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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED
OCT 21 2008
Federal Communications Commission
Office of the Secretary

In the Matter of)
)
NFL Enterprises LLC,)
Complainant)
)
v.)
)
Comcast Cable Communications, LLC,)
Defendant)

MB Docket No. 08-214
File No. CSR-7876-P

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Federal Communications Commission
Bureau / Office

To: Hon. Richard L. Sippel
Chief Administrative Law Judge

REQUEST FOR CERTIFICATION TO THE COMMISSION

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**Before the
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| NFL Enterprises LLC, |) | MB Docket No. 08-214 |
| Complainant |) | |
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| v. |) | |
| |) | |
| Comcast Cable Communications, LLC, |) | |
| Defendant |) | |

To: Hon. Richard L. Sippel
Chief Administrative Law Judge

REQUEST FOR CERTIFICATION TO THE COMMISSION

Comcast Cable Communications, LLC (“Comcast”), by its attorneys and pursuant to Section 1.115(e)(3) of the Commission’s rules,¹ requests that the Chief Administrative Law Judge (“ALJ”) certify to the Commission the issues set forth below and authorize Comcast to file immediately with the Commission an application for review of the Media Bureau’s Hearing Designation Order as amended by the Erratum of October 15, 2008, with respect to the above-captioned carriage complaint by NFL Enterprises LLC (“NFL Network”).² If the matter is certified, the ALJ also should ensure that the hearing process does not commence until after a decision on the certified issues has been rendered.

¹ 47 C.F.R. § 1.115(e)(3); *see* 47 C.F.R. § 0.341(c) (authorizing ALJ to certify questions independently to the Commission); *see also* 47 C.F.R. § 1.229 (giving ALJ authority to change the issues).

² *See Herring Broad, Inc. v. Time Warner Cable Inc.*, MB Docket No. 08-214, *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (MB rel. Oct. 10, 2008) (“HDO”), *Erratum* (MB rel. Oct. 15, 2008) (“Erratum”). Comcast is filing this request with the Chief ALJ because a Presiding Judge has not been designated as of today, the due date for this request. *See* 47 C.F.R. § 0.351(f).

SUMMARY

The *HDO* conflicts with the plain language of the Communications Act of 1934 (the “Communications Act” or “Act”),³ the Commission’s rules, the Administrative Procedure Act (“APA”),⁴ and the U.S. Constitution. Specifically, the *HDO* misconstrues the applicable legal standards and establishes a 60-day time period for resolving the case that is unworkable and unlawful. It also erroneously decides threshold issues that, if correctly decided, would obviate the need for a hearing.

Although Comcast believes that the ALJ has authority to rectify at least some of these problems on his own motion or through management of the hearing,⁵ to the extent that the ALJ deems his discretion to correct these errors is constrained, the matter should be certified to the Commission. Certification is appropriate because (1) there are “controlling question[s] of law as to which there [are] substantial ground[s] for difference of opinion,” and (2) “immediate consideration of the question[s] would materially expedite the ultimate resolution of the litigation.”⁶ Obtaining Commission guidance on these core legal issues *before* beginning the hearing would be the most efficient and economical way to resolve the case expeditiously and avoid the substantial risk that time and resources would be wasted by the parties and the ALJ addressing issues that would later be modified or rejected in their entirety by the Commission or a reviewing court.

³ 47 U.S.C. § 151 *et seq.*

⁴ 5 U.S.C. § 551 *et seq.*

⁵ *See* 47 C.F.R. § 1.243(f).

⁶ *See id.* § 1.115(e)(3).

I. THE *HDO* FAILS TO PROVIDE SUFFICIENT GUIDANCE BECAUSE IT APPEARS TO MISCONTRUE THE APPLICABLE PROGRAM CARRIAGE LEGAL STANDARDS

The *HDO* fails to provide sufficient guidance for the upcoming hearing. It instructs the ALJ to make a Recommended Decision on the issues of (1) whether Comcast violated the program carriage provisions of the Act and the Commission's implementing rule, and (2) potential remedies if a violation has occurred,⁷ but the relevant legal standards appear to be misstated.

As to the issue of compliance with the program carriage requirements, the Bureau directs the ALJ to assess "whether the defendant has discriminated against the complainant's programming in favor of its own programming."⁸ In contrast, the Act and implementing rule prohibit discrimination "on the basis of affiliation or non-affiliation" that "unreasonably restrain[s] the ability of an unaffiliated video programming vendor to compete fairly."⁹ The *HDO* appears to depart from the governing standard of discrimination in two significant respects.

First, the Bureau's language, which focuses on discrimination "*in favor of [Comcast's] own programming*,"¹⁰ could be construed as permitting a finding of discrimination simply because a multichannel video programming distributor ("MVPD") treated its affiliated network differently than it treated a complainant's network. Under this view, a complainant arguably would not be required to show that the MVPD treated the complainant's network differently *because* it was unaffiliated (as opposed to for any number of other valid business reasons). However, the statute and the rules plainly require that the complainant must show not only differential treatment, but also that the MVPD's actions were taken "*on the basis of affiliation or*

⁷ See Erratum ¶ 9.

⁸ *Id.*

⁹ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹⁰ See Erratum ¶ 9 (emphasis added).

*non-affiliation.*¹¹ Thus, the Bureau has created a new, and different, standard, one that is inconsistent with the statute and the rules and has never been adopted by the Commission.¹²

Second, the *HDO* appears to misapply the requirement that the complainant show that it was “unreasonably restrain[ed] . . . from] compet[ing] fairly.”¹³ This misapplication is particularly significant, among other reasons, because the NFL Network received precisely the carriage it agreed to in its carriage contract. Although the *HDO* asserts that “the interpretation of the contract has no bearing on a determination of whether Comcast discriminated against NFL Network,”¹⁴ a determination under the statutory standard of discrimination cannot properly exclude consideration of whether the network in question received precisely what it bargained for.

With respect to Section 616(a)(1)’s prohibition on “requiring a financial interest in a program service as a condition for carriage,”¹⁵ the *HDO* purports to adopt an entirely novel theory of what constitutes a violation. Specifically, contrary to the statute and Commission rules and precedent, the Bureau improperly conflates Comcast’s *request to obtain (and pay for) licensing rights to carry programming* on its own network (Versus), which is lawful,¹⁶ with unlawfully *requiring an equity or other financial interest* in NFL Network as a condition for

¹¹ 47 U.S.C. § 536(a)(3) (emphasis added); 47 C.F.R. § 76.1301(c) (emphasis added).

¹² See *Tully-Warwick Corp. and Concord Broad. Assocs.*, MM Docket No. 83-505, Memorandum Opinion and Order, 95 FCC 2d 1427, 1430 (1983).

¹³ 47 U.S.C. § 536(a)(3).

¹⁴ *HDO* ¶ 71 n.323.

¹⁵ 47 U.S.C. § 536(a)(1); see *Erratum* ¶ 9.

¹⁶ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-265, *Second Report and Order*, 9 FCC Rcd 2642, 2648 (1993) (“1993 Program Carriage Order”).

carriage, which Comcast plainly did not do.¹⁷ Comcast currently carries NFL Network even though it never sought and does not have an equity or financial interest in NFL Network, thus, it is hard to imagine how it could have “require[d] a financial interest . . . as a condition of carriage.”¹⁸

As to the remedy for any violation of the rules, the Bureau directs that the ALJ should determine the “appropriate price, terms and conditions on which the complainant’s programming should be carried on defendant’s systems *and* such other remedies as the [ALJ] recommends.”¹⁹ The statute and corresponding rule, in contrast, give the Commission (or in this case the ALJ) the discretion to “provide for appropriate penalties and remedies for violations . . . , including carriage,”²⁰ but do not presuppose that the preferred remedy for a violation is the one that is most antithetical to the First and Fifth Amendments of the Constitution, *i.e.*, compelled carriage of the complainant’s programming by the defendant cable operator. Here again, the Commission has never construed the statute or its rules as requiring mandatory carriage when a violation is found to have occurred.

¹⁷ *HDO* ¶ 87. The Bureau also improperly focuses on the carriage of programming rather than a “program service” as required under the rule.

¹⁸ 47 U.S.C. § 536(a)(1). The *HDO* also overlooks significant policy implications of this novel legal theory. Under the Bureau’s reasoning, any proposal by an MVPD to license a minimal amount of programming (even as little as 24 hours annually, as might have been the case here) from an unaffiliated entity for broadcast on an MVPD’s affiliated network could constitute a program carriage violation. The Bureau’s interpretation leaves open the possibility that an MVPD simply seeking to license programming completely independent of negotiations for carriage of the programmer’s network could be found in violation of the program carriage rules.

¹⁹ *Erratum* ¶ 9 (emphasis added).

²⁰ 47 U.S.C. § 536(a)(5); *see also* 47 C.F.R. § 76.1302(g) (“Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, *if necessary*, mandatory carriage of a video programming vendor’s programming on defendant’s video distribution system. . . .” (emphasis added)).

Moreover, with regard to this case in particular, the *HDO* adopts an exceedingly low standard for determining when mandatory carriage is an appropriate remedy. Specifically, a complainant seeking mandatory carriage should “specify the desired duration and terms of such carriage, and should include the rationale and any documentary evidence supporting such request.”²¹ Although the NFL Network’s carriage complaint did not meet these requirements, the *HDO* accepts the NFL Network’s vague, conclusory statements in support of its requested remedy to be sufficient²² and assumes that mandatory carriage is an appropriate remedy in this case.²³

Certification of an application for review to the full Commission is required in these circumstances to ensure that the issues designated for hearing are articulated clearly and correctly. As the *Algreg Cellular Engineering* proceeding demonstrates, a failure to certify these issues will undermine expeditious resolution of this dispute. In that case, the Common Carrier Bureau designated issues for hearing based on its conclusion that participation in Mutual Contingent Risk-Sharing Agreements (“MCRSAs”) violated certain of the Commission’s cellular licensing rules, rendering the associated cellular applications defective and reflecting adversely on the qualifications of participating licensees.²⁴ After approximately six years of litigation before an ALJ and the Review Board, the Commission rejected the legal foundation upon which the hearing rested — that participation in a MCRSA violated Commission cellular rules — and reversed the decisions by the ALJ and the Review Board to dismiss the applications

²¹ *1993 Program Carriage Order*, 9 FCC Rcd at 2654 (emphasis added).

²² *HDO* ¶ 73 (construing NFL reply pleading, not complaint, as requesting carriage on expanded basic tier “on the same terms and conditions as Comcast’s affiliated national sports networks”).

²³ *Erratum* ¶ 9.

²⁴ *Algreg Cellular Eng’g*, CC Docket No. 91-142, *Memorandum Opinion and Order, Order Designating Applications for Hearing and Order to Show Cause*, 6 FCC Rcd 2921, 2925-26, 2927-28 (CCB 1991).

and revoke the licenses.²⁵ The Commission noted: "In dismissing the applications and revoking the licenses, the Board, like the ALJ, had no occasion to address arguments that the Bureau erred in determining . . . that the MCRSA violated several" cellular rules.²⁶ Certification in this case is thus appropriate to prevent history from repeating itself.

Moreover, certification is necessary because the Media Bureau's adoption of an unprecedented standard for what constitutes a violation of Section 616 of the Communications Act and the program carriage rules and its misinterpretation of the remedial provisions of the Act and the rules constitute "controlling question[s] of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation."²⁷ In *Tully-Warwick*, a case, like this one, involving novel questions of law, the Commission upheld an ALJ's certification of an application for review, stating:

We agree with Capitol that the Bureau exceeded its delegated authority in taking the action here challenged. Section 0.281(a)(18)(ii) of Commission's Rules, governing the Bureau's delegated authority powers, makes clear that the full Commission must act on novel questions of law, fact and policy which cannot be resolved under existing guidelines and precedents. As the ALJ aptly pointed out in certifying this matter to us, there is no Commission precedent — one way or the other — on the appropriateness of waiver of Section 73.37(e)(1)(ii) under circumstances similar to those presented in this case. Hence, a novel question of law, fact and policy was and is presented which warrants consideration by the full Commission. Accordingly, the Bureau's Hearing Designation Order in this proceeding will be vacated. For these same reasons, we find that Capitol has made the

²⁵ *Algreg Cellular Eng'g*, CC Docket No. 91-142, *Memorandum Opinion and Order*, 12 FCC Rcd 8148, 8151-52 (1997).

²⁶ *Id.* at 8155.

²⁷ 47 C.F.R. § 1.115(e)(3).

prerequisite showing warranting a grant of its Application for Review.²⁸

This reasoning supports grant of Comcast's certification request in this case. While Comcast would welcome any action by the Presiding Judge (or Chief ALJ) to clarify these matters, to the extent the ALJ believes he lacks authority to do so, certification is requested as set forth above.

II. THE 60-DAY HEARING PERIOD IS LEGALLY INSUFFICIENT

The Bureau also erred in mandating that the ALJ adjudicate this case within 60 days.²⁹ Such a timetable is inconsistent with the fact finding objectives of the *HDO*, beyond the Bureau's delegated authority, and contrary to the APA and the Due Process Clause of the Constitution. It is plainly impracticable to finish a full evidentiary hearing complete with discovery, witness testimony, and a written decision within 60 days.³⁰ In fact, the Bureau itself took over five months simply to find that a *prima facie* showing had been established. The Bureau has delegated authority to refer cases to ALJs, but has no authority to constrain the timing of their work.

Once a matter is referred to an ALJ, the course of the hearing is within the ALJ's discretion until its conclusion.³¹ ALJs' authority to conduct hearings is primarily derived from

²⁸ *Tully-Warwick Corp.*, 95 FCC 2d at 1430.

²⁹ *HDO* ¶ 120.

³⁰ This is especially true here where the Bureau has simultaneously referred *six* cases to the two FCC ALJs, imposing the same deadline on all of them, and has substantially altered the *HDO* after nearly 10 percent of the allotted time for the hearing process had already elapsed. *See Erratum*.

³¹ *See, e.g., Arcatel, Inc.*, BC Docket No. 82-449, *Memorandum Opinion and Order*, 92 FCC 2d 893, 895 (Rev. Bd. 1982) (Board is "loath to intervene in ongoing adjudicatory proceedings").

the APA and Section 409 of the Communications Act.³² Section 556(c) of the APA provides that “[s]ubject to published rules of the agencies and within its powers, employees presiding at hearings may . . . (5) regulate the course of the hearing, . . . and (11) take other action authorized by agency rule consistent with this [Act].”³³ Consistent with the independent authority vested in ALJs under the APA and the Communications Act,³⁴ the Commission’s rules specifically contemplate that an ALJ can structure his own hearing.³⁵ In addition, the Commission has affirmed on multiple occasions that its ALJs are afforded substantial discretion to discharge their duties fairly and thoroughly.³⁶

³² 5 U.S.C. § 556; 47 U.S.C. § 409; *see* 47 C.F.R. § 0.201(a)(2) note (noting that “[i]nterlocutory matters which are not delegated to the Chief [ALJ] are ruled on by the presiding officer by virtue of the authority vested in him to control the course and conduct of the hearing” and that “[t]his authority stems from section 7 of the [APA] and section 409 of the Communications Act”).

³³ 5 U.S.C. § 556(c). In interpreting nearly identical language contained in the original text of the APA, the Attorney General’s Manual on the Administrative Procedure Act explains that the “quoted language automatically vests in hearing officers the enumerated powers to the extent that such powers have been given to the agency itself, i.e., ‘within its powers.’ In other words, not only are the enumerated powers thus given to hearing officers by section 7(b) without the necessity of express agency delegation, *but an agency is without power to withhold such powers from its hearing officers.*” Attorney General, *Attorney General’s Manual on the Administrative Procedure Act* 74 (1947) (emphasis added).

³⁴ *See* 5 U.S.C. § 556(c); 47 U.S.C. § 409.

³⁵ 47 C.F.R. §§ 0.341, 1.243, 1.248; *see Gilbert Broad. Corp.*, Docket No. 204207, *Memorandum Opinion and Order*, 54 FCC 2d 69, 70 (Rev. Bd. 1975) (“[I]n the absence of a clear abuse of discretion by arbitrary or capricious action, [the ALJ’s] determination in such matters, including the scheduling of hearing sessions, will not be overturned.”).

³⁶ *See, e.g., Family Broad., Inc.*, EB Docket No. 01-39, *Memorandum Opinion and Order*, 17 FCC Rcd 19332, 19334-35 (2002) (“The Commission accords its administrative law judges discretion in regulating the course of evidentiary hearings, and presumes they will discharge their duties in a fair and impartial manner.”) (internal citations omitted); *see also WWOR-TV, Inc.*, MM Docket No. 88-382, *Memorandum Opinion and Order*, 5 FCC Rcd 4113, 4115 (Rev. Bd. 1990) (“[B]road discretion is ceded [to the ALJ] in ordering discovery. . . .”); *Mark Sobel*, WT Docket No. 97-56, *Decision*, 17 FCC Rcd 1872, 1897 (2002) (separate statement of Commissioner Kevin J. Martin) (the Commission “routinely defers to the ALJ” with respect to matters relating to hearings).

The Bureau already has concluded that the written record before it was insufficient to render a decision and thus referred the matter to an ALJ for a hearing.³⁷ In establishing a timeline for rendering a decision, a number of factors must be considered, such as the need of the parties to gather and introduce evidence,³⁸ cross-examine witnesses, and submit proposed findings of fact and conclusions of law, as well as the need of the ALJ to analyze the record, assess witness credibility and demeanor, and write a Recommended Decision.³⁹ As the attached Table demonstrates, 34 reported Initial Decisions have been rendered by ALJs over the last 15 years⁴⁰ and *not a single decision was rendered within 60 days*.⁴¹ In fact, the quickest decision was issued after approximately seven months.⁴² Thus, a mandatory 60-day deadline for resolving this hearing is unreasonable. Indeed, the Commission previously rejected a request to impose a uniform 90-day deadline for resolving carriage complaints “[g]iven the complexity of

³⁷ See HDO ¶ 7.

³⁸ There are a large number of witnesses, as reflected in the NFL Network’s own pleadings, which identify some of the numerous party and non-party witnesses with knowledge relevant to fact issues raised by the NFL Network. See, e.g., Complaint ¶ 46 (Fox Sports Network); ¶ 56 (DIRECTV, EchoStar, Verizon and AT&T); ¶ 69 (NFL Broadcast Committee); Complaint Exhibit 3 (Adam Shaw); Complaint Exhibit 9 ¶ 1 (Paul Tagliabue); Complaint Exhibit 10 (Frank Hawkins); Complaint Exhibit 10 ¶ 11 (unidentified “others from the NFL”); Complaint Exhibit 10 ¶ 20 (Pac-10/Big 12 Conference); Complaint Exhibit 10 ¶ 22 (“many NFL Network advertisers,” including Best Buy and Nissan); Reply ¶ 24 n.9 (ESPN); Reply ¶ 4 (Ronald Furman); Reply Exhibit 4 ¶ 11 (Wendy’s International, Inc. and Ford Motor Company); see also Complaint Exhibit 11 (Dr. Hal Singer).

³⁹ The minimum deadlines established for discovery, which were designed to ensure a full and fair hearing, are not consistent with the 60-day schedule. See, e.g., 47 C.F.R. §§ 1.315 (requiring a *minimum* of 21 days notice for depositions on oral testimony), 1.316 (requiring a *minimum* of 35 days notice for depositions on written interrogatories, providing for cross interrogatories 14 days *after* the interrogatories, and motions to suppress or limit interrogatories 21 days *after* interrogatories).

⁴⁰ There were no reported Recommended Decisions issued by ALJs over that same period.

⁴¹ See Attachment A.

⁴² That hearing involved a very simple question regarding an AM station’s non-compliance with minimum operating standards and whether the station could be placed back on the air quickly. See *Under His Direction, Inc.*, MM Docket No. 96-70, *Initial Decision*, 11 FCC Rcd 16831 (ALJ 1996).

the issues that may be raised in such cases, as well as the likely need to resolve factual disputes.”⁴³

The establishment of a time period for a decision does not, in general, remove the discretion of the deciding official to take the time needed to reach a decision consistent with due process, applicable law, and the public interest. For example, the Commission has held that the 90-day period specified by Section 405 of the Act for the disposition of certain petitions for reconsideration⁴⁴ does not prevent the Commission from taking longer when necessary.⁴⁵ This is particularly true given the Commission’s long-standing recognition of the need to afford ALJs considerable discretion, as discussed above. The Supreme Court, moreover, has emphasized that “the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, *free from pressures by the parties or other officials within the agency.*”⁴⁶ Specifically because of this requirement, the Commission chose in 1991 to expedite hearings by providing ALJs with “time guidelines” rather than hard time limits for decisions, noting that such guidelines do not “unduly circumscribe[] an ALJ’s independence.”⁴⁷

⁴³ 1993 Program Carriage Order, 9 FCC Rcd at 2656 n.52. Such a deadline is especially unreasonable given that the parties have produced more than one million pages of documents in discovery in the ongoing contract litigation between Comcast and the NFL Network.

⁴⁴ 47 U.S.C. § 405(a), (b)(1).

⁴⁵ See, e.g., *Rebecca Radio of Marco*, MM Docket No. 87-244, *Memorandum Opinion and Order*, 5 FCC Rcd 2913, 2913 n.8 (1990); see also *Gottlieb v. Peña*, 41 F.3d 730, 733 (D.C. Cir. 1994) (a statutory time limit is merely “directory,” rather than mandatory, when the statute requires an agency to act within a specified time, but does not set the consequences for the agency’s failure to act within that time); accord *Brock v. Pierce County*, 476 U.S. 253, 262-66 (1986); *Fort Worth Nat’l Corp. v. Fed. Sav. and Loan Ins. Corp.*, 469 F.2d 47, 58 (5th Cir. 1972).

⁴⁶ *Butz v. Economou*, 438 U.S. 478, 513 (1978).

⁴⁷ *Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases*, Gen. Docket 90-264, *Report and Order*, 6 FCC Rcd 157, 163 n.26 (1991).

Based on the foregoing, the deadline set forth in the *HDO* for issuing a Recommended Decision should be deemed to constitute guidance that the ALJ proceed as expeditiously as reasonably possible, because a binding constraint on the ALJ's discretion would circumscribe his independence in violation of law and would be inconsistent with due process and fundamental fairness. Such an approach would be consistent with the *MobileMedia* case, in which the Commission apparently recognized that it could not order the ALJ to complete a hearing by a date certain in light of due process considerations.⁴⁸ Rather, the Commission provided a recommended six-month timetable for completion of the ALJ's work and directed the ALJ to "make every effort to adhere to the expedited procedural schedule and guidelines set forth below."⁴⁹ The Commission emphasized the need for judicial discretion in the interest of justice, stating that the ALJ "shall take evidence and *develop a full, fair, and complete evidentiary record . . . and make every effort to conclude the case . . . within six months.*"⁵⁰

Comcast has no objection to prompt resolution of this case, but only supports such action where it is *both expeditious and fair*. Based on the foregoing, the ALJ's primary objective should be a full and fair adjudication of this case. The 60-day timetable should not be interpreted to prohibit the ALJ from taking the time necessary to conduct a fair hearing, compile a complete record, evaluate witnesses, and write a Recommended Decision. As discussed above, the ALJ has ample authority under the APA, the Communications Act, and the Commission's rules to set his own hearing schedule.

⁴⁸ See *MobileMedia Corp.*, WT Docket No. 97-115, *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, 12 FCC Rcd 14896 (1997). But see *TCR Sports Broad. Holding, LLP*, MB Docket No. 06-148, *Memorandum Opinion and Hearing Designation Order*, 21 FCC Rcd 8989 (2006) (Although this case established a fixed deadline, it did not address due process concerns. Moreover, the hearing never occurred so the feasibility of the deadline was never validated.).

⁴⁹ See *MobileMedia*, 12 FCC Rcd at 14902.

⁵⁰ *Id.* at 14903 (emphasis added).

Nevertheless, to the extent that the ALJ is uncertain regarding his ability to treat the *HDO* deadline as guidance, rather than mandatory, consistent with the case law discussed above, the matter should be certified to the Commission to determine the controlling issues of law regarding the propriety of the 60-day deadline and to expedite ultimate resolution of the proceeding.

III. NO HEARING IS NECESSARY AT ALL

The *HDO* addresses several controlling issues of law related to Commission procedures in a manner that is inconsistent with the Commission's rules and precedent and that, upon Commission review, could result in dismissal of the case. First, the NFL Network filed its complaint outside the applicable one-year statute of limitations.⁵¹ Because the NFL Network's complaint challenges Comcast's straightforward exercise of a right granted under the parties' carriage agreement, the only relevant triggering event cognizable under the statute of limitations is the date that the carriage agreement was executed — August 11, 2004. Accordingly, the Commission's statute of limitations expired one year later on August 11, 2005. Nevertheless, the *HDO* concluded that the Complaint was timely filed on May 6, 2008.⁵² This interpretation cannot stand because it directly undermines the Commission's purpose for adopting a statute of

⁵¹ See 47 C.F.R. § 76.1302(f)(1)-(3). The statute of limitations is triggered by any one of three events: (1) the complainant and defendant enter into a contract alleged to violate the rules; (2) unrelated to an existing contract, the defendant makes an offer to the complainant that allegedly violates the rules; or (3) the defendant unreasonably refuses to negotiate with the complainant. See *id.*; see also *1998 Biennial Regulatory Review — Part 76 — Cable Television Service Pleading and Complaint Rules*, CS Docket No. 98-54, *Order on Reconsideration*, 14 FCC Rcd 16433, 16435-36 (1999).

⁵² The Bureau reasons that the NFL's carriage complaint is timely because "the alleged act of discrimination about which the NFL complains is Comcast's act of moving the NFL Network from a *digital basic tier* to a premium sports tier" and "[t]his act occurred no earlier than June 2007." *Id.* ¶ 70 (emphasis added). But there is no dispute that, pursuant to the parties' August 11, 2004 carriage agreement, Comcast has carried the NFL Network on a digital basic tier — and not an expanded basic tier — since launch in 2004. Accordingly, the NFL Network's complaint about not being distributed on an expanded basic tier is untimely even under the Bureau's erroneous reading of the statute of limitations.

limitations in the first place, *i.e.*, to “protect a potential defendant against ‘stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.’”⁵³

Second, the *HDO* improperly concludes that the NFL Network’s carriage complaint should not be dismissed pending the outcome of ongoing contract litigation between Comcast and the NFL Network involving the same set of operative facts that underlie the Complaint. The resolution of this state litigation is inextricably intertwined with resolution of the NFL Network’s carriage complaint.⁵⁴ In similar circumstances, the Commission has denied without prejudice and dismissed complaints pending completion of the litigation.⁵⁵ The *HDO*, however, ignored this precedent and refused to dismiss the NFL Network’s carriage complaint.⁵⁶ Under the analysis set forth above, the ALJ should certify these issues as well.

CONCLUSION

For the reasons set forth above, Comcast asks, to the extent necessary and appropriate, that the ALJ certify to the Commission the issues set forth above and authorize Comcast to immediately file with the Commission an application for review of the *HDO*. If the matter is certified, the ALJ also should ensure that the hearing process does not commence until after a

⁵³ *EchoStar Communications Corp. v. Fox/Liberty Networks*, 14 FCC Rcd. 10480, 10487 n.47 (CSB 1999) (quoting language from *Bunker Ramo Corp. v. W. Union Telegraph*, Docket No. 19206, *Memorandum Opinion and Order*, 31 FCC 2d 449 (Rev. Bd. 1971)); *see id.* at 10485-86 (“All limitations periods and statutes of limitations are premised upon a recognition that, at some specified point in time, potential defendants should be able to proceed with their affairs without the looming possibility of liability.”).

⁵⁴ The NFL Network has taken flatly contradictory positions on the relationship between its carriage complaint and the state breach-of-contract litigation. *Compare* Complaint ¶ 65 (arguing that the parties’ carriage agreement incorporates Section 616 such that “Comcast was prohibited by Section 616 *and the Agreement itself*” from discriminating against the NFL Network) (emphasis added) *with* Reply ¶ 34 (“The issues of contract interpretation presented in the lawsuit — whether or not Comcast breached the 2004 Agreement — is entirely separate from the Section 616 inquiry.”).

⁵⁵ *See EchoStar Communications Corp. v. Speedvision Network, LLC*, 14 FCC Rcd 9327 (CSB 1999), *aff’d*, 16 FCC Rcd 4949 (2001).

⁵⁶ *HDO* ¶ 72.

decision on the certified issues has been rendered. Starting discovery and a hearing without a proper determination of the scope of the issues, and without enough time to develop, present, and decide the facts regarding those issues, would be pointless and unlawful.

Respectfully submitted,

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October 20, 2008

ATTACHMENT A

| Case Name | HDO | Initial Decision | Elapsed Time |
|---|----------|------------------|-----------------------------------|
| <i>Florida Cable Telecomm. Ass'n, Inc.</i> , 22 FCC Rcd 1997 (ALJ 2007) | 9/27/04 | 1/31/07 | More than twenty-eight months |
| <i>San Francisco Unified School Dist.</i> , 21 FCC Rcd 3837 (ALJ 2006) | 7/16/04 | 4/7/06 | More than twenty months |
| <i>Ronald Brasher</i> , 18 FCC Rcd 16707 (ALJ 2003) | 8/29/00 | 5/8/03 | Nearly three years |
| <i>Kevin David Mitnick</i> , 17 FCC Rcd 27028 (ALJ 2002) | 12/21/01 | 12/23/02 | Approximately one year |
| <i>Herbert L. Schoenbohm</i> , 17 FCC Rcd 20076 (ALJ 2002) | 1/9/02 | 10/11/02 | Approximately nine months |
| <i>Reading Broad.</i> , 16 FCC Rcd 8309 (ALJ 2001) | 5/6/99 | 4/5/01 | Approximately two years |
| <i>Gerard A. Turro</i> , 15 FCC Rcd 560 (ALJ 1999) | 4/18/97 | 8/16/99 | Approximately twenty-eight months |
| <i>Hicks Broad. of Indiana, LLC</i> , 14 FCC Rcd 8412 (ALJ 1999) | 5/18/98 | 5/11/99 | Approximately one year |
| <i>Martin Hoffman, Trustee-in-Bankr. For Astroline Comm'n Co. LP</i> , 1999 FCC LEXIS 1616 (ALJ 1999) | 4/28/97 | 4/16/99 | Approximately two years |
| <i>Liberty Cable Co.</i> , 13 FCC Rcd 10716 (ALJ 1998) | 3/5/96 | 3/6/98 | Approximately two years |
| <i>Marc Sobel</i> , 12 FCC Rcd 22879 (ALJ 1997) | 2/12/97 | 11/28/97 | Approximately nine months |
| <i>Chameleon Radio Corp.</i> , 12 FCC Rcd 19348 (ALJ 1997) | 8/26/96 | 9/18/97 | More than one year |
| <i>Rainbow Broad. Co.</i> , 12 FCC Rcd 4028 (ALJ 1997) | 11/22/95 | 4/2/97 | Approximately sixteen months |
| <i>AJI Broad., Inc.</i> , 11 FCC Rcd 19756 (ALJ 1996) | 4/16/96 | 12/12/96 | Approximately eight months |
| <i>Under His Direction, Inc.</i> , 11 FCC Rcd 16831 (ALJ 1996) | 4/1/96 | 11/22/96 | Approximately seven months |
| <i>James A. Kay, Jr.</i> , 11 FCC Rcd 6585 (ALJ 1996) | 12/13/94 | 5/31/96 | Approximately seventeen months |
| <i>Herbert L. Schoenbohm</i> , 11 FCC Rcd 1146 (ALJ 1996) | 2/15/95 | 2/2/96 | Approximately one year |
| <i>Trinity Broad. of Florida, Inc.</i> , 10 FCC Rcd 12020 | 4/7/93 | 11/6/95 | Approximately thirty-one months |

| Case Name | HDO | Initial Decision | Elapsed Time |
|--|----------|------------------|---------------------------------|
| (ALJ 1995) | | | |
| <i>Telephone and Data Sys., Inc.</i> , 10 FCC Rcd 10518 (ALJ 1995) | 2/1/94 | 9/27/95 | Approximately nineteen months |
| <i>Lutheran Church/ Missouri Synod</i> , 10 FCC Rcd 9880 (ALJ 1995) | 2/1/94 | 9/15/95 | Approximately nineteen months |
| <i>Pine Tree Media, Inc.</i> , 10 FCC Rcd 9268 (ALJ 1995) | 10/25/93 | 8/21/95 | Approximately twenty-two months |
| <i>Darrell Bryan SBH Properties, Inc.</i> , 10 FCC Rcd 7743 (ALJ 1995) | 8/31/93 | 7/19/95 | Nearly two years |
| <i>Scripps Howard Broad. Co.</i> , 10 FCC Rcd 5461 (ALJ 1995) (Partial ID) | 4/1/93 | 5/18/95 | More than two years |
| <i>Family Broad., Inc.</i> , 10 FCC Rcd 3174 (ALJ 1995) | 3/23/94 | 3/21/95 | Approximately one year |
| <i>Community Educ. Ass'n</i> , 10 FCC Rcd 3179 (ALJ 1995) | 8/2/94 | 3/20/95 | Approximately seven months |
| <i>Cavan Comm'n</i> , 10 FCC Rcd 2873 (ALJ 1995) | 11/30/93 | 3/17/95 | Approximately fifteen months |
| <i>Raymond W. Clanton</i> , 9 FCC Rcd 6930 (ALJ 1994) | 4/1/93 | 11/10/94 | Approximately nineteen months |
| <i>Capitol Radiotelephone Inc.</i> , 9 FCC Rcd 6370 (ALJ 1994) | 8/31/93 | 10/31/94 | More than one year |
| <i>Petroleum v. Nasby Corp.</i> , 9 FCC Rcd 6072 (ALJ 1994) | 6/23/93 | 10/20/94 | Approximately sixteen months |
| <i>Richard Richards</i> , 9 FCC Rcd 3604 (ALJ 1994) | 6/28/93 | 7/29/94 | More than one year |
| <i>Q Prime Inc.</i> , 9 FCC Rcd 1 (ALJ 1993) | 11/19/90 | 12/27/93 | More than three years |
| <i>Rivertown Comm'n Co.</i> , 8 FCC Rcd 7928 (ALJ 1993) | 1/21/93 | 11/10/93 | Approximately nine months |
| <i>Aurio A. Matos</i> , 8 FCC Rcd 7920 (ALJ 1993) | 4/8/93 | 11/4/93 | Approximately seven months |
| <i>Pensacola Radio Partners</i> , 8 FCC Rcd 7225 (ALJ 1993) | 9/24/90 | 10/4/93 | Nearly three years |

CERTIFICATE OF SERVICE

I, Marc D. Knox, hereby certify that, on October 20, 2008, copies of the attached Request for Certification to the Commission were served by hand delivery and email to the following:

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The Honorable Richard L. Sippel*
Chief Administrative Law Judge
445 12th Street, SW
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Marc D. Knox

* Courtesy Copy