Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

OPPOSITION TO APPLICATION FOR REVIEW

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OPPOSITION TO APPLICATION FOR REVIEW

Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast") hereby submit this Opposition to the Application for Review filed by beIN Sports, LLC ("beIN") seeking review of the Media Bureau's March 29, 2019 Order dismissing beIN's third program carriage complaint against Comcast (the "Third Complaint") with prejudice (the "Dismissal Order").[1] The Bureau properly applied the law and the Commission's rules in rejecting the Third Complaint. beIN's Application for Review should be denied.

I. INTRODUCTION AND SUMMARY

In its Application for Review, beIN is essentially asking the Commission to turn a blind eye to beIN's deliberate gamesmanship and disregard for the Commission's Part 76 pleading requirements and program carriage rules. Specifically, on December 13, 2018, beIN filed a

[1] *See* Application of beIN Sports, LLC for Review, MB Docket No. 18-384 (Apr. 29, 2019) ("Application"); *beIN Sports, LLC v. Comcast Cable Commc'ns and Comcast Corp.*, Order, MB Docket No. 18-384, DA 19-234 (Mar. 29, 2019) ("Dismissal Order"); Complaint of beIN Sports, LLC Against Comcast Cable Commc'ns, LLC and Comcast Corp., MB Docket No. 18-384 (Feb. 5, 2019) ("Third Complaint").

second program carriage complaint (the "Second Complaint") that seeks to re-litigate a prior program carriage discrimination claim against Comcast involving the potential renewal of beIN's affiliation agreement, which expired on July 31, 2018 (the "First Complaint").[2] The Bureau dismissed the First Complaint after finding that beIN failed to establish a prima facie case of discrimination due to gaping uncertainties in the programming it would offer to Comcast as part of a renewal agreement.[3] The Second Complaint recycles the same discrimination claim, based on the same renewal negotiations and term sheets already considered by the Bureau. beIN then filed its Third Complaint on February 5, 2019, again claiming discrimination on the basis of affiliation, but this time centered around the allegation that Comcast unreasonably refused to deal with beIN in subsequent negotiations during October and November of 2018. The operative facts underlying this equally meritless allegation were *fully known* to beIN before it filed the Second Complaint in December 2018 (and were even referenced for other purposes in the Second Complaint).[4] beIN also seeks the *identical* substantive remedies in the Second and Third Complaints.

The Commission's procedural rules in program carriage cases expressly require a complainant to plead fully all matters supporting a claim or a requested remedy. Moreover, the rules prohibit the submission of additional pleadings absent (1) a showing of extraordinary circumstances or (2) prior Commission approval. As the Bureau rightly concluded, neither occurred here. By its own admission, beIN intentionally withheld its refusal to deal allegation

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[2] Complaint of beIN Sports, LLC Against Comcast Cable Commc'ns, LLC and Comcast Corp., MB Docket No. 18-384 (Dec. 13, 2018) ("Second Complaint"); *see also* Dismissal Order ¶ 3.

[3] *See* Dismissal Order ¶ 3; *see also beIN Sports, LLC, Complainant v. Comcast Cable Commc'ns, LLC and Comcast Corp., Defendants*, Memorandum Opinion and Order, 33 FCC Rcd. 7476 (MB 2018).

[4] *See* Second Complaint ¶¶ 4, 54-57 (noting, among other things, that "as far as Comcast was concerned such 'business issues' no longer existed: Comcast was 'not inclined to re-open negotiations'").

from the Second Complaint in disregard of the Commission's rules and for its own strategic reasons – i.e., because beIN thought including the allegation would "complicate" the Second Complaint and be "counterproductive" to beIN's negotiation objectives.[5] beIN then changed course and informed Comcast that it wanted to amend the Second Complaint to include the related allegation.[6] In response, Comcast directed beIN to the Commission's rules, which do not allow beIN to unilaterally amend its Second Complaint, and offered to join beIN in seeking the Commission's guidance as to whether beIN would be permitted to amend the Second Complaint.[7] Rather than take Comcast up on its offer, beIN waited until just before Comcast's Answer to the Second Complaint was due and then filed its Third Complaint with the previously-withheld refusal to deal allegation.[8]

As the Bureau found, "This evidence suggests that beIN Sports is engaging in negotiating tactics and . . . such procedural gamesmanship is not permitted under the Commission's rules."[9]

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[5] Dismissal Order ¶ 7 (quoting beIN's correspondence with Comcast); *see* Letter from Pantelis Michalopoulos, Steptoe & Johnson LLP, Counsel for beIN, to Francis Buono et al., Comcast, at 2 (Jan. 10, 2019) ("beIN Jan. 10 Notice") (attached to Third Complaint as Ex. 19) (stating that beIN did not want to "complicat[e] the refiling [of its dismissed First Complaint] with an additional cause of action," and also asserting that including this claim in the Second Complaint would have been "counterproductive" to further negotiations between the parties).

[6] *See* Letter from Pantelis Michalopoulos, Counsel for beIN, to Francis Buono et al., Comcast, at 3 (Dec. 24, 2018) (attached to Third Complaint as Ex. 17).

[7] *See* Letter from Francis M. Buono, SVP, Legal Regulatory Affairs & Senior Deputy General Counsel, Comcast Corporation, to Pantelis Michalopoulos, Steptoe & Johnson LLP, Counsel for beIN (Jan. 3, 2019) (attached to Third Complaint as Ex. 18); Letter from Francis M. Buono, SVP, Legal Regulatory Affairs & Senior Deputy General Counsel, Comcast Corporation, to Pantelis Michalopoulos, Steptoe & Johnson LLP, Counsel for beIN (Jan. 18, 2019) ("Comcast Jan. 18 Letter") (attached to Third Complaint as Ex. 20).

[8] beIN continues to inaccurately claim that, prior to filing the Third Complaint, it made an offer to Comcast for the parties to jointly request a status conference with Commission staff. *See* Application at 9; Third Complaint ¶ 27. In fact, on January 31, 2019, counsel for beIN orally reiterated its request that Comcast agree to file a consolidated Answer to beIN's Second and Third Complaints 60 days after beIN filed the Third Complaint. Counsel for beIN gave no explanation for beIN's failure to seek leave of the Commission to file its Third Complaint, or to jointly submit the parties' correspondence for consideration by Commission staff, as Comcast had suggested. *See* Motion to Strike ¶ 5 n.10. Nor did Comcast express a different view about a status conference in its February 6, 2019 email to the Bureau, as beIN mischaracterizes. *See* Application at 9. Comcast simply indicated that it was not appropriate or realistic to convene a conference with all of the necessary representatives in the three business days before Comcast's Answer to beIN's Second Complaint was due. *Id.*

[9] Dismissal Order ¶ 8.

The Bureau's resulting dismissal of the Third Complaint with prejudice was fully in accordance with the Commission's pleading rules, as well as its statutory mandate in Section 616 of ensuring fair and expeditious resolution of program carriage disputes. Accordingly, the Commission should deny beIN's Application for Review.

II. THE BUREAU PROPERLY FOUND THAT BEIN VIOLATED THE COMMISSION'S PROCEDURAL RULES FOR PROGRAM CARRIAGE COMPLAINTS.

The Bureau dismissed beIN's Third Complaint because beIN disregarded the procedural rules governing program carriage complaints. The Commission's Part 76 pleading requirements for these complaints are clear, stating, in relevant part, that:

> *All* matters concerning a *claim*, defense or *requested remedy*, should be *pleaded fully* and with specificity.[10]
>
> The petition or complaint shall state . . . fully and precisely *all pertinent facts and considerations* relied on to demonstrate the need for the relief requested.[11]

The rules further instruct that additional pleadings "by any party will not be accepted" absent "a showing of extraordinary circumstances" or a request by Commission staff.[12] As the Bureau explained, the Commission relied on the Part 76 pleading rules when establishing these complaint procedures to fulfill its mandate under Section 616 to review such disputes "expeditiously."[13]

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[10] 47 C.F.R. § 76.6(a)(1) (emphases added).

[11] *Id.* § 76.7(a)(4) (emphasis added).

[12] *Id.* § 76.7(d)-(e); *see also 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 ¶ 23 (1993) ("*1993 Program Carriage Order*") (stating that additional filings would not be "accepted or entertained *unless specifically requested by the reviewing staff*") (emphasis added).

[13] *See* Dismissal Order ¶ 2 & n.6 (citing and quoting *1993 Program Carriage Order* ¶ 23 (explaining that the Commission's complaint procedures would "provide the most flexible and expeditious means" for adjudicating program carriage complaints pursuant to Section 616's "explicit direction . . . to handle program carriage complaints expeditiously")); *see also* 47 U.S.C. § 536(a)(4) (directing the Commission to establish regulations that "provide for *expedited review*" of program carriage complaints) (emphasis added).

The Bureau correctly determined that beIN violated these procedural rules. The record showed that beIN withheld its unreasonable refusal to deal allegation from the Second Complaint for strategic reasons, and then unilaterally filed its Third Complaint with this new allegation related to the same underlying discrimination claim and seeking the same remedies as the Second Complaint, without the Bureau's permission and without providing evidence of any "extraordinary circumstances" that could justify such actions.[14]

In its Application for Review, beIN asserts that the Bureau erred in applying these procedural rules to the Third Complaint *at all*, arguing that beIN had no obligation to "include all program carriage claims against the same defendant in one complaint,"[15] and that its Second and Third Complaints state unrelated claims, each of which stands on its own.[16] But, as noted, Section 76.6(a)(1) expressly requires that a complainant like beIN must plead "[a]ll matters concerning a claim . . . or requested remedy."[17] The Dismissal Order correctly found that the Third Complaint's refusal to deal allegation "is in fact *an extension* of arguments already made in the Second Complaint,"[18] involving the *same* program carriage discrimination claim and requested remedy, based on operative facts fully known to beIN when it filed the Second

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14 *See* Dismissal Order ¶¶ 6-7.

15 Application at 17.

16 *See id*. at 18-19.

17 47 C.F.R. § 76.6(a)(1).

18 Dismissal Order ¶ 9 (internal quotations omitted) (emphasis added).

Complaint.[19] In the words of the Commission's rule, this allegation is simply another "matter[] concerning" the same underlying claim and identical remedy.[20]

As the Bureau observed, beIN's Second and Third Complaints involve the same claim that Comcast discriminates against the beIN networks on the basis of affiliation,[21] and beIN even emphasized in the Second Complaint that Comcast had said it "was not inclined to re-open negotiations" in October and November of 2018 as support for this discrimination claim.[22] Under beIN's incorrect view of Section 76.6(a)(1), a complainant would be free to file multiple program carriage complaints against the same defendant, based on the same set of known operative facts, with each new filing triggering a separate pleading cycle. Such a result would contravene the statutory directive in Section 616 for expeditious resolution of complaints, unduly complicate and delay these program carriage proceedings, and waste valuable Commission time and resources.[23]

beIN was likewise obligated under the Commission's procedural rules to allege *all matters* and *all pertinent facts and considerations* supporting its requested substantive remedies, which are *verbatim* the same in both the Second and Third Complaints.[24] Both complaints

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[19] *Id.* ¶¶ 6, 8. In what could be considered a further amendment to beIN's claims, beIN argues for the first time in its Application that Comcast refused to deal with beIN when Comcast responded to beIN's pre-filing notice for its Second Complaint on December 13, 2018. *See* Application at 2. beIN offers no justification for why Comcast's response letter should be construed as a refusal to deal and, in any event, Comcast merely responded to beIN's notice as required under the Commission's rules. *See* 47 C.F.R. § 76.1302(b).

[20] 47 C.F.R. § 76.6(a)(1); *see also* Dismissal Order ¶¶ 4, 6-8; discussion *infra* Section IV (further explaining why a "refusal to deal" is not a separate, standalone program carriage claim).

[21] *See* Dismissal Order ¶ 9 n.41.

[22] Second Complaint ¶ 56.

[23] Contrary to beIN's assertion, the Commission's pleading requirements do not abridge the statute of limitations for program carriage claims as to *when* a complaint may timely file a complaint. *See* Application at 17. Rather, the rules simply require that, when a complainant chooses to file a complaint, it must fully plead all known matters (including all known allegations) supporting its requested remedies to help ensure the expeditious resolution of these disputes, as Congress mandated. *See* 47 C.F.R. § 76.6(a)(1).

[24] *See* 47 C.F.R. § 76.6(a)(1); *id.* § 76.7(a)(4); *see also* Comcast Jan. 18 Letter at 2 (citing and quoting these rules); *see also* Motion to Strike ¶ 4 (same).

request that the Commission: (i) "enjoin Comcast from further program carriage discrimination"; (ii) "order Comcast to carry beIN on equitable terms that do not restrict beIN's ability to compete fairly, as determined by the Media Bureau"; and (iii) "order any other relief that the Commission may deem appropriate."[25] Because beIN's refusal to deal theory in the Third Complaint is directed toward the same remedy beIN already requested in the Second Complaint, beIN also violated this portion of the rules by withholding this allegation from its earlier pleading.

Although beIN attempts to downplay the "remedy" portion of this rule, it is no less important than the "claim" portion – especially in the program carriage context. To the extent the Commission is asked in a program carriage case to consider a remedy such as mandatory carriage that directly implicates the First Amendment rights of an MVPD defendant, as beIN has done, it is crucial that the Commission have before it all matters relevant to its consideration of that remedy, and equally crucial that a complainant not strategically reserve a second bite at the same extraordinary relief.

The Bureau's enforcement of its procedural requirements was especially warranted here. beIN admitted that it intentionally withheld its refusal to deal allegation to avoid "over-complicating" the Second Complaint and in an attempt to "convince Comcast . . . [to] resume negotiations" (even though the parties' respective positions had not changed in months).[26] The Bureau correctly concluded that beIN was engaging in "negotiating tactics" and that such

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[25] *Compare* Second Complaint at 68 (prayer for relief), *with* Third Complaint at 59 (same). beIN notes that the Second Complaint also invokes the *Comcast-NBCUniversal Order*, while the Third Complaint only seeks relief under Section 616 of the Act and the Commission's program carriage rules. That is a distinction without a difference; the substantive remedies beIN requests in the Second Complaint and Third Complaint are identical.

[26] Application at 17-18.

improper "procedural gamesmanship is not permitted under the Commission's rules."[27] In addition, rather than seek the Commission's leave to amend its Second Complaint, as the rules require, or even consult the Commission for guidance, beIN unilaterally filed its Third Complaint to gain perceived leverage for business negotiations. And as the Bureau correctly noted, "beIN Sports neither claimed nor provided evidence that any 'extraordinary circumstances' arose that explain why its refusal to deal allegation 'could not have been addressed in the normal pleading cycle.'"[28] Given these circumstances, the Bureau rightly dismissed the Third Complaint for violation of the Commission's rules.

III. THE BUREAU CORRECTLY DISTINGUISHED BEIN'S INAPPOSITE LEGAL AUTHORITY.

beIN next attempts to excuse its rule violations by arguing that the Bureau should have applied the legal standard that federal courts apply for claim-splitting. Under this standard, courts consider for analytical purposes whether the disposition of claims involving a common nucleus of facts in one action would bar a party from pursuing other claims in a second action (i.e., if they arise from the same set of facts, *res judicata* would apply). beIN contends that the Bureau misapplied this standard and failed to follow the "controlling" *res judicata* precedent in the Bureau's *MASN* decision, which involved the settlement of a prior program carriage complaint and a later-filed complaint.[29] This argument is equally flawed.

The Commission established its own procedural rules governing program carriage complaints at the express direction of Congress.[30] As shown above, the Bureau properly applied those rules in dismissing the Third Complaint. Although the Bureau engaged in a *res judicata*

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27 Dismissal Order ¶ 8.

28 *Id.* ¶ 7.

29 Application at 13-14.

30 *See* 47 U.S.C. § 536(a). The federal court standards for claim-splitting are not part of those rules.

analysis, and that analysis is correct, it had no obligation to undertake such an analysis to determine that beIN violated those rules, which stand on their own.

In all events, the Bureau's analysis in *MASN* fully *supports* its Dismissal Order here. In *MASN*, the Bureau found that the complainant's second program carriage discrimination complaint – filed *three years* after its first complaint (and two years after the parties had settled that case) – was not barred by *res judicata* because the second complaint "present[ed] a different set of facts and circumstances" for a new program carriage complaint that did not exist when the first complaint was filed.[31] MASN did not set out to strategically "split claims" for the same relief in successive filings, as beIN did here.

Unlike the Bureau's analysis of the complaints at issue in *MASN*, beIN's Second and Third Complaints involve the same dispute, share a common nucleus of operative facts, and request identical remedies.[32] Both complaints present substantially the same arguments and nearly identical evidence in an attempt to establish a prima facie case of discrimination on the basis of affiliation. beIN also relies on identical programming, ratings, target audience, and other evidence in both the Second and Third Complaints in arguing that the beIN networks are similarly situated to NBCSN and Universo. The purported reasons that beIN allegedly has been unreasonably restrained from competing fairly by Comcast are likewise identical in both complaints. A determination that beIN failed to meet its prima facie burden on one or more of these elements in the Second Complaint would have precluded relief under the Third

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[31] *TCR Sports Broad. Holding, LLP, d/b/a Mid-Atlantic Sports Network v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd. 14787 ¶ 107 (MB 2008); *see also* Dismissal Order ¶ 9 ("The instant case is distinguishable from *MASN* because the dispute between beIN Sports and Comcast is ongoing and the Third Complaint addresses the same dispute and facts that were in existence at the time beIN Sports filed the Second Complaint."). beIN appears to be under the impression that *MASN* would permit beIN to file substantially similar program carriage complaints against Comcast year after year. *See* Application at 15. But, as discussed herein, that is a misreading of this decision.

[32] *See* Dismissal Order ¶ 9 n.39.

Complaint.[33] Thus, the Bureau correctly concluded that the Third Complaint would be barred under claim preclusion principles because beIN's unreasonable refusal to deal allegation (a) arises from the same claim and the same operative facts underlying the Second Complaint and (b) could and should have been included as part of that earlier pleading.

IV. THE BUREAU CORRECTLY DETERMINED THAT AN ALLEGED UNREASONABLE REFUSAL TO DEAL IS NOT A STANDALONE CAUSE OF ACTION UNDER SECTION 616.

beIN alternatively seeks to excuse its disregard of the program carriage rules by challenging the Bureau's determination that an alleged unreasonable refusal to deal is not a standalone cause of action under Section 616. Like beIN's other arguments, this misstates the Commission's rules and precedent. The Dismissal Order appropriately recognized that "the Commission has not adopted a proposed good-faith negotiation requirement for program carriage negotiations between vertically-integrated MVPDs and VPVs" and, thus, a "refusal to deal is not a cause of action in itself; a complainant must demonstrate discrimination under [the Commission's program carriage] rules."[34]

The three cognizable causes of action under Section 616, as implemented by the Commission's rules, are: (1) requiring a financial interest as a condition of carriage; (2) requiring exclusivity as a condition of carriage; or (3) affiliation-based discrimination that unreasonably restrains a network's ability to compete fairly.[35] The Commission has recognized that an unreasonable refusal to deal could give rise to a program carriage violation, but *only* when

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[33] *See* Application at 15 (explaining that the determination of whether claims share a common nucleus of operative fact considers whether a judgment with respect to one complaint has an effect on the outcome or remedies of the other complaint).

[34] Dismissal Order ¶ 4 n.21.

[35] *See* 47 U.S.C. § 536; 47 C.F.R. § 76.1302.

brought as an element of a cognizable cause of action under Section 616.[36] In the precedents that beIN cites, the Commission and Judge Edwards (in his concurrence in the D.C. Circuit *Tennis Channel* decision) simply observed that an unreasonable refusal to deal could be a triggering event for purposes of the limitations period in a program carriage case alleging discrimination, financial interest, or exclusivity.[37] Nothing in these decisions or any other Commission precedent amends, or could amend, Section 616 to add a standalone unreasonable refusal to deal claim unrelated to one of the existing enumerated causes of action.

V. CONCLUSION

The Media Bureau's Order dismissing beIN's Third Complaint correctly applied the law and the Commission's rules to the facts and circumstances presented by beIN's conduct in this proceeding. beIN's Application for Review should be denied.

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[36] *See 1993 Program Carriage Order* ¶ 17 (stating that "behavior that is tantamount to an unreasonable refusal to deal with a vendor *who refuses to grant financial interests or exclusivity rights in exchange for carriage*" is actionable under Section 616) (emphasis added); *1998 Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules*, Order on Reconsideration, 14 FCC Rcd. 16433 ¶¶ 4-5 (1999) ("*1999 Program Carriage Order*").

[37] *See 1999 Program Carriage Order* ¶¶ 4-5 (first explaining that Section 616 was intended to prevent an MVPD from requiring a financial interest in a program service or exclusive rights as condition of carriage before then addressing an unreasonable refusal to deal as a potential triggering event for purposes of the limitations period); *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 1001 (D.C. Cir. 2013) (Edwards, J., concurring) (first explaining that Section 616 prohibits discrimination on the basis of affiliation before explaining the applicable statute of limitations for such complaints and the possibility that an unreasonable refusal to deal could constitute a triggering event).

Respectfully submitted,

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May 14, 2019

CERTIFICATE OF SERVICE

I, Melanie A. Medina, certify that on this 14th day of May 2019, I caused a true and correct copy of the foregoing Opposition to Application for Review to be served by overnight and electronic mail on the following:

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