**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| 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. | ) | |

## REPLY OF BEIN TO OPPOSITION TO APPLICATION FOR REVIEW

In its Opposition, Comcast consigns the threshold question in the applicable legal analysis to the status of an afterthought. Before determining whether beIN's complaint for Comcast's refusal to deal is a "pleading" additional to beIN's complaint about a discriminatory offer, the Bureau should have decided whether it involves a new cause of action. The proper analysis starts with the claim-splitting test. That test was misinterpreted by the Bureau, an error that Comcast glosses over. And Comcast fails in its effort to explain away the inconsistency between the Bureau's statement that refusal to deal is not a cause of action in itself and the D.C. Circuit's statement that programmers have one year from refusals to deal to file a complaint. The court cannot have meant that programmers have one year from the refusal to deal to complain about something else.

**The Third Complaint States a Separate Claim.** Comcast places the proverbial cart—the Commission's Part 76 rules on additional pleadings—before the horse. *See* 47 C.F.R. § 76.7(d)-(e). The question at issue is whether the two complaints state a single claim or separate

ones.[1] Comcast asserts that the Commission's Part 76 procedural rules "stand on their own" in determining when a program carriage complainant may bring its claims against a defendant separately. Opposition at 8-9. But Comcast does not contest that a complainant need not bring all its program carriage claims in a single complaint against a defendant. Such an argument would not withstand scrutiny. If Comcast makes a discriminatory offer in February for carriage of an independent programmer's sports network in favor of NBC Sports and then makes a separate discriminatory offer in July for carriage of that same programmer's news network in favor of its affiliate MSNBC, the programmer is under no requirement to lodge the claims in a single, omnibus complaint. Such a requirement would artificially abridge the one year limit for bringing the second claim. *See* 47 C.F.R. § 76.1302(h).

The threshold question is whether the complainant has engaged in impermissible "claim-splitting." If the two complaints state separate claims, then the Third Complaint is not an additional pleading barred from being brought separately.[2] Claim-splitting is an established principle of law recognized by the Supreme Court. *See Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011). It follows the *res judicata* test, except that the element of a final judgment is assumed to be satisfied. *Id.* at 1218. The *res judicata* standard, in its turn, is well-known to the Commission.[3]

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[1] Comcast mischaracterizes the interactions between the parties. beIN's December 24, 2018 letter, which gave notice of beIN's refusal-to-deal claim, stated beIN's intent to amend its earlier filed complaint for a simple reason: consolidation of the two claims seemed the more efficient route. Once Comcast objected, beIN readily offered to file the complaint separately.

[2] *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, 14835 ¶ 106-07 (2008) ("*MASN*").

[3] Service Electric Cable TV, Inc., Trading as Teleservice Co. of Wyoming Valley, Ashley Borough, PA, *Memorandum Opinion and Order*, 55 F.C.C.2d 388, 389-90 (1975); *see MASN*, 23 FCC Rcd. at 14835 ¶ 106-07.

In applying that test, the Bureau wrongly saw a decisional distinction in what is in fact a necessary part of the test. The claim-splitting analysis asks whether the second complaint is precluded *assuming that* the first was disposed of. Thus, the fact that the first complaint had been disposed of in *MASN* was the expected par for the course, not a fatal difference.

In light of this mistake, the Bureau did not thoroughly analyze whether the Second and Third Complaints arise from the same "common nucleus of operative fact." *MASN*, 23 FCC Rcd. at 14835 ¶ 106-07. The Bureau did not consider whether the same right is allegedly being infringed by the same wrong, whether a different judgment obtained in the second action would impair rights under the first judgment, or whether the same evidence would sustain both judgments. *See id.* (citing Teleservices Industry Ass'n v. AT&T Corp., *Memorandum Opinion and Order*, 15 FCC Rcd. 21454, 21457-58 ¶ 9 (2000)). Nor did Comcast's motion to strike provide any factual predicate for concluding that two events as different as those here—(1) an offer for renewal of a currently carried network and (2) a refusal to engage in discussions about the new launch of a network that is not carried—are one and the same thing.

The refusal-to-deal claim scores as a separate one on all of the *Teleservices* factors: the Third Complaint alleges a separate wrong that occurred nearly a year later. The Second Complaint concerns a discriminatory *renewal* offer by Comcast in December 2017, while the Third Complaint concerns a refusal to negotiate the new *launch* of beIN programming during the last quarter of 2018. Separate evidence of Comcast's discriminatory December 13, 2017 offer and its subsequent refusal to deal is required to sustain the two complaints and a different judgment on the Third Complaint would not impair rights under the judgment on the Second. Of course, both complaints rely on similar showings that the networks are similarly situated to Comcast's networks. Every program discrimination complaint against Comcast must compare the complain-

ant's programming to Comcast's own. To require that such comparisons be different before a new complaint may be sustained would be to ordain that each programmer has only one shot at Comcast and must be silent forever thereafter.

*Pace* Comcast, the operative facts underlying the Third Complaint were not "fully known" to beIN when it filed the Second Complaint. Opposition at 2, 5. Far from "negotiating tactics" and "procedural gamesmanship," beIN's December 3, 2018 pre-filing notice letter for the Second Complaint pled with Comcast that the partners reengage in good-faith dialogue and declared beIN available day and night to that end. Second Complaint, Exhibit 3. While Comcast's December 13, 2018 response did not accept beIN's plea, the factual dispute as to how certain Comcast's refusal to deal was at the time of the filing of the Second Complaint should not bar beIN's subsequent Third Complaint. Comcast seeks to ascribe "gamesmanship" to beIN simply because beIN did not fully appreciate in advance Comcast's intransigence.

Comcast argues that the two complaints requested identical remedies. But the remedies requested in any two program carriage complaints are bound to look similar. The Second and Third Complaints request broad remedies typical to all such complaints and request that the Commission tailor the relief to the circumstances. In fact, the Commission explicitly affords parties the opportunity to "enlarge, change, or delete the issues" at the hearing phase. *See* 47 C.F.R. § 1.229(a). In any event, the two complaints do not request identical remedies. The Second Complaint also seeks redress under the *Comcast-NBCU Order*, which specifically notes that the non-discrimination condition contained in that order is an "additional remed[y] regarding program carriage disputes."[4]

[4] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4287 ¶ 121 (2011) ("*Comcast-NBCU Order*").

**beIN Properly Pled a Discriminatory Refusal to Deal.** beIN alleged that "Comcast has discriminated against beIN by refusing to deal with beIN, even as it continues to carry the programming of its affiliates," and that this was "unreasonable." Third Complaint ¶ 108. The Bureau seemed to find that this claim did not constitute a sufficient cause of action, objecting that "refusal to deal is not a cause of action in itself." *Order* ¶ 4 n.21. But this runs into the teeth of Judge Edwards' emphatic statement that programmers may file a complaint for one year after "an MVPD denied or refused to acknowledge a request to negotiate for carriage." *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 1001 (D.C. Cir. 2013) (Edwards, J., concurring).

Comcast flippantly dismisses Judge Edwards' words on the ground that they are focused on the statute of limitations. The court cannot plausibly have meant that programmers have a year from a refusal to deal to complain about something else. And Comcast ignores beIN's point that, even if refusal to deal is not a cause of action in itself, beIN was not asserting it in itself, but rather pled an unreasonable and discriminatory refusal to deal.

Respectfully Submitted,

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May 24, 2019

## CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on May 24, 2019, I caused a true and correct copy of the foregoing Reply of beIN to Opposition to Application for Review to be served by overnight mail and electronic mail on the following:

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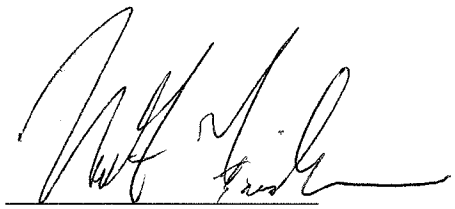

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