

97-171

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Federal Communications Commission

DA 97-1498

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Classic Sports Network, Inc.,)	
Complainant)	
)	
v.)	CSR-4975-P
)	
Cablevision Systems Corporation,)	
Defendant)	
)	
Program Carriage Complaint)	
Pursuant to 47 C.F.R. § 76.1301)	

MEMORANDUM OPINION AND HEARING DESIGNATION ORDER

Adopted: July 14, 1997

Released: July 16, 1997

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Hearing Designation Order* ("Order"), the Cable Services Bureau ("Bureau") designates for hearing before an Administrative Law Judge the resolution of factual disputes raised in Classic Sports Network, Inc.'s ("Classic Sports") program carriage complaint against Cablevision Systems Corporation ("Cablevision"). Classic Sports, a video programming vendor, alleges that Cablevision, a multichannel video programming distributor, demanded a financial interest or an exclusivity agreement or both in return for carriage of Classic Sports' programming in violation of 47 U.S.C. § 536 and the Commission's corollary regulations, 47 C.F.R. §§ 76.1300-76.1302. Classic Sports requests, among other things, that Cablevision be required to carry Classic Sports' programming on its cable systems pursuant to an agreement entered into between the parties.¹ As explained herein, the Bureau directs that an Administrative Law Judge hold a hearing to resolve the factual disputes and return a recommended decision to the Bureau.

II. BACKGROUND

2. Section 616 of the Communications Act of 1934 provides, in relevant part, that the Commission "establish regulations governing program carriage agreements and related practices between

¹Pursuant to 47 C.F.R. § 76.1302(a), Classic Sports served written notice upon Cablevision on February 28, 1997 of its intention to file a § 616 Complaint. Classic Sports filed its Complaint on March 17, 1997. Cablevision filed its Response on or about April 21, 1997. On May 12, 1997, Classic Sports filed its Reply to Cablevision's Answer. The Bureau granted the parties' requests for confidentiality of proprietary information pursuant to 47 C.F.R. § 76.1302(h).

cable operators or other multichannel video programming distributors and video programming vendors."² In particular, Congress directed that the regulations

- (1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;
- (2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;
- (3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by 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;
- (4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;
- (5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and
- (6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.³

3. In *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order ("*Second Report and Order*"), in which the Commission adopted regulations pursuant to § 616, the Commission attempted 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 the competitive 'marketplace.'"⁴ Because § 616 does not prohibit multichannel video programming distributors from acquiring exclusivity rights or financial interests from video programming vendors, the Commission recognized that "resolution of Section 616 complaints will necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to

²47 U.S.C. § 536.

³47 U.S.C. § 536(a).

⁴*Second Report and Order*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd. 2642, 2648-49 (1993) (quoting *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Notice of Proposed Rule Making, 8 FCC Rcd. 194 (1993)).

determine whether a violation has, in fact, occurred."⁵

4. In the context of "good faith" negotiations, multichannel video programming distributors may negotiate for, but may not insist upon, benefits in exchange for carriage.⁶ On the other hand, negotiations may violate § 616 if they were to involve "ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a [video programming] vendor who refuses to grant financial interests or exclusivity rights in exchange for carriage. . . ." ⁷ Section 616 encompasses explicit as well as implicit "coercion."⁸

5. Given that alleged violations of § 616 might require an evaluation of "contested facts," the Commission acknowledged in implementing § 616 that the "staff w[ould] be unable to resolve most carriage agreement complaints on the sole basis of a written record. . . ." ⁹ In such a case, if the staff were to determine that the complainant establishes a *prima facie* case but that "disposition of the complaint w[ould] require the resolution of factual disputes or other extensive discovery," the staff is to notify the parties that they have the option of choosing Alternative Dispute Resolution ("ADR") or proceeding to an adjudicatory hearing before an Administrative Law Judge.¹⁰

III. DISCUSSION

6. After reviewing the pleadings and supporting documentation filed by the parties in the above-referenced matter, the Bureau finds that Classic Sports has established a *prima facie* showing under § 616. The Bureau also finds that the pleadings and supporting documentation present several factual disputes.¹¹ Accordingly, the Bureau directs an Administrative Law Judge to hold a hearing, issue a recommended decision on the underlying facts in this matter, and then return the matter to the Bureau. In order to preserve its neutrality pending the findings of the Administrative Law Judge, the Bureau will designate separate trial staff to participate in the hearing¹² and will not be deemed a party to the hearing.¹³ Upon receipt of the Administrative Law Judge's recommended decision, the Bureau will make the requisite legal determinations of whether Cablevision required a financial interest in Classic Sports' video programming as a condition for carriage on one or more of Cablevision's systems and whether Cablevision

⁵*Id.* at 2648.

⁶*Id.* at 2649.

⁷*Id.*

⁸*Id.* at 2650.

⁹*Id.* at 2652.

¹⁰*Id.* at 2656.

¹¹47 C.F.R. § 76.1302(g)(3).

¹²47 C.F.R. § 1.1202(c).

¹³47 C.F.R. § 76.1302(m)(3).

retaliated against Classic Sports for refusing to provide exclusive rights against any other multichannel video programming distributor as a condition for carriage on one or more of Cablevision's systems and will decide upon, if necessary, the appropriate remedy.

7. Pursuant to 47 C.F.R. § 76.1302(m)(2), Classic Sports and Cablevision will have ten days following the release of this *Order* to elect to resolve this dispute through ADR. Should either side not agree to ADR or in the event that ADR is unsuccessful, the Bureau will set this matter for an adjudicatory hearing before an Administrative Law Judge.¹⁴ Each party will notify the Bureau, in writing, of its election and, in the event that ADR is chosen, will timely update the Bureau on the status of the ADR process.¹⁵

IV. CONCLUSION

8. In light of the *Second Report and Order* and based upon the pleadings and supporting documentation in this matter, the Bureau will refer this matter to an Administrative Law Judge for a recommended decision as to the factual disputes presented by pleadings and supporting documentation should either or both of the parties not elect ADR or fail to achieve a settlement through that process.

V. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to § 616 of the Communications Act of 1934, as amended, 47 U.S.C. § 536, and 47 C.F.R. §§ 76.1300-76.1302, Classic Sports and Cablevision submit to the Cable Services Bureau, in writing and within ten days of the release of this *Order*, their respective elections as to whether each wishes to proceed to Alternative Dispute Resolution and, in the event that Alternative Dispute Resolution is chosen, will timely update the Cable Services Bureau on the status of that process.

10. **IT IS FURTHER ORDERED** that in the event that the parties choose not to avail themselves of Alternative Dispute Resolution or fail to reach a settlement through that process, Classic Sports Network Inc.'s § 616 complaint against Cablevision Systems Corporation will be **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge.

11. **IT IS FURTHER ORDERED** that the Administrative Law Judge will make and return to the Cable Services Bureau a recommended decision on the following factual questions:

(a) What credible proof is there, if any, that Cablevision required a financial interest in Classic Sports' video programming service as a condition for carriage on one or more of Cablevision's cable systems?

(b) What credible proof is there, if any, that Cablevision retaliated against Classic Sports for failing to provide exclusive rights against any other multichannel video programming distributor as a condition for carriage on one or more of Cablevision's cable systems?

¹⁴47 C.F.R. § 76.1302(m)(2).

¹⁵47 C.F.R. § 76.1302(m)(2).

12. **IT IS FURTHER ORDERED** that the Cable Services Bureau will designate separate trial staff to participate in the hearing and will not be deemed a party to the hearing.

13. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

¹⁶47 C.F.R. § 0.321.