

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of)
)
TCR Sports Broadcasting Holding, L.L.P.,)
)
Complainant,)
)
v.)
)
Comcast Corporation,)
)
Defendant.)

MB Docket No. 08-214

File No. CSR-8001-P

FILED/ACCEPTED

OCT 27 2008

Federal Communications Commission
Office of the Secretary

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Hon. Arthur I. Steinberg
Administrative Law Judge

**OPPOSITION TO COMCAST CORPORATION'S REQUEST FOR CERTIFICATION
TO THE COMMISSION**

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**OPPOSITION TO COMCAST CORPORATION'S REQUEST FOR CERTIFICATION
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This case concerns Comcast Corporation's ("Comcast") discriminatory and unreasonable refusal to carry MASN¹ in important regions of MASN's seven-state Television Territory ("Television Territory"). In those regions, Comcast carries affiliated regional sports networks ("RSNs") that are similarly situated to MASN, but Comcast has refused to carry MASN in order to protect those affiliated RSNs. In answering MASN's complaint,² Comcast interposed a number of legal arguments for why MASN's complaint should be dismissed out of hand

¹ TCR Sports Broadcasting Holding, L.L.P. ("TCR") d/b/a/ Mid Atlantic Sports Network, Inc. ("MASN").

² Carriage Agreement Complaint, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, No. CSR-8001-P (FCC filed July 1, 2008) ("Carriage Complaint").

(including defenses based on the statute of limitations, res judicata, and the parties' Term Sheet), and Comcast also challenged MASN's factual proffer on a handful of issues.

In the *Order*,³ the Media Bureau concluded that MASN has made out a *prima facie* case of discrimination against Comcast and rejected all of Comcast's threshold legal defenses, including Comcast's contract-based defenses. The Media Bureau then designated a hearing before an administrative law judge ("ALJ") to address remaining factual questions, including the remedies to which MASN is entitled for Comcast's discrimination (such as damages and the terms and conditions of carriage). Comcast has now requested certification of certain legal issues to the Commission and requested that ALJ Steinberg allow Comcast to file an application for review of the *Order* immediately.

Comcast's request, which seeks to re-litigate legal questions that have already been decided and to introduce further delay, should be rejected. Under 47 C.F.R. § 1.115(e)(3), any challenge to the "hearing designation order" must be presumptively "deferred until exceptions to the initial decision in the case are filed." 47 C.F.R. § 1.115(e)(3); *see also, e.g.*, Initial Decision of Administrative Law Judge, *Applications of Robert D. Janeck d/b/a Lion's Share Broadcasting*, 8 FCC Rcd 916, ¶ 20 (1993) (party is prohibited under "Section 1.115(e)(3) of the Commission's rules" from "revisit[ing]" "matter[s]" decided in a hearing designation order; such challenges are "deferr[ed] . . . until an application for review is filed"). There is a narrow exception to that practice, but it applies only when each of two conditions is satisfied: "there is substantial ground for difference of opinion" on "a controlling question of law" *and* "immediate consideration of the question would materially expedite the ultimate resolution of the litigation." 47 C.F.R. § 1.115(e)(3). Neither condition is satisfied here: the *Order* provides clear legal

³ Memorandum Opinion and Hearing Designation Order, No. DA 08-2269 (M.B. rel. Oct. 10, 2008), as modified by the erratum adopted and released on October 15, 2008 ("*Order*").

guidance to ALJ Steinberg (guidance that is entirely consistent with Commission precedent) and there is no possible way, in light of the Media Bureau's 60-day deadline for resolution of this proceeding, that certification now would expedite resolution of this matter. The most efficient and reasonable approach for resolving this case is to follow the path marked by the Media Bureau in the *Order*.

ARGUMENT

I. THE *ORDER'S* RESOLUTION OF CERTAIN THRESHOLD LEGAL ISSUES DOES NOT WARRANT CERTIFICATION

1. Comcast argues (at 3) that certification is appropriate because the *Order* "misstated" the law in three respects. Comcast is wrong: the *Order* properly interpreted the Cable Act and the Commission's rules. Moreover, even if the Media Bureau did misstate the law, any such misstatement can be corrected on subsequent review and certification is therefore unwarranted.

2. Comcast first argues (at 3) that the Media Bureau improperly held that unlawful discrimination could be found where a cable company "treated its affiliated network differently than it treated a complainant's network," even where such treatment is based on a "valid business reason[.]" Comcast mischaracterizes the *Order*.

3. Under the relevant legal framework, MASN has an initial burden to establish a *prima facie* case of discrimination.⁴ If MASN can establish, first, that it is similarly situated to affiliated networks of Comcast and, second, that Comcast treats MASN (an unaffiliated programmer) differently from those affiliated programmers in the terms and conditions of

⁴ Cf. Memorandum Opinion and Hearing Designation Order, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989, ¶ 8 (2006) ("*TCR Order*"); Second Report and Order, *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*, 9 FCC Rcd 2642, ¶ 29 (1993) ("*1993 Order*").

carriage, then it becomes Comcast's burden to justify that differential treatment by pointing to a legitimate, non-discriminatory reason for the disparate treatment. MASN must also show that Comcast's discrimination has restrained MASN's ability to "compete fairly." This legal framework — which the Commission has long used in the mirror-image program-access context⁵ — determines whether Comcast treated MASN disparately on the basis of affiliation or non-affiliation. The framework does not, as Comcast asserts, elide considerations of whether "valid business reasons" supported Comcast's decision to treat MASN differently from affiliated programmers; it simply requires that cable companies that chose to vertically integrate (such as Comcast) point to legitimate, non-discriminatory justifications for preferential treatment of affiliated programmers. Because this framework is straightforward and has long been applied in the program-access context, there is no basis for Comcast's naked assertion (at 4) that this standard is "new[] and different."⁶

⁵ See Memorandum Opinion and Order, *Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, ¶¶ 14, 15 (CSB 1998); Memorandum Opinion and Order, *CellularVision of New York, L.P. v. SportsChannel Assocs.*, 10 FCC Rcd 9273, ¶ 23 (CSB 1995); Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petitions for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822, ¶ 56 (1998) ("*Ameritech Order*"); see also First Report and Order, *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*, 8 FCC Rcd 3359, ¶ 116 (1993) (in the program-access context, a refusal to sell programming that is not supported by "legitimate reasons" is unreasonable and unlawful); *id.* ¶ 77 (imposing "burden . . . on the defendant" after *prima facie* showing in exclusivity cases has been made); *id.* ¶ 105 (defendant programming vendors "assume the responsibility of justifying the legitimacy" of permissible factors "in order to maintain the pricing differentials between distributors"); see also *National Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001) (affirming Commission burden-shifting framework because, among other things, where Congress's "concern . . . [is] to eliminate the use of monopolistic power to stifle competition," it is "appropriate to shift the burden to [the defendant] to prove that it did not discriminate").

⁶ The reasoning of Memorandum Opinion and Order, *Tully-Warwick Corp. & Concord Broadcasting Assocs.*, 95 F.C.C.2d 1427 (1983), is therefore inapposite. The Media Bureau here

4. Second, Comcast conclusorily asserts (at 4) that the Media Bureau “misappl[ied]” the requirement that MASN show that Comcast’s discriminatory treatment has undermined MASN’s ability to “compete fairly” in Virginia and Pennsylvania. Comcast argues that, because Comcast carries MASN on some systems in MASN’s Television Territory, MASN’s right to demand equal treatment on other systems is extinguished. In Comcast’s view, MASN must demonstrate that it would be driven from the market without carriage. But this position — for which Comcast cites no authority — is contrary to the language and purpose of the statute, which requires that MASN demonstrate only that it cannot “compete fairly,” not that it cannot compete at all. MASN submitted abundant evidence to the Media Bureau that its ability to compete fairly for sports broadcasting rights, advertising dollars, and viewers has been harmed as a result of Comcast’s carriage denial.

5. Third, Comcast argues (at 4) that the Media Bureau erred because “the Commission has never construed the statute or its rules as requiring mandatory carriage when a violation is found to have occurred.” But Comcast does not deny that the Commission has the *discretion* to issue a remedy of mandatory carriage. The Media Bureau determined, based on the circumstances of this case, that, if ALJ Steinberg found discrimination, then mandatory carriage and other remedies (such as damages to make MASN whole from Comcast’s discriminatory conduct) might be appropriate.

6. In any event, even were there grounds to question the Media Bureau’s legal conclusions — and there are none — any legal error could be corrected upon subsequent review. Comcast argues (at 5) that interlocutory review is appropriate in light of the *Algreg Cellular Engineering* proceeding. But that proceeding is inapposite. According to Comcast (*id.*), that

did not “adopt[] . . . an unprecedented standard” or “misinterpret[] . . . the remedial provisions” of the Cable Act or the Commission’s rules, as Comcast asserts (at 5).

ALJ proceeding took “approximately six years” to resolve, when it turned out that the legal foundation of the proceeding was flawed. Certification is appropriate here, Comcast argues, “to prevent history from repeating itself.” But there is *no chance* that history will repeat itself: the Media Bureau has instructed ALJ Steinberg to resolve narrow factual disputes on a handful of issues within 60 days. There is no prospect of open-ended delay that would make this case anything like the *Algreg Cellular Engineering* proceeding.

II. THE 60-DAY HEARING PERIOD IS LEGALLY SUFFICIENT

7. Comcast next argues (at 6-11) that the Media Bureau’s requirement that ALJ Steinberg render a decision within 60 days violates the Administrative Procedures Act, the Communications Act, and “due process and fundamental fairness.” Certification is necessary, Comcast asserts (at 10), to establish that the Bureau’s 60-day mandate is “guidance” only. Comcast’s various arguments fail.

8. It is well established that the Commission (and its constituent Bureaus) can delegate decision-making authority to an ALJ along with constraints on how that authority is to be exercised. For instance, the Commission regularly orders an ALJ to decide some issues but not others,⁷ or to render a decision within a particular time limit.⁸ On the latter point, the

⁷ See, e.g., Memorandum Opinion and Hearing Designation Order, *Classic Sports Network, Inc., v. Cablevision Systems Corp.*, 12 FCC Rcd 10288, ¶ 6 (1997) (ordering that the ALJ resolve certain factual disputes but retaining sole authority to make the “requisite legal determinations”). See generally Report and Order, *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, ¶ 135 (1997) (“*Implementation Order*”) (announcing an amendment to the existing rule such that the Common Carrier Bureau can delegate decision-making authority to any ALJ regarding even “novel” factual disputes, but retaining the existing prohibition on designating for hearing “novel questions of law or policy”).

⁸ See, e.g., *TCR Order*, ¶ 13. See generally *Implementation Order*, ¶ 136 (“The hearing designation order may set a recommended deadline for the ALJ to certify the record by, and, if time permits, issue a recommended decision on the factual dispute.”); *id.* ¶137 (“[W]e conclude that the existing rules provide the Commission with the authority to request, in a hearing

Commission in *TCR* issued a Hearing Designation Order that required the ALJ to issue a recommended decision within 45 days.⁹ Moreover, the Commission specifically concluded in its 1990 *Report and Order* on expediting case resolution — which Comcast cites in its Motion — that “[t]ime limits on the ALJs are permissible.”¹⁰ Thus, the Commission already has decided the question on which Comcast seeks certification.¹¹ Finally, it is well established that the Commission (and its constituent Bureaus) can delegate decision-making authority to an ALJ to the extent of their enumerated statutory powers.¹² It follows that, if either could impose a time limit on itself in the adjudication of a complaint or completion of an appeal, either may also impose a similar time limit upon an ALJ to which it delegates decision-making authority.¹³

designation order, that disputes be resolved by an ALJ within a set period of time consistent with the final Commission decision complying with the statutory deadline”).

⁹ See *TCR Order* ¶ 13.

¹⁰ See Report and Order, *Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd 157, ¶ 40 n.26 (1990). The Commission noted that the only exception was where deadlines “unduly interfere” with a judge’s independence. For the reasons set forth in more detail below, however, it is clear that a 60-day time limit in no way prevents the ALJ from ordering the full panoply of discovery allowed under Commission regulations.

¹¹ Comcast suggests (at 10 n.38) that the Commission’s HDO in the *TCR* matter is not relevant because it “did not address due process concerns” and because that case’s settlement prior to a hearing meant that the “feasibility of the deadline was never validated.” But it bears repeating that this is an odd position to take in a motion for certification: Comcast is asking to stay the proceedings to certify a question to the Commission on the propriety of a time limit for an ALJ’s decision that the Commission itself has previously imposed in other matters.

¹² See, e.g., *Attorney General’s Manual on the Administrative Procedures Act* 74 (1947) (noting that a hearing officer to which decision-making authority is delegated has the same powers as the agency itself would have were it to adjudicate the dispute itself).

¹³ See, e.g., Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelfia Communications Corp. to Time Warner Cable Inc.*, 21 FCC Rcd 8203, ¶ 190 (2006) (“*Adelfia Order*”) (providing for a 60-day time limit for Commission review of the arbitrator’s decision). Notably, Comcast subsequently accepted the benefits of this transaction and did not challenge the condition with the 60-day time limit.

9. The Media Bureau's 60-day mandate is also fully consonant with both the APA and the Communications Act. The APA requires that a party be given a "reasonable opportunity" to submit "proposed findings or conclusions" and "supporting reasons,"¹⁴ and "to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."¹⁵ The Communications Act likewise requires that a party have an opportunity to "file exceptions and memoranda in support thereof to the . . . recommended decision."¹⁶ The Media Bureau's *Order* requesting that ALJ Steinberg render a Recommended Decision within 60 days (which must then be passed upon by the full Commission), combined with ALJ Steinberg's recent *ALJ Order*¹⁷ providing for a live hearing with witnesses and the subsequent filing of Proposed Findings of Fact and Conclusions of Law, readily meet these statutory requirements.¹⁸

10. Comcast's arguments to the contrary are wide of the mark. For instance, Comcast suggests (at 7) that, "once a matter is referred to an ALJ," the conduct of a hearing is "within the ALJ's discretion until conclusion." Yet any such principle is plainly inapplicable here. The Media Bureau's *Order* providing for a 60-day mandate did not impose a procedural requirement on a hearing that was already underway; nor did it amount to an interlocutory ruling during the

¹⁴ See 5 U.S.C. § 557(c).

¹⁵ See 5 U.S.C. § 556(d).

¹⁶ See 47 U.S.C. § 409(b).

¹⁷ Order, No. FCC 08M-44 (ALJ rel. Oct. 23, 2008) ("*ALJ Order*").

¹⁸ And indeed, the Commission could have, under its own rules, decided this matter on the pleadings the parties have submitted to this point in the proceedings, through which Comcast had a full and fair opportunity to present evidence in answering MASN's complaint. See 47 C.F.R. § 76.1302 (providing for a complaint, answer, and reply in carriage agreement proceedings).

pendency of an existing proceeding, as in *Arcatel*.¹⁹ Rather, the *ALJ Order* designates a hearing, prescribes a timeline, and limits the scope of the issues to be decided during ALJ Steinberg's *subsequent* conduct of the hearing. Comcast's argument, and the authority it cites in support, ignores this basic distinction.²⁰

11. Comcast further suggests (at 7-8) that the Media Bureau's 60-day mandate contravenes the usual discretion afforded ALJs in the day-to-day conduct of hearings. But the authority Comcast cites in support of its argument amounts to a series of statements plucked from Commission decisions that bear no resemblance to the current dispute. In *Family Broadcasting*, the Commission noted the presumption that an ALJ will discharge his duties "in a fair and impartial manner" in the context of an unsuccessful motion to disqualify.²¹ In *WWOR-TV*, the Commission noted in passing the "broad discretion" to be accorded ALJ rulings in upholding an ALJ's privilege determinations.²² And the language Comcast cites from Chairman Martin's separate statement in *Sobel* merely states the broad principle that an appellate tribunal reviewing a "cold record" will "routinely defer[]" to a trial-level factfinder on issues such as witness credibility.²³ Comcast does not and cannot explain how any of this relates to the current

¹⁹ Memorandum Opinion and Order, *Application of Arcatel, Inc.*, 92 FCC 2d 893, 895 (Rev. Bd. 1982).

²⁰ See 47 C.F.R. § 0.341 (describing the "authority" of the ALJ "[a]fter [he] has been designated to preside at a hearing"); *id.* § 1.243 (describing the "authority" of the ALJ "[f]rom the time he is designated to preside"); see also *Butz v. Economou*, 438 U.S. 478, 514 (1978) (holding that ALJs performing "adjudicatory functions" within federal agencies are entitled to absolute immunity from damages *during the conduct of those functions*).

²¹ See Memorandum Opinion and Order, *Family Broadcasting, Inc.*, 17 FCC Rcd 19332, ¶ 11 (2002).

²² See Memorandum Opinion and Order, *Application of WWOR-TV, Inc.*, 5 FCC Rcd 4113, ¶ 11 (1990).

²³ See Decision, *Mark Sobel*, WT Docket No. 97-56, 17 FCC Rcd 1872, 1897 (2002).

dispute, much less raises the Media Bureau's *Order* to the level of a violation of the APA, the Communications Act, or due process.

12. Comcast is also wrong on the practicality of the Media Bureau's 60-day deadline. Comcast mischaracterizes the Commission's regulations regarding discovery when it suggests (at 8 n.29) that a 60-day mandate would be "inconsistent" with the "minimum deadlines" provided therein. In support of its argument, Comcast cites the requirement that parties be given 35 days' notice of depositions upon interrogatories and then suggests that cross interrogatories or motions to suppress or limit interrogatories must come 14 or 21 days "*after* interrogatories." Together, Comcast implies, this nearly exceeds the *Order*'s 60-day mandate. But in reality, the regulations plainly provide that cross interrogatories or motions to suppress or limit must come "*within* 14 days" and "*within* 21 days," respectively, of the "*filing and service*" of interrogatories — that is, well before any deposition is actually taken upon the conclusion of the 35-day notice period. Had ALJ Steinberg determined that discovery would be permitted — which he did not — he could have provided for the full panoply of discovery authorized by the Commission's rules, including depositions, while still honoring the Media Bureau's 60-day mandate.

13. Comcast's assertion (at 8) that no FCC ALJ has rendered an Initial Decision within 60 days during the past 15 years fares no better. As an initial matter, there have been no program carriage complaints before an ALJ that have reached this stage in the past 15 years, and any comparisons with other proceedings are apples-to-oranges. The one close analog to the current situation is the arbitration proceeding between MASN and Time Warner Cable, which was completed in 75 days from the time that an arbitrator was appointed.²⁴ Moreover, many of

²⁴ See Decision and Award of Arbitrator Daniel Margolis, *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, No. 71-472-E-00697-07 (AAA June 2, 2008). Arbitrator Margolis was appointed on March 19, 2008.

the different proceedings on which Comcast relies took only marginally more time from pre-hearing conference to final hearing (and closure of the record) than is provided for in ALJ Steinberg's recent *Order*.²⁵ And given that ALJ Steinberg here is required to issue only a Recommended Decision, it should be even easier to complete within the required timeframe than those prior decisions, all of which involved Initial Decisions in disputes that are more complex than the straightforward and narrow issues to be resolved here. Indeed, the Media Bureau's *Order* rejects the bulk of Comcast's legal arguments — and the core of Comcast's defense — leaving only a few factual questions to resolve.

14. Finally, there is no merit to Comcast's assertion that the Media Bureau's 60-day mandate violates "due process and fundamental fairness." Comcast relies principally on the Commission's *MobileMedia Order*, which required the ALJ to "make every effort" to render a Recommended Decision within 60 days.²⁶ Comcast suggests (at 10) that the Commission "apparently recognized" that a binding 60-day deadline would raise due process concerns. But

Discovery had already occurred during earlier proceedings under a previous arbitrator. A total of 75 days elapsed between the appointment of Arbitrator Margolis and his rendering of a decision, on June 2, 2008. During that time, the parties engaged in two rounds of briefing, and a two-day hearing with live witnesses was held.

²⁵ See, e.g., Initial Decision, *Under His Discretion, Inc.*, 11 FCC Rcd 16831 (1996) (two and a half months between pre-hearing conference and hearing in matter covering four broad issues in licensing matter); Initial Decision, *Application of Herbert L. Schoenbohm*, 17 FCC Rcd 20076 (2002) (two and a half months between pre-hearing conference and hearing in licensing matter); Initial Decision, *Aurio Matos Lloyd Santiago-Santos et al.*, 8 FCC Rcd 7920 (1993) (two and a half months from prehearing conference to hearing in complex matter regarding construction permit for new radio station); Initial Decision, *Application of Rivertown Communications Co.*, 8 FCC Rcd 7928 (1993) (two months between prehearing conference and admissions hearing session and three months between prehearing conference and hearing on remaining issues in complex matter regarding construction permit for new radio station and license).

²⁶ See Hearing Designation Order, *MobileMedia Corp.*, 12 FCC Rcd 14896, ¶ 15 (1997) ("*MobileMedia Order*").

this is pure speculation on Comcast's part, for the Commission's *MobileMedia Order* nowhere mentions due process.

15. More fundamentally, any alleged violation of due process should be analyzed under the Supreme Court's decision in *Mathews v. Eldridge*²⁷ and progeny. *Mathews* sets forth a familiar balancing test that considers: (i) the strength of the private interest affected; (ii) the risk of an erroneous deprivation of rights if additional process is not afforded; and (iii) the cost and administrative burden to the government of additional process.²⁸ Under that test, Comcast's claim plainly fails. As noted, ALJ Steinberg's recent *Order* providing for a full-dress hearing with presentations by counsel and live witnesses followed by the filing of Proposed Findings of Fact and Conclusions of Law is plainly sufficient for Comcast to present its views on the case. Moreover, there is little or no risk of an erroneous deprivation because ALJ Steinberg's Recommended Decision will be subject to Commission review and cannot, unlike an Initial Decision, merely ripen into a decision of the Commission. In short, no additional process is due here.

III. COMCAST'S DISGAREEMENT WITH THE MEDIA BUREAU'S REJECTION OF ITS THRESHOLD AND CONTRACT-BASED LEGAL DEFENSES PROVIDES NO BASIS FOR CERTIFICATION

16. Comcast's other arguments for certification also fail. First, Comcast argues (at 11-12) that MASN "waived its right to file the instant complaint" via the Release Clause of a Term Sheet. But, as the Media Bureau correctly held, nothing in the parties' Term Sheet "indicate[s] that MASN waived its statutory program carriage rights with respect to Comcast's exercise of [any] discretion" afforded under the Term Sheet. *Order* ¶ 105. MASN has explained the legal foundation for that conclusion in detail, *see* Reply ¶¶ 32-57, and Comcast makes no

²⁷ 424 U.S. 319 (1976).

²⁸ *Id.* at 321.

attempt in its Request for Certification to explain why either the Media Bureau or MASN are incorrect.

17. Comcast next maintains (at 12) that “MASN’s carriage complaint was filed outside the applicable one-year statute of limitations.” But the Media Bureau properly rejected this argument as well. *See Order* ¶ 105. MASN’s complaint is about Comcast’s unreasonable and discriminatory refusal to carry MASN on certain unlaunched systems. From the time that MASN discovered that Comcast would not carry MASN on those systems in January 2007 until filing its Carriage Complaint in July 2008, MASN attempted to reach a carriage agreement with Comcast in those areas of MASN’s Television Territory. Because those negotiations appeared to reach a firm impasse in March 2008, MASN sent a notice and demand letter to Comcast pursuant to 47 C.F.R. § 76.1302(a)-(b) on March 7, 2008. MASN then filed its Carriage Complaint on July 1, 2008, within one year of MASN “notif[ying] [Comcast] that it intend[ed] to file a complaint with the Commission” based on Comcast’s unreasonable refusal to carry MASN in the Harrisburg and southwestern Virginia DMAs.²⁹ Under the plain terms of the Commission’s rules, MASN’s Carriage Complaint was timely filed. The Media Bureau thus did not “disregard the statute of limitations,” as Comcast asserts (at 12); it enforced its plain terms.

18. Finally, Comcast asserts (at 13) that MASN’s complaint “should be barred by the doctrine of *res judicata* because MASN’s latest claims are merely a subset of its claims that were fully and finally resolved by the Term Sheet and Release in 2006.” But the Media Bureau rejected that argument because MASN’s complaint involves Comcast’s unreasonable and

²⁹ 47 C.F.R. § 76.1302(f)(3). Comcast repeats its argument (at 12) that the only relevant triggering date is the date of execution of the Term Sheet, but that line of argument was quickly and properly rejected by the Media Bureau. *See Order* ¶ 105. MASN is seeking to enforce *statutory* rights to equal carriage treatment under the nondiscrimination principle set forth in the Cable Act and the Commission’s rules, not any right based in the Term Sheet.

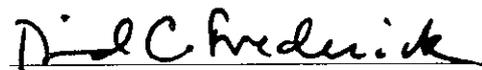
discriminatory refusal to carry MASN on the unlaunched systems since January 2007, which “presents a different set of facts and circumstances than those presented in the 2005 Complaint.” *Order* ¶ 107. That conclusion was correct. *See Reply* ¶¶ 52-57.

19. At bottom, Comcast’s arguments amount to nothing more than disagreements with the legal and factual conclusions reached by the Media Bureau. MASN believes that all of those determinations were correct. But ALJ Steinberg need not attempt to sit in review of the Media Bureau’s conclusions now in order to reject Comcast’s Request for Certification: any party that has legal arguments rejected in a hearing designation order likely wishes to seek review prior to an ALJ proceeding, but that is not the standard under 47 C.F.R. § 1.115(e)(3), and Comcast has set forth no reasonable basis for deviating from the normal rule that an application for review may be filed *after* the ALJ proceeding runs its course. The most expeditious and logical course is to proceed with the ALJ proceeding as instructed by the Media Bureau in the *Order*.

CONCLUSION

20. For the reasons stated above, Comcast’s Request for Certification should be denied.

Respectfully submitted,



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Certificate of Service

I hereby certify that, on this 27th day of October 2008, I caused one copy of the foregoing to be served upon the following:

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