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

In the Matter of	)	
1998 Biennial Regulatory Review - Part 76 Cable Television Service Pleading and Complaint Rules	)	CS Docket No. 98-54

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO PETITION FOR RECONSIDERATION

Fox Sports Net LLC ("Fox"), by its attorneys and pursuant to sections 1.429 of the Commission's rules, 47 C.F.R. § 1.429, hereby opposes the Petition for Reconsideration filed by EchoStar Communications Corporation ("EchoStar") on March 12, 1999[1/] in the above-captioned proceeding.[2/]

EchoStar's Petition is nothing but a collateral attack on the outcome of the Cable Bureau's decision in the Fox Sports program access case.[3/] There, the Bureau correctly held that EchoStar's program access complaint was barred by the statute of limitations because more than a year had passed since EchoStar signed a contract with Fox Sports Direct. EchoStar has sought reconsideration of that decision, arguing for "carte blanche" to bring program access complaints

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1/ Public Notice, 64 Fed. Reg. 15,755 (1995).

2/ In the Matter of 1998 Biennial Regulatory Review -- Part 76, Cable Television Service Pleading and Complaint Rules, Report and Order, CS Docket No. 98-54, FCC 98-348 (rel. Jan. 8, 1999) ("Report and Order").

3/ EchoStar Communications Corporation v. Fox/Liberty Networks, LLC et al, DA 98-2153, CSR No. 5138-P (rel. Oct. 28, 1998) ("Fox Sports").

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at any time.[4] Now EchoStar seeks the opportunity to make the same unpersuasive arguments again.

There is no basis to allow EchoStar a third bit of the apple by granting reconsideration in this proceeding. No "new" procedures have been announced. Moreover, the Commission was not obligated to provide prior notice of the clarification it made to the pleading rules, since notice was not required under section 553 of the Administrative Procedure Act.[5] EchoStar's reference to "substantive" and "procedural" rules is irrelevant and misleading. Under the proper test for determining whether notice is required, the Commission was clearly within its authority to clarify the pleading rules as it did.

For these reasons, EchoStar's Petition should be DENIED.

ARGUMENT

The background for EchoStar's Petition is straightforward. Congress authorized the Commission to prescribe regulations to implement the program access provisions of the Cable Act of 1992.[6] The Commission duly enacted the rules, including a statute of limitations barring complaints brought more than one year after a contract is entered into or an allegedly discriminatory offer is made.[7] The policy behind the statute of limitations is consistent with

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[4] Under EchoStar's reading of the rules, there would be no statute of limitations.

[5] 5 U.S.C. § 553(b)(A).

[6] See 47 U.S.C. § 628(f).

[7] 47 C.F.R. § 76.1003(r). See also In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order, 8 FCC Rcd 3359, 3390 ¶ 75, 3416 ¶ 124, 3422 ¶ 139 (1993).

Commission practice generally.[8] Moreover, the statute of limitations clearly furthers the Congressional goal of encouraging prompt and speedy resolution of complaints.[9]

The Fox Sports case confirmed that the statute of limitations period may commence either when a contract is executed or a when a discriminatory offer is made. The ruling made clear, however, that when an allegedly discriminatory contract forms the basis of a Complaint, the one year period commences when the contract is signed.[10] Unhappy with that result, EchoStar wants to use this proceeding to re-argue the outcome of the Fox Sports case.[11] It should not be allowed to do so.

In this proceeding, the Commission undertook to "reorganize and simplify" its pleading and complaint process rules.[12] The Commission therefore clarified that "an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory."[13] This was hardly a change in the method used to grant substantive rights.[14] The Commission merely clarified

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[8] In promulgating this rule, the Commission acted consistently with its standard practice of protecting potential defendants against "stale and vexatious claims" by putting an end to the possibility of litigation after a reasonable period of time has elapsed. In the Matter of Aetna Life Insurance v. AT&T, 3 FCC Rcd 2126, 2129 (1988). See also In the Matter of Anchorage v. ALASCOM, 4 FCC Rcd 2472, 2473 (1989); Sprint Communications Co. v. AT&T, 9 FCC Rcd 4801 (1994).

[9] See 47 U.S.C. § 628(f) ("expedited review" required); 8 FCC Rcd 3389-90 (rules designed to assist Commission to dispose of complaints expeditiously).

[10] Fox Sports at ¶¶ 18-20.

[11] See EchoStar Petition at n.10 (styling the Commission's action as "resolving" matters disposed of by the Cable Bureau in Fox Sports).

[12] Report and Order at ¶ 1.

[13] Id. at ¶ 18 (emphasis supplied) (codified at 47 C.F.R. § 76.1003(f)(2)).

[14] See Brown Express, Inc. v. United States, 607 F.2d 695, 700 (5th Cir. 1979) (distinguishing substantive rules, which create law, from interpretive rules, which are statements as to what an

existing law.[15] Nor was a new rule announced. The Commission merely explained how its existing rules would be enforced. Since the rules adopted were merely interpretive, the Commission was not required to publish its intentions in advance.[16]

I. ECHOSTAR SHOULD NOT BE ALLOWED TO USE THIS PROCESS TO MOUNT A COLLATERAL ATTACK ON THE CABLE BUREAU'S DECISION

In the context of adjudicating the Fox Sports case, the Cable Bureau correctly held that program access complaints must be brought within one year of the date on which the defendant's alleged violation occurred. EchoStar, on the other hand, contended that correspondence from the defendant started a "new" one year limitations period. The Bureau correctly found that EchoStar's argument missed the point. "Executing a contract and making an allegedly discriminatory offer are two separate events," each of which may trigger the limitations period.[17] However, as the Bureau understood, when the underlying contract forms the basis of the Complaint, the statute of limitations commences on the date the contract is signed.

It would be inappropriate to allow EchoStar to use this proceeding as a forum to re-argue the outcome reached by the Bureau in the Fox Sports case. That case balanced the need for plaintiffs to vindicate their rights against the costs of upsetting established business expectations based upon longstanding contractual relationships. Moreover, allowing complaints to be filed

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administrative officer thinks the statute or regulation means).

[15] See Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1989) (noting that if a rule simply clarifies or explains existing law or regulations, it will be deemed interpretive).

[16] See American Soc'y of Cataract & Refractive Surgery v. Bowen, 725 F.Supp. 606 (D.D.C. 1989) (specifically exempting interpretive rules from the notice and comment requirements).

[17] Fox Sports at ¶ 18.

based on the basis of discriminatory offers[18/] where there is an underlying contract between the parties would essentially vitiate entirely the first prong of the rule.[19/]

Importantly, EchoStar offers no basis to conclude that the Report and Order effected a change in Commission pleading policies. While EchoStar probably wishes the program access rules did not bar its Complaint against Fox Sports, in fact, logic and the rules supported the Bureau's action even before the Report and Order was issued.

II. THE COMMISSION WAS NOT OBLIGATED TO PROVIDE NOTICE OF ITS CLARIFICATION TO THE ONE-YEAR LIMITATIONS PERIOD FOR FILING PROGRAM ACCESS COMPLAINTS

EchoStar wrongly claims that the Administrative Procedure Act required the Commission to give "notice of the terms and substance of the proposed rule or a description of the subjects and issues involved."[20/] However, the law does not impose this requirement on "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice . . . ."[21/] An "interpretive rule" is a clarification of existing regulations, rather than a "substantive modification in or adoption of new regulations."[22/] As such, it clarifies "what an administrative officer thinks the statute or regulation means."[23/]

[18/] 47 C.F.R. § 76.1003(f)(2) (complaint against offer).

[19/] 47 C.F.R. § 76.1003(f)(1) (complaint against contract). As Fox noted in the Fox Sports case, allowing conduct that takes place after the statutory period has elapsed to form the basis for a Complaint would not be in the public interest, as it would eliminate entirely any incentive for parties who have an agreement to negotiate any changes at all during the term of a contract after the statute of limitations has otherwise run -- since any such discussion could form the basis for a Complaint that reaches back to the beginning of the contract.

[20/] EchoStar Petition at 4-5 (citing 5 U.S.C. § 553(b)).

[21/] 5 U.S.C. § 553(b)(A).

[22/] Continental Oil Co. v. Burns, 317 F.Supp. 194, 197 (D.C.Del. 1970).

[23/] Spring Mills, Inc. v. Consumer Products Safety Commission, 434 F.Supp. 416, 430 (D.D.C. 1977).

A formal Commission rule may still be interpretive "despite the fact that it establishes new procedures."[24] The Commission has adopted a test utilizing four criteria to determine whether or not the rule is interpretive,[25] all of which cut against EchoStar's Petition.

First, the rule announced was neither complex nor pervasive. It simply clarified when the statute of limitations period commences for (1) complaints based on existing contracts and (2) complaints not based on existing contracts. These categories hardly require further explanation. Second, the provisions did not effect a "drastic change" in existing law.[26] Third, the Report and Order did not announce a retroactive rule.[27] Fourth, and finally, except for EchoStar's attempt to bootstrap its own losing arguments into this proceeding, no "confusion and controversy [has been] engendered by practical difficulties of compliance"[28] with the rules. For all these reasons, the clarification made to the program access pleading rules in the Report and Order was an interpretive rule that did not require advance notice.

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[24] In the Matter of Amendment of Part 22 of the Commission's Rules, 85 FCC 2d 910, 912 ¶ 5 (1981) (rejecting challenge to rule that was adopted without notice and comment) (citing Commonwealth of Pennsylvania v. United States, 361 F.Supp. 208 (D.C.Pa. 1973)).

[25] Id. (citing Spring Mills at 430).

[26] Indeed, EchoStar itself implicitly recognized the distinction between the two categories by arguing in the alternative that the allegedly discriminatory offer at issue in Fox Sports (1) resulted from negotiations that had commenced before the one-year period elapsed or (2) had nothing to do with the existing contract between the parties. Compare EchoStar Communications Corporation v. Fox/Liberty Networks, LLC et al, DA 98-2153, CSR No. 5138-P, EchoStar Petition for Reconsideration, filed November 28, 1998, at 6 ("contract modification negotiations between EchoStar and Fox Sports had actually started" before the one-year period elapsed) (emphasis in original) with id., EchoStar Reply, filed December 30, 1997, at 5-6 (arguing that defendant's letter constituted an independent discriminatory offer). These alternative arguments mirror precisely the common sense clarification announced in the Report and Order. See 47 C.F.R. §§ 76.1003(f)(1)(where contract forms the basis of the Complaint) and (f)(2) (where independent offer forms the basis of the Complaint).

[27] See Report and Order at ¶ 27 (effective date to be announced).

[28] Spring Mills, 434 F.Supp. at 430.

CONCLUSION

For the reasons set forth above, EchoStar's Petition for Reconsideration should be denied and the Report and Order affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathleen Birch, hereby declare that a copy of the foregoing Opposition to Petition for Reconsideration was sent this 16th day of April, 1999, by hand (indicated by *) or First Class U.S. mail, postage prepaid, to the persons listed below:

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