek appropriate relief with respect to the Third Complaint the following week, after its answer was filed. Later that morning, the Bureau emailed counsel to beIN and Comcast to state that it was in the process of

[20] Third Complaint ¶ 27.

[21] *Id.*

[22] *Id.* ¶¶ 4, 28.

considering how to treat beIN's additional claim and request for a status conference, and that it would not be scheduling a status conference, if at all, prior to the filing of Comcast's answer.

On February 11, 2019, Comcast filed its answer to beIN's Second Complaint.[23] On February 13, 2019, Comcast requested permission to file a motion to strike the Third Complaint. beIN opposed that motion the same day. The Bureau granted Comcast's motion the next day, February 14, 2019. As ordered, Comcast filed a motion to strike on February 15, 2019.[24] beIN filed an opposition to that motion on February 22, 2019.[25] The Bureau released the *Order*, granting Comcast's motion to strike and dismissing the Third Complaint with prejudice, on March 29, 2019.

III. STANDARD OF REVIEW

Applications for review must state the questions presented for review.[26] These questions are:

- Whether the *Order* erred as a matter of law by holding that the Third Complaint was an impermissible additional pleading in the proceeding commenced by the Second Complaint;
- Whether the *Order* erred as a matter of law by finding that beIN was required to include the discriminatory refusal to deal claim contained in the Third Complaint in the Second Complaint;
- Whether the *Order* erred as a matter of law by misapplying the legal standard for determining improper "claim-splitting";

[23] Answer of Comcast Cable Communications, LLC and Comcast Corporation to Complaint of beIN Sports, LLC, MB Docket No. 18-384 (Feb. 11, 2019).

[24] Motion to Strike of Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384 (Feb. 15, 2019) ("Motion to Strike the Third Complaint").

[25] Opposition of beIN Sports, LLC to Motion to Strike of Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384 (Feb. 22, 2019) ("Opposition to Motion to Strike the Third Complaint").

[26] 47 C.F.R. § 1.115(b)(1).

- Whether the *Order* erred as a matter of law by holding that the *MASN* decision on claim preclusion is inapposite;

- Whether the *Order* erred as a matter of law by holding that the claims in the Second Complaint and Third Complaint arose from a "common nucleus of operative fact";

- Whether the *Order* erred as a matter of law by failing to find that the Third Complaint put forth an actionable claim that Comcast's refusal to deal constituted unlawful discrimination in violation of Section 616 and the Commission's program carriage rules;

- Whether the *Order* erred as a matter of law by holding that refusal to deal is not a cause of action in itself under the program carriage rules; and

- Whether the Order erred as a matter of law in dismissing the Third Complaint with prejudice and granting Comcast's Motion to Strike the Third Complaint.

Applications for review must also specify with particularity, among five enumerated factors, the factor or factors that warrant Commission consideration of the questions presented.[27] These five factors are whether the Bureau's decision (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not been previously resolved by the Commission; (3) involves precedent or policy that should be overturned or revised; (4) makes an erroneous finding as to an important or material question of fact; or (5) commits a prejudicial procedural error.[28] As explained in greater detail below, the *Order* conflicts with the Act, the Commission's regulations, and Commission precedent, and commits a prejudicial procedural error.[29]

[27] 47 C.F.R. § 1.115(b)(2); *see also* Spectrum Networks Group, LLC, *Memorandum Opinion and Order*, WT Docket No. 14-100, FCC 18-173, ¶ 7 (Dec. 10, 2018); *see also* Saga Communications of New England, LLC, *Order on Review*, 26 FCC Rcd. 16678, 16680 ¶ 6 (2011).

[28] 47 C.F.R. §§ 1.115(b)(2)(i)-(v).

[29] 47 C.F.R. §§ 1.115(b)(2) (i), (v).

To remedy these errors, the Commission should reverse the *Order*, deny with prejudice Comcast's Motion to Strike the Third Complaint, and ask the Bureau to adjudicate beIN's unreasonable and discriminatory refusal to deal claim.[30]

IV. THE BUREAU'S DISMISSAL WAS ERRONEOUS AS A MATTER OF LAW

The *Order* erroneously concludes that beIN failed to comply with procedural requirements contained in the Commission's rules governing program carriage when it "submitted an additional pleading absent a request from the Media Bureau (Bureau) and failed to satisfy its obligation to present 'extraordinary circumstances' that could permit [the Bureau's] acceptance of this otherwise prohibited pleading."[31] The *Order*'s reliance on these procedural requirements is misplaced. First, the *Order* misapplied the legal standard for determining improper "claim-splitting," and wrongly distinguished the controlling Bureau precedent, the *MASN* case.[32] Second, the *Order* erroneously applied the "common nucleus of operative fact" prong of that "claim-splitting" test, ignoring key questions the Commission has previously relied on in making such determinations. Third, the *Order* applied the Commission's rule governing additional pleadings in a program carriage complaint proceeding even though that rule does not operate to dismiss new claims, has never previously been applied in this fashion, and is inapplicable to the Third Complaint. Rather than an impermissible amendment to the Second Complaint or an additional pleading in the Second Complaint proceeding, the Third Complaint sets forth a separate claim that can and does stand on its own. Finally, the *Order* wrongly concludes that there is no stand-alone cause of action for a refusal to deal.

---

[30] 47 C.F.R. §§ 1.115(b)(3)-(4).

[31] *Order* ¶ 1.

[32] *See MASN*, 23 FCC Rcd. at 14835 ¶ 106-07.

A. The Second Complaint and Third Complaint state separate, stand-alone claims, and beIN's decision to bring these claims separately does not constitute improper claim-splitting

The fundamental question in evaluating the permissibility of the Third Complaint is whether it states a separate claim from the Second Complaint. If Comcast's refusal to deal in 2018 is a separate claim from Comcast's discriminatory offer in 2017—the focus of the Second Complaint—then the Third Complaint stands on its own, and consolidating the two becomes a matter of administrative convenience. The applicable legal doctrine is "claim-splitting."

1. The Bureau misapplied the legal standard for determining improper "claim-splitting" and wrongly distinguishes the controlling *MASN* precedent.

beIN explained in its Opposition to Motion to Strike the Third Complaint that the test for claim-splitting follows claim preclusion principles.[33] As articulated by the federal courts: "[t]o determine whether a plaintiff is claim-splitting, '[t]he proper question is whether, assuming the first suit was already final, the second suit would be precluded under res judicata analysis.'"[34] Under the controlling decision in *MASN*, beIN explained, where the Bureau engaged in a res judicata analysis for two refusal to carry claims made by MASN and had found them separate, beIN's claims in the Second and Third Complaints were also not prohibited on claim-splitting or claim preclusion grounds.[35]

---

[33] Opposition to Motion to Strike the Third Complaint at 3.

[34] *Clayton v. District of Columbia*, 36 F.Supp. 3d 91, 94 (D.D.C. 2014) (quoting *Katz v. Gerardi*, 655 F.3d 1212, 1219 (10th Cir. 2011)). In turn, the Bureau has articulated the res judicata standard, for example in In re Applications of Mid Atlantic Network, Inc., Assignor, and Centennial Licensing II, L.L.C., Assignee, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 23 FCC Rcd. 7582, 7586 ¶ 8 (2008) (res judicata operates to bar a subsequent litigation if the prior action: "(1) shared a common nucleus of operative facts with the subsequent action; (2) resulted in a final judgment on the merits; and (3) involved the same parties or their privies.").

[35] Opposition to Motion to Strike the Third Complaint at 3-4.

In dismissing beIN's argument, the Bureau stated that *MASN* is "inapposite" because in that case "a new program carriage dispute arose after [MASN] and Comcast settled their previous dispute, presenting a different set of facts and circumstances for a new program carriage complaint."[36]

This is wrong: this difference is explicitly contemplated under the legal test, and does not matter under it. Under the claim-splitting test laid out in the *Clayton* and *Katz* decisions, the critical question is whether beIN's refusal to deal claim in the Third Complaint would be precluded by its discriminatory offer claim in the Second Complaint *if the discriminatory offer claim had been settled or otherwise disposed of*. But then *MASN* is directly applicable. There, the first claim had been settled, and the Bureau ruled that the second claim was not precluded by that settlement. The *Order*'s attempt to distinguish the one controlling case based on a supposed difference that is in fact a key part of the test is reversible error.

2. The Second Complaint and Third Complaint do not arise from a "common nucleus of operative fact."

The *Order*'s fallback argument, that "there would be claim preclusion with respect to the refusal to deal claim had the Bureau entered a final judgment on the Second Complaint because both complaints arise from the same dispute and share a 'common nucleus of operative fact,'"[37] is also erroneous. The *Order* fails to acknowledge, let alone answer, key questions the Commission has previously asked when determining whether two sets of claims share a common nucleus of operate fact: "Is the same right allegedly being infringed by the same wrong? Would

[36] *Order* ¶ 9.

[37] *Id.* ¶ 9 n.39.

a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?"[38]

The answer to each of these questions is no. Rather than the Third Complaint "extend[ing] arguments already made" in the Second Complaint,[39] the two complaints allege separate wrongs (discriminatory offers for carriage versus discriminatory refusal to deal), which occurred nearly a year apart, and require different evidence to sustain a judgment (evidence of Comcast's discriminatory offers for carriage versus Comcast's subsequent discriminatory refusal to negotiate). The first of Comcast's actions in question was a discriminatory *renewal* offer; the second a refusal to negotiate the *launch* of beIN, as Comcast had discontinued carriage of beIN by that time. Similarly, a judgment on the Third Complaint would not impair rights under a judgment on the Second Complaint, whether in beIN's favor or Comcast's favor: that is, the claims in the Second Complaint and Third Complaint stand on their own, and a judgment with respect to one complaint has no effect on the outcome or remedies of the other complaint. As beIN put it in the Opposition to Motion to Strike the Third Complaint: "to make a carriage offer that places an independent programmer in a worse position than the distributor's programming affiliate is one thing; to decline carriage altogether and disadvantage the independent programmer by totally denying access to over 20% of the multichannel video market in that manner, another."[40] The fact that Comcast's discriminatory refusal to deal commenced before beIN filed the separate claims contained in the Second Complaint (and shortly before that filing,

[38] Teleservices Industry Ass'n v. AT&T Corp., *Memorandum Opinion and Order*, 15 FCC Rcd. 21454, 21457-58 ¶ 9 (2000).

[39] *Order* ¶ 9.

[40] Opposition to Motion to Strike the Third Complaint at 4.

at that)[41] does not change the answers to any of these questions. Nor does it justify the *Order*'s failure to follow precedent and answer them.

B. The Third Complaint is not an additional pleading requiring the Bureau's permission or "extraordinary circumstances"

The *Order* is similarly wrong as a matter of law in its conclusion that the Third Complaint is an "additional pleading in an ongoing program carriage dispute [that] must either be requested by Bureau staff or accompanied by a showing of extraordinary circumstances that justifies the acceptance of an additional, otherwise prohibited pleading."[42] Because the Second Complaint and Third Complaint state separate claims, this Commission rule is inapplicable.

Rather than an "additional pleading" within the Second Complaint proceeding, the Third Complaint is itself a new and separate complaint, filed not in the Second Complaint docket, but with the intention that the Commission open a new docket and initiate a new proceeding. beIN is not aware of, and the *Order* does not cite to, any precedent where the Commission has treated either such new complaint, filed in addition to an existing complaint, or even an amended complaint, as an "additional pleading." Instead, the Commission's implementing rules specifically focus on "motions to dismiss or motions for summary judgment," which are filed within the same complaint proceeding, as such "additional pleadings" requiring approval of Commission staff or extraordinary circumstances.[43] Indeed, the additional pleading at issue in

---

[41] Comcast's refusal to deal with beIN started on [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]] The Second Complaint was filed on December 13, 2018.

[42] *Order* ¶ 7; *see* 47 C.F.R. § 76.6(d).

[43] *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order*, 9 FCC Rcd. 2642, 2654-55 ¶ 30 n.51 (1993).

the sole case the *Order* points to—its decision in *Dan Reynolds v. TCA Cable Partners*—has nothing to do with the assertion of a new claim and the question of whether it is separate from a previously asserted one.[44] That case dealt with a supplemental opposition filed by the defendant Cox Communications to a complaint filed by plaintiff Dan Reynolds. That supplemental opposition, like Cox's previously filed opposition, responded to one and the same claim. Thus, the Bureau concluded, Cox should have demonstrated that "the issue could not have been addressed in the normal pleading cycle," *i.e.*, in Cox's initial opposition.[45]

But surely, the "additional pleadings" rule does not create an obligation that a complainant include all program carriage claims against the same defendant in one complaint, no matter that such claims arise from different facts. If the claims in question are separate, the time limit on filing each is one year from the relevant triggering event.[46] The "additional pleadings" rule does not impose a narrower time limit or abridge the one-year statute of limitations for a separate claim.

The question, then, is whether the refusal to deal claim was separate. As discussed, the *Order* did not apply the correct standard to that question, finding that a difference that was an essential prerequisite of the separateness test (under which one must *assume* the first claim was disposed of) was in fact the reason why the test was not satisfied.

Far from "procedural gamesmanship," there was good cause for beIN to bring these claims separately. beIN had a good-faith belief that bringing its discriminatory refusal to deal claim as part of the Second Complaint would detract from beIN's attempt to convince Comcast

---

[44] Dan Reynolds v. TCA Cable Partners d/b/a Cox Communications, *Memorandum Opinion and Order*, 18 FCC Rcd. 26693, 26693 ¶ 2 (2003).

[45] *Id.*

[46] 47 C.F.R. § 76.1302(h).

to back off from its refusal and resume negotiations,[47] and that further attempts to convince Comcast to recommence negotiations may ultimately bear fruit and save the Commission from expending additional resources to resolve Comcast's refusal to deal.

Even when it became clear that beIN's good-faith belief was mistaken, beIN continued to make efforts to ensure the Bureau could expeditiously resolve its separate claims. Prior to filing the Third Complaint and Comcast answering the Second Complaint, beIN sought Comcast's consent to the filing of an amended Second Complaint, and agreed to an extension of 60 days for Comcast to answer that amended complaint.[48] beIN believed that this approach promoted the expeditious resolution required by the Act and would minimize the burden on the Bureau. Comcast refused this accommodation.[49] Nevertheless, even after this rejection, the Third Complaint itself requested the Bureau hold a status conference with the parties to discuss a path for expeditious resolution of beIN's claims, in an even further attempt to minimize the burden on the Bureau.[50] Having conditionally agreed to a status conference,[51] Comcast then opposed one,[52] causing the Bureau to agree that one was unnecessary. But these actions speak to Comcast's aggressive advocacy. They do not connote that beIN's actions were designed to serve any improper purpose.

The *Order*'s conclusion that beIN was required to bring its discriminatory refusal to deal claims as part of the Second Complaint is further undermined by its misstatement that beIN was

[47] Third Complaint, Exhibit 19 at 2.

[48] *Id.*

[49] Third Complaint, Exhibit 20 at 2.

[50] Third Complaint ¶¶ 4, 28.

[51] Third Complaint, Exhibit 20 at 2.

[52] Email from Michael Hurwitz, Counsel for Comcast, to Martha Heller, Chief, Policy Division, Media Bureau, FCC (Feb. 6, 2019)).

required to "plead all claims 'fully and with specificity' and to 'state fully and precisely all pertinent facts and considerations.'"[53] In fact, the applicable rules state that "[a]ll matters concerning a *claim*, defense, or requested remedy should be pleaded fully and with specificity,"[54] and that complainants "shall state fully and precisely all pertinent facts and considerations *relied on* to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest."[55]

The Second Complaint and Third Complaint allege separate claims, arising at separate times. Each complaint pled fully and with specificity each claim contained in that complaint. Each complaint also fully states all matters concerning the requested remedy in each complaint, which varies between them. While the Second Complaint raises conduct arising while the *Comcast-NBCU Order* was in effect, and seeks relief under that order, the Third Complaint seeks relief only under Section 616 of the Act and the Commission's program carriage rules.

Further, each complaint states fully and precisely all pertinent facts and considerations relied upon, as required. beIN did not need, as the *Order* concludes, to state any facts and considerations in the Second Complaint *upon which it did not rely*, such as Comcast's subsequent and separate discriminatory refusal to deal. This is true even if beIN could have included such facts and considerations. The *Order* erred as a matter of law in finding that beIN was required to include its discriminatory refusal to deal claims in the Second Complaint, and by misstating the Commission's rules regarding the claims, facts, and considerations that beIN was required to fully plead in the Second Complaint.

---

[53] *Order* ¶ 9.

[54] 47 C.F.R. § 76.6(a)(1) (emphasis added).

[55] 47 C.F.R. § 76.7(a)(4)(i) (emphasis added).

C. The Third Complaint properly alleges that Comcast's discriminatory refusal to deal violates Section 616 and the Commission's program carriage rules

The *Order* characterizes the Third Complaint as asserting a stand-alone cause of action for Comcast's "unreasonable refusal to deal,"[56] and denies the existence of such a cause of action. But the *Order* both mischaracterizes the Third Complaint and erroneously departs from the Commission's clear recognition of unreasonable refusals to deal as causes of action in and of themselves.

First of all, the permissibility of the Third Complaint does not rest on the existence of such a cause of action. Rather, the Third Complaint alleged that Comcast unlawfully discriminated against beIN in violation of Section 616 of the Act and Section 76.1301(c) of the Commission's rules by refusing to deal with beIN.[57] The Third Complaint also demonstrated a *prima facie* showing of such discrimination under Section 76.1302(d)(3)(iii) of the Commission's rules.[58] Thus, the Third Complaint puts forth an actionable claim that Comcast's refusal to deal constituted unlawful discrimination, regardless of whether a refusal to deal constitutes a separate cause of action.[59]

In any event, Commission and D.C Circuit precedent establish that a refusal to deal does in fact constitute a "cause of action in itself." The Commission has ruled that one event triggering the limitations period for bringing a program carriage complaint is when the

---

[56] *Order* ¶ 4.

[57] Third Complaint ¶ 117.

[58] *Id.* ¶¶ 34, 110.

[59] *See Order* ¶ 4 n.21 ("a complainant must demonstrate discrimination under Section 76.1302(d)(3)(iii) of our rules.").

"defendant unreasonably refuses to negotiate with complainant."[60] The D.C. Circuit has commented on this rule, stating: "as promulgated, [this trigger] plainly applied only when an MVPD denied or refused to acknowledge a request to negotiate for carriage," and "[t]he 1999 Order on Reconsideration thus confirms that [this trigger] applies only to refusals to negotiate for carriage," and not proposals to amend a carriage contract.[61] Thus, Comcast's unreasonable refusal to deal with beIN constitutes a separate, stand-alone cause of action.

V. CONCLUSION

For these reasons, the Commission should grant beIN's Application for Review, reverse the *Order*, deny with prejudice Comcast's Motion to Strike the Third Complaint, and ask the Bureau to adjudicate beIN's refusal to deal claim.

Respectfully Submitted,

/s/ Pantelis Michalopoulos
Pantelis Michalopoulos
Markham C. Erickson
Matthew R. Friedman
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for beIN Sports, LLC

April 29, 2019

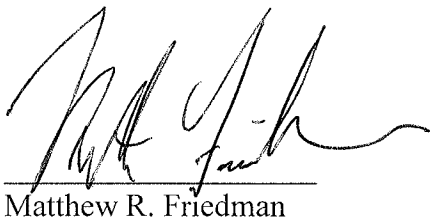
[60] *1999 Order on Reconsideration*, 14 FCC Rcd. at 16435 ¶ 5 (explaining that one of the triggering events for a program carriage complaint is if the "defendant unreasonably refuses to negotiate with complainant").

[61] *Comcast*, 717 F.3d at 1001 (Edwards, J., concurring).

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on April 29, 2019, I caused true and correct copies of the foregoing Application of beIN Sports, LLC for Review, as well as a copy of the redacted version electronically filed with the Federal Communications Commission this day, to be served by overnight mail (Confidential Version) and electronic mail (Confidential Version and Public Version) on the following:

Michael D. Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
Counsel to Comcast Corporation and
Comcast Cable Communications, LLC



Matthew R. Friedman
Steptoe & Johnson LLP