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December 15, 2008

VIA HAND DELIVERY

Marlene H. Dortch  
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Federal Communications Commission  
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Washington, DC 20554

FILED/ACCEPTED  
DEC 15 2008  
Federal Communications Commission  
Office of the Secretary

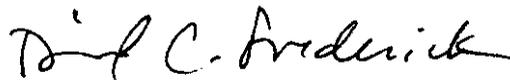
Re: *In the Matter of TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, No. CSR-8001-P; MB Docket No. 08-214

Dear Ms. Dortch:

Please find enclosed an original and four copies of a Reply in Support of Motion for Reconsideration of Hearing Designation Order being filed on behalf of TCR Sports Broadcasting Holding, L.L.P d/b/a Mid-Atlantic Sports Network ("MASN") in the above-captioned matter. MASN filed its Motion for Reconsideration of Hearing Designation Order on November 26, 2008.

Thank you for your assistance in this matter. Please feel free to contact me (202-326-7951) if you have any questions.

Respectfully submitted,



David C. Frederick

Encl.

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

**FILED/ACCEPTED**  
**DEC 15 2008**  
Federal Communications Commission  
Office of the Secretary

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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

To: Chief, Media Bureau

**REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF HEARING  
DESIGNATION ORDER**

Pursuant to 47 C.F.R. § 1.106(h), TCR Sports Broadcasting Holding, L.L.P, doing business as Mid-Atlantic Sports Network (“MASN”), hereby files this reply in support of its Motion for Reconsideration of Hearing Designation Order. On November 26, 2008, MASN filed a Motion for Reconsideration of Hearing Designation Order, requesting that this Bureau reassume jurisdiction over MASN’s program-carriage complaint in light of the Presiding Judge’s deviations from that order. On December 8, 2008, Comcast opposed MASN’s motion. Comcast argues (at 1) that MASN’s attempt to secure timely resolution of its complaint consistent with the intent of Congress and this Bureau is “absurd” on the merits but Comcast relies principally on procedural objections to MASN’s motion. Comcast’s opposition does not call into question the compelling reasons set forth in MASN’s motion for why, in the unique circumstances of this case, reconsideration is necessary and proper. Nor is there any procedural bar to MASN’s motion.

1. MASN's paramount interest in moving for reconsideration is expedition. The *Hearing Designation Order* ("HDO") found that MASN had established a *prima facie* case that Comcast had discriminated against MASN on the basis of affiliation in violation of federal law. The Bureau did conclude that certain narrow "factual disputes" regarding Comcast's purported business justifications for refusing to carry MASN needed further investigation. *HDO* ¶ 119. In designating those issues for hearing, however, the Bureau imposed a strict sixty-day time limit to honor Congress's intent that program-carriage proceeding be resolved expeditiously and because the Bureau (correctly) understood that many of the key questions in the case (such as Comcast's reliance on a Term Sheet as foreclosing MASN's carriage claims) had already been resolved. *See id.*; *see also id.* ¶¶ 102-107 (rejecting Comcast's statute of limitations and res judicata defenses and, in so doing, rejecting the legal relevance of the parties' Term Sheet as a defense to MASN's claims). The Presiding Judge has now ruled that the 60-day time limit will be disregarded and that, rather than limit a hearing to resolution of the narrow factual disputes the *HDO* left unaddressed, the parties would be required to re-litigate *all* disputes in the case. The Presiding Judge set a hearing date of March 17, 2008 — *five months* after the date of the *HDO* — with no time limit on the issuance of a recommended decision.

This course of proceedings will frustrate the purpose of the *HDO* and Congress's intent that program-carriage disputes be resolved expeditiously. *See* MASN Mot. at 3-6. The Bureau should reclaim jurisdiction now to ensure timely resolution of MASN's carriage complaint, bringing MASN's must-have programming to hundreds of thousands of sports fans denied regional sports programming by Comcast's discrimination.

2. Comcast's primary response (at 4) to MASN's Motion is that the Presiding Judge was free to disregard the Bureau's time limit and to reconsider issues already decided because

administrative law judges (“ALJs”) generally have “discretion” to regulate the course of a hearing. Comcast’s submission is incorrect: Commission precedent is clear that “an ALJ may not countermand a designation order issued under delegated authority as to matters already considered by the delegating authority.” Memorandum Opinion and Order, *Tequesta Television, Inc.*, 2 FCC Rcd 41, ¶ 10 (1987). That principle follows from the Commission’s rules. See 47 C.F.R. § 0.204(a) (“[a]ny official (or group of officials) to whom authority is delegated in this subpart is authorized to issue orders . . . pursuant to such authority”) (emphasis added).

Here, the *HDO* unequivocally directs the Presiding Judge to issue a recommended decision within 60 days. See *HDO* ¶ 119 (“[W]e direct the ALJ to make and return a Recommended Decision to the Commission . . . within 60 days after the release of this *Order*.”). The *HDO* has the force and effect of law, see 47 U.S.C. § 155(c), and the Presiding Judge was bound to follow it. The fact that ALJs have some discretion regarding how to conduct a hearing — which is the nub of Comcast’s argument — cannot be used to enlarge the scope of the Presiding Judge’s delegated authority or to empower the Presiding Judge to re-visit issues that this Bureau decided in the *HDO*, no more than this Commission’s discretion to implement the Communications Act allows it to disregard statutory limits on its authority. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (an agency’s “power to promulgate legislative regulations is limited to the authority delegated” to it by Congress).<sup>1</sup>

Comcast points to the need for discovery (at 5) as an apparent justification for the Presiding Judge disregarding the time limit. But if Comcast believed that adequate discovery

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<sup>1</sup> Comcast’s reliance (at 4) on decisions like Memorandum Opinion and Order, *Rio Grande Broadcasting Co.*, 6 FCC Rcd 7464 (RB 1991), is thus difficult to understand. That an ALJ ordinarily has discretion regarding when to schedule a hearing has nothing to do with whether an ALJ can ignore instructions in a hearing designation order or otherwise act contrary to the scope and nature of his or her delegated authority.

was not feasible within the time limit imposed by the Bureau, Comcast should have moved for reconsideration of the *HDO*; the appropriate remedy is not for the ALJ to toss out the time limit. Besides, there is no automatic right to discovery in a program-carriage proceeding, and if Comcast wanted discovery, it could have requested discovery before the Bureau. In fact, Comcast submitted several factual declarations with its answering statement and it made *no* requests for discovery from MASN, nor did it so much as hint in its answering statement that there were any issues of fact for which further investigation was needed (by either an ALJ or the Bureau). Comcast, in short, was prepared to have the case decided by the Bureau on the *record as it stood*. Its newfound claim of a pressing need for discovery is therefore implausible.<sup>2</sup>

In any event, were the Bureau to reassume jurisdiction over this proceeding, there are options for discovery to resolve remaining questions of fact. *See, e.g.*, 47 C.F.R. § 76.8. The need for narrow discovery cannot possibly be a reason for the Bureau to refrain from reclaiming jurisdiction over the proceeding. Nor can it justify disregarding the Bureau's time limit.

Comcast further argues (at 1-2) that *de novo* review by the Presiding Judge is appropriate because only *prima facie* findings were made and the Bureau recognized that there was a need for resolution of other factual issues. But, again, that there are some factual issues left to resolve does not necessitate an ALJ proceeding: the Bureau has tools available to it to make any necessary further factual findings. Furthermore, Comcast appears to misunderstand the program-carriage framework. The *HDO* found that MASN had established a *prima facie* case of discrimination. Once a complainant establishes a *prima facie* case, "the burden shifts to the respondent to justify treatment of [the] non-affiliated programmer." Order on Review, *TCR*

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<sup>2</sup> Comcast's invocation (at 5) of due process therefore has no merit: Comcast had ample opportunity before the Bureau to ask for discovery; it had the opportunity to submit an answer and declarations; and it will have the opportunity to seek limited discovery in the event the Bureau reclaims jurisdiction.

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*Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*, 23 FCC Rcd 15783, ¶ 21 (2008) (internal quotation marks omitted); *see id.* ¶¶ 22, 32; 47 U.S.C. § 155(c)(3). Thus, because MASN proved a *prima facie* case of discrimination, the *only* primary issues left for resolution are whether Comcast has a legitimate, non-discriminatory reason for its disparate treatment of MASN and affiliated regional sports networks, and whether the carriage rate sought by MASN is reasonable.

The Presiding Judge's decision that *all* issues of fact and law will be considered *de novo* functionally overrules the Bureau's determination that MASN established a *prima facie* case of discrimination. Requiring re-litigation of the *prima facie* case or other legal and factual issues the Bureau already decided is contrary to established law. *See* Memorandum Opinion and Order, *Applications of Western Cities Broadcasting, Inc.*, 6 FCC Rcd 2325 ¶ 4 (RB 1991) (ALJ properly concluded that the hearing designation order had decided certain questions, which "preclude[d] consideration of the merits . . . by the ALJ"); Memorandum Opinion and Order, *Atlantic Broadcasting Co.*, 5 F.C.C.2d 717, ¶ 10 (1966) (explaining that "subordinate officials should look to see whether specific reasons are stated for our action or inaction in a designation order" and "[i]f our designation order contains a reasoned analysis of a particular matter, we are confident that . . . the subordinate officials will have no difficulty in adopting that analysis and denying the relief requested"). The Presiding Judge's clear legal error is sure to result in a lengthy, costly proceeding to re-litigate issues that have already been decided, an outcome at odds with Congress's demand that program-carriage complaints be resolved "expeditiously." Second Report and Order, *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*, 9 FCC Rcd 2642, ¶ 23 (1993).<sup>3</sup>

Only reconsideration by this Bureau can prevent that outcome.

3. Comcast attempts to sidestep the strong case for this Bureau reclaiming jurisdiction by arguing that MASN's motion is time barred or otherwise procedurally improper. But Comcast concedes that the Commission's time limits (even statutory ones) may be waived, *see* Opp. at 7 & n.24; *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) ("section 405 does not absolutely prohibit FCC consideration of untimely petitions for reconsiderations"), and MASN has already explained why exceptional circumstances in this case satisfy that standard, *see* MASN Mot. at 6: MASN moved for reconsideration within one business day after the Presiding Judge made definite his intent not to proceed in substantial compliance with the *HDO*. Furthermore, without reconsideration, Congress's aim of expeditious resolution of program-carriage complaints will be frustrated and the public interest will be harmed by allowing Comcast's discrimination to go unremedied. *See* Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, 21 FCC Rcd 8208, ¶¶ 189-90 (2006) (recognizing the strong public interest in quick resolution of carriage proceedings). Comcast also argues (at 6) that the Bureau lacks delegated authority "to review rulings by administrative law judges," but MASN is not asking the Bureau

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<sup>3</sup> Comcast's claim (at 5-6) that, under the APA, a claimant bears the burden of proof on all issues only illustrates that Comcast is attempting to lead the Presiding Judge into error by disregarding this Bureau's conclusion and settled Commission precedent that a burden-shifting framework is used to resolve program-access and -carriage decisions. *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); 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, ¶¶ 14-15, 95, 77, 116 (1993); *National Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001).

formally to issue an order reviewing a decision of an ALJ. MASN is seeking reconsideration of a *Bureau* decision — namely, the *HDO* — on the ground that reconsideration is imperative to fulfill Congress’s mandate of expeditious review of program-carriage complaints in light of subsequent developments.

Comcast further argues (at 8) that a petition for reconsideration of a hearing designation order is improper. But Comcast concedes, as it must, that reconsideration is permissible in cases of “clear error” or an obvious “abuse of discretion.” Memorandum Opinion and Order, *James A Kay, Jr.*, 13 FCC Rcd 16369 (1998). Both conditions are satisfied here: the Bureau could not have known when it issued the *HDO* that the ALJ would exceed the scope of his delegated authority, act contrary to Commission precedent in disregarding a time limit that he was bound to apply, and elect to review *de novo* legal and factual issues the Bureau has already decided. See MASN Mot. at 3-6.<sup>4</sup>

Finally, and with great irony, Comcast argues (at 8-9) that MASN must remain in the ALJ proceeding (which has no end in sight) — notwithstanding the Presiding Judge’s decision to act outside his delegated authority — because the *Bureau* may not act outside its “delegated authority” in deciding a novel question of fact or law that “cannot be resolved under existing precedents,” (citing 47 C.F.R. § 0.283(c)). But, as MASN’s motion, Comcast’s opposition, and MASN’s reply all make clear, there is ample “precedent” and guidance on all questions relevant to MASN’s motion. There is accordingly no procedural bar to this Bureau granting

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<sup>4</sup> Comcast’s suggestion that only the Commission, not this Bureau, may invoke this principle is wrong: in *James A. Kay, Jr.*, it was (¶ 2) “the Commission [that had] designated this proceeding for hearing” — it is therefore not surprising that the motion for reconsideration was directed to the Commission. Moreover, the Commission was interpreting (¶ 6) “47 C.F.R. § 1.106(a)(1),” which is the same rule Comcast invokes here (at 8 & n.26).

reconsideration to fulfill Congress's mandate that program-carriage proceeding be resolved expeditiously.

**Conclusion**

For the foregoing reasons and those set forth in its Motion, MASN requests that the Bureau reconsider the October 10, 2008 Hearing Designation Order and reclaim jurisdiction over the above-captioned proceeding.

Respectfully submitted,



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December 15, 2008

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### Certificate of Service

I hereby certify that, on this 15th day of December 2008, I caused one copy of the foregoing to be served by hand and email upon the following:

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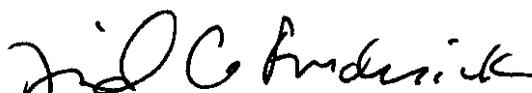
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