BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	MB Docket No. 08-214
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant	)	
v.	)	
Time Warner Cable Inc.	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P
Complainant	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P
Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	
	)	
NFL Enterprises, LLC,	)	File No. CSR-7876-P
Complainant	)	
v.	)	
Comcast Cable Communications, LLC,	)	
Defendant	)	
	)	
TCR Sports Broadcasting Holding, L.L.P.,	)	File No. CSR-8001-P
d/b/a Mid-Atlantic Sports Network,	)	
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	

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

MOTION FOR REAFFIRMATION OF SCHEDULING ORDER OR, IN THE ALTERNATIVE, REQUEST FOR CERTIFICATION OF AN APPLICATION FOR REVIEW

On Wednesday, December 24, 2008 – Christmas Eve – the Chief of the Media Bureau issued a Memorandum Opinion and Order purporting to terminate the hearings scheduled by the presiding Administrative Law Judge ("ALJ") in the above-captioned proceedings so that the Media Bureau could resolve the cases itself.[1]

This Christmas Eve surprise represents an unprecedented attempt by the Media Bureau to interfere with and obstruct a duly designated administrative hearing. For the sake of the integrity of the Commission's processes, not to mention fundamental due process and the ends of justice, the ALJ should not capitulate to the Media Bureau's attempt to usurp the independence and authority of the administrative hearing process and to undermine the principles of the Administrative Procedure Act. As will be shown below, once the HDO was issued, the ALJ has absolute authority over the course of the hearing until such time as an initial decision is issued. The Media Bureau had no power — delegated or otherwise — to impose an arbitrary 60-day timeframe in the HDO, and had no power to "delegate" a limited grant of jurisdiction to the ALJ.

Time Warner Cable Inc. ("TWC"), and on behalf of Bright House Networks, LLC ("BHN"), Cox Communications, Inc. ("Cox"), Comcast Corporation and Comcast Cable Communications, LLC (collectively, "Comcast"), urges the ALJ to treat the Media Bureau's unlawful order as *ultra vires* and of no effect and to issue a reaffirmed scheduling order reflecting his intention to see these matters through to an initial decision, in accordance with his authority under Sections 0.341 and 1.243 of the Commission's rules[2]. Specifically, we ask the ALJ to reaffirm that the scheduling order issued on December 15 remains in effect, and to extend

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[1] Memorandum Opinion and Order, DA 8-2005 (Media Bur., Dec. 24, 2008) (*"Christmas Eve Order"*).

[2] TWC notes that BHN, Cox, and TWC have joined in Comcast's emergency application for review and motion for stay of the *Christmas Eve Order* to the Commission, also filed today (courtesy copies of which have been provided to Chief ALJ Sippel and Judge Steinberg).

all deadlines by the number of days between December 24 and the release of the reaffirmed scheduling order. In the alternative, given that the *Christmas Eve Order* raises a "substantial difference of opinion" involving a "controlling question of law" regarding the jurisdictional impact of the aspirational 60-day timeframe originally referenced by the Media Bureau in its HDO, the ALJ should certify the filing of an Application for Review of the HDO for consideration by the full Commission, as timely requested by the defendants in these cases on October 20, 2008.

BACKGROUND

A full appreciation of the unprecedented and extraordinary action taken by the Media Bureau on Christmas Eve requires a review of the procedural history of this case. Herring Broadcasting, Inc. d/b/a WealthTV ("WTV") filed a program carriage complaint against TWC on December 20, 2007, even as negotiations continued and TWC offered to enter into an affiliation agreement containing all material terms that had been requested by WTV. Over nine months later, on October 10, 2007, the Media Bureau issued a Memorandum Opinion and Hearing Designation Order finding that WTV had satisfied its *prima facie* case burden but concluding that "the pleadings and supporting documentation filed by the parties…present several factual disputes, such that we are unable to determine on the basis of the existing record[] whether we can grant relief."[3]

The HDO thus directed that an ALJ be assigned to "resolve all factual disputes" necessary to determine whether TWC "has discriminated against the complainant's programming in favor of its own programming, with the effect of unreasonably restraining the complainant's ability to compete fairly in violation of Section 76.130(c)," and to recommend a remedy, if

[3] Memorandum Opinion and Hearing Designation Order, DA 08-2269 (Media Bur., Oct. 10, 2008) (*"HDO"*).

appropriate.[4] Notably, after the Media Bureau took many months to conclude that a *prima facie* case had been established, the Media Bureau ordered the ALJ in the HDO to do what the Media Bureau could not do — address a multitude of highly contested factual disputes relating to six separate and complex programming negotiations and return a recommended decision in 60 days — without so much as a word as to why such an impossibly truncated timetable was deemed necessary or as to the Media Bureau's authority to impose such an unreasonable schedule.

Without even waiting for the assignment of the matter to an ALJ, TWC and the other defendants immediately filed motions seeking clarification of the scope of the HDO and of the schedule for resolving the factual disputes at issue. In particular, the parties sought confirmation that the ALJ was not bound by the 60-day timeframe for returning a recommended decision specified in the HDO or, in the alternative, certification of the issue to the full Commission. Judge Steinberg, who was assigned to the case by an order released by Chief Judge Sippel on October 22, 2008, issued an initial procedural order the next day, clarifying the assignment of the burden of proof for the designated issues and adopting a schedule that denied any discovery, but nevertheless did not call for the issuance of the recommended decision until some time after the end of the 60-day timeframe in the HDO.[5] Neither the Media Bureau nor the Enforcement Bureau (which had been made a party to the proceeding by the corrected HDO issued on October 15, 2008) gave any indication that they regarded the 60-day timeframe as jurisdictional in nature and that the ALJ would be without authority to issue a recommended decision based on this initial schedule.

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[4] HDO at ¶¶ 124, 122. The same HDO directed the ALJ to address three other program carriage complaints involving WTV, as well as program carriage complaints filed by NFL Enterprises LLC ("NFL") and TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network ("MASN") against Comcast Cable Communications LLC and Comcast Corporation, respectively. The HDO as initially issued did not contain a specific designation of issues in its ordering clauses. The Media Bureau issued an Erratum on October 15, 2008 revising the ordering clauses to add a specification of the issues being designated.

[5] Order, FCC 08M-44 (Judge Steinberg, Oct. 23, 2008).

The silence of the Media and Enforcement Bureaus as to whether the 60-day timeframe was jurisdictional continued through a series of subsequent orders clarifying the issues and revising the procedural timetable for the case. Most significantly, at a pretrial conference held on October 27, 2008, Judge Steinberg suspended his October 23, 2008 procedural schedule,[6] a ruling confirmed by a written Order issued on October 30, 2008.[7] Thereafter, on November 20, 2008, after fully considering the pleadings filed by the parties regarding the various motions for clarification of the issues and the procedural schedule, Judge Steinberg issued a Memorandum Opinion and Order finding that "it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60-day timeframe contemplated by the HDO."[8]

That ruling was reaffirmed by Chief Judge Sippel in a prehearing conference held on November 25, 2008, following the announcement that Judge Steinberg was retiring and that the case was being reassigned to the Chief Judge. The Chief Judge thereafter issued a written Procedural and Hearing Order on December 2, 2008 setting forth a detailed and aggressive schedule that allowed for limited discovery and the conduct of a hearing starting March 17, 2009.[9]

Obviously anticipating the new schedule, WTV had filed a motion with the Media Bureau on November 24, 2008 asking it to revoke the HDO and to resolve the pending complaints on their merits by December 10, 2008.[10] Following the Chief Judge's decision to

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[6] At the October 27, 2008 prehearing conference, Judge Steinberg stated as follows:

> ...I have to be candid, it is not possible to do this within the 60 days... And I think it's more important to do things correctly than to do things quickly.

Hearing Transcript, MB Docket No. 08-214 ("Tr.") at 38.

[7] Order, FCC 08M-45 (Judge Steinberg, Oct. 30, 2008).

[8] Memorandum Opinion and Order, FCC 08M-47 (Judge Steinberg, Nov. 20, 2008) ("*November 20 Order*").

[9] Procedural and Hearing Order, FCC 08M-50 (Chief Judge Sippel, Dec. 2, 2008).

[10] WTV's motion was filed two business days after an *ex parte* meeting attended by, *inter alia*, Kathleen Wallman (who admitted attending the meeting in her role as WTV's "litigation counsel", Chairman Martin, the Chairman's

adopt a schedule under which the hearing would commence March 17, 2009, WTV supplemented its motion. In the meantime, all of the parties, including WTV, continued to act in reliance on the procedural schedule established by Chief Judge Sippel, exchanging document requests, identifying experts, and taking other actions consistent with the conduct of an expedited hearing.[11]

TWC and the other WTV defendants promptly filed oppositions to the WTV motion, pointing out its various procedural and substantive defects. WTV elected not to file a substantive response, instead simply notifying the Media Bureau on December 8, 2008 that it considered the record on its motion to be complete. More than two weeks passed (during which time the parties continued to engage in discovery-related proceedings before the ALJ) before the Media Bureau issued the *Christmas Eve Order* purporting to find that the HDO had "expired" on December 9, 2008. Based on this determination, the Media Bureau ordered the proceedings set for hearing before the ALJ "terminated" and announced that the Media Bureau "will proceed to resolve" the disputes itself.[12]

DISCUSSION

Particularly in light of the crucial First Amendment issues that permeate any program carriage proceeding, whereby the government professes authority to substitute its judgment for the Constitutionally-protected editorial discretion of a cable television operator, a full and fair hearing is crucial. Indeed, it must be recognized that any mandatory carriage ordered in response

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legal advisor, and the Chief of the Media Bureau. While the *ex parte* meeting ostensibly concerned a pending rulemaking proceeding relating to the program carriage rules, the ex parte notice indicates that Judge Steinberg's decision that the instant proceeding could not be resolved within 60-days was specifically discussed. *See* Letter from Kathleen Wallman to Marlene H. Dortch, FCC Secretary, MB Dkt. No. 07-42 (Nov. 21, 2008).

[11] The schedule established in the order released December 2, 2008 subsequently was modified slightly on December 15, 2008 by the issuance of a Revised Procedural and Hearing Order, FCC 08M-53 (Chief Judge Sippel, Dec. 15, 2008).

[12] *Christmas Eve Order* at ¶ 20.

to a program carriage complaint constitutes governmentally compelled speech.[13] Thus, if such a ruling is to have any prospect to survive the requisite exacting First Amendment scrutiny, it must be preceded by a full trial-type hearing with appropriate discovery rights, witness credibility determinations through live testimony before an impartial and independent tribunal, and other attendant due process rights. A limited, paper-only proceeding conducted by the Media Bureau before it issues a predictable decision is no substitute for the crucible of an administrative hearing conducted under the full protections of the Administrative Procedure Act and the Commission's hearing rules.

The conduct of this proceeding before an impartial and independent ALJ will provide the parties the full and fair due process to which they are entitled. In contrast, as will be shown below, the Media Bureau's *Christmas Eve Order* was unlawful and an abuse of the Commission's processes. Accordingly, TWC urges the ALJ to disregard the *Christmas Eve Order* and to proceed with these hearings as authorized by Sections 0.341 and 1.243 of the Commission's rules.

I. The Media Bureau's *Christmas Eve Order* Is *Ultra Vires* And Not Binding On The Presiding Officer.

A. *The Issuance Of The Christmas Eve Order Violated Section 0.341(a) Of The Commission's Rules.*

Under the Commission's rules, once a proceeding is referred to an ALJ for a hearing, jurisdiction over matters relating to such hearing generally rests solely with that ALJ.

[13] Cable operators, like other First Amendment speakers, have a constitutional right not to be forced by the government to distribute content "which reason tells them should not be published." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). Where the government seeks to impose forced speech as a remedy for private action that allegedly restricts the speech of others, "this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Id.* at 254. In *Tornillo*, the Court struck down a state "right of reply law" that required newspapers to give access to speakers with views opposing those expressed by the paper. The Court held that compelling newspapers to "print that which 'reason' tells them should not be published" unduly burdened speech in violation of the First Amendment. Just as a newspaper editor's decisions regarding the content and layout of the paper are protected by the First Amendment, so too are the decisions that the operator of a cable system makes in deciding what services to carry and how to package and price those services. *See also Pacific Gas & Elec. V. Public Util. Comm'n*, 475 U.S. 1 (1986).

Specifically, Section 0.341(a) of the Commission's rules expressly states that:

> [a]fter an administrative law judge has been designated to preside at a hearing and until he has issued an initial decision or certified the record to the Commission for decision, or the proceeding has been transferred to another administrative law judge, all motions, petitions and other pleadings shall be acted upon by such administrative law judge….[14]

Because the Media Bureau's issuance of the *Christmas Eve Order* purporting to terminate the designated hearing in this proceeding directly contravenes this rule, it is *ultra vires* and not binding on the presiding officer.

In the *Christmas Eve Order*, the Media Bureau attempted to skirt Section 0.341(a) by suggesting that its decision to terminate the hearing is essentially ministerial in nature. In particular, while acknowledging and discussing at length the motions filed by WTV and TCR asking that the Media Bureau revoke the HDO and reclaim jurisdiction over the factual issues therein designated for hearing because of their dissatisfaction with the procedural schedule adopted by the presiding officer, the Media Bureau contends that those motions are not the basis for the *Christmas Eve Order* and, indeed, are moot.[15] Instead, the Media Bureau asserts that the basis for its order purporting to terminate the hearing is that the HDO (and the ALJ's jurisdiction with regard to the designated hearing) "expired" on December 9, 2008.[16]

Upon designation of the matter to an ALJ to determine complicated factual issues, the Media Bureau's decision to act on its own motion to terminate the designated hearing is squarely barred by Section 0.341(a). If that rule is to have any vitality, it must mean that, once the HDO was issued and an ALJ was assigned (to say nothing of a scheduling order having been agreed upon and with discovery well underway), the Media Bureau lacked the authority to adopt an order terminating (or otherwise interfering with) the designated hearing. Permitting the Media Bureau to take unilateral, unfettered actions based on its own initiative would create an exception

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[14] 47 C.F.R. § 0.341(a).

[15] *Christmas Eve Order* at ¶ 19.

[16] *Id.*

that simply swallows up the rule requiring that the designated ALJ – and only the ALJ – act on matters involving the hearing proceeding.

The Media Bureau's characterization of the *Christmas Eve Order* as unrelated to the motions filed by WTV and MASN is belied by the *Christmas Eve Order* itself. The HDO designated a total of six separate proceedings for hearing and established the same alleged "deadline" for resolving the disputes in each of these cases. Yet, the *Christmas Eve Order* only terminates the designated hearing for five of those proceedings – the five covered by the motions filed by WTV and MASN. The sixth proceeding – a complaint filed by the NFL against Comcast – is not mentioned in or affected by the *Christmas Eve Order*. If the Media Bureau's action truly was merely ministerial and unrelated to the motions filed by WTV and MASN, it would have addressed all six proceedings. The fact that it did not do so establishes that, notwithstanding the Media Bureau's assertion that those motions were "moot," the *Christmas Eve Order* was adopted by the Media Bureau in response to those motions in direct violation of Section 0.341(a).[17]

B. The Media Bureau Exceeded its Delegated Authority When It Issued the Christmas Eve Order.

Apart from directly violating Section 0.341(a) of the Commission's rules, the Media Bureau's issuance of the *Christmas Eve Order* exceeded the scope of its delegated authority. There is no dispute that the Media Bureau has the requisite delegated authority in appropriate circumstances (e.g., those not involving novel legal questions or policy judgments) to refer disputed factual issues in a program carriage complaint proceeding to an ALJ for resolution.[18]

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[17] Although the *Christmas Eve Order* purports not to decide the motions to revoke filed by WTV and MASN and to be based solely on the "expiration" of the HDO, the decision itself goes to substantial lengths to criticize the handling of this proceeding by the ALJs to which it has been assigned, particularly rulings clarifying the burden of proof and the scope of the issues to be resolved. To the extent that the Media Bureau's criticisms could be read as an attempt to override the ALJ's rulings, they can and should be disregarded as procedurally improper and substantively incorrect.

[18] *Christmas Eve Order* at ¶ 5, *citing* 47 C.F.R § 76.7(g).

However, the delegated authority to issue an HDO in certain program carriage cases does not mean that the Media Bureau has either the authority or the discretion to undo the HDO or to limit the ALJ's plenary authority over the conduct of the designated hearing after the HDO has been issued.[19]

In particular, the Media Bureau is mistaken in its assertion that it was empowered to confer a "limited grant" of authority to the ALJ and that once the ALJ did not issue a recommended decision by December 9, 2008, the ALJ "no longer has delegated authority to conduct hearings" in the proceedings at issue.[20] The Media Bureau's fundamental error is that even where it has the delegated authority to refer a program carriage proceeding to an ALJ, it does not have the power to define the scope of the ALJ's authority to control the course and conduct of the administrative hearing. In other words, the Media Bureau itself has no power to either "delegate" or "undelegate" authority to the ALJ.

First, under Section 5(c) of the Communications Act, only the full Commission has authority to delegate authority to a subordinate body within the agency. Thus, while the Commission can delegate authority to the Media Bureau to take actions otherwise within the Commission's jurisdiction, it cannot empower the Media Bureau to make its own delegations of authority to other bodies within the agency.[21]

Second, and more critically, an ALJ does not derive its authority to control the course and conduct of designated hearings from a "delegation" from the Commission, let alone from a bureau that can act only pursuant to its own limited delegated powers. Rather, as the

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[19] The Media Bureau claims that the decision whether to issue an HDO is committed to its discretion. That claim is somewhat misleading, as it is clear that the Commission expected the Media Bureau to utilize administrative hearings to resolve program carriage cases that raise contested issues of fact, as is the case here. *See 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*, Second Report and Order, 9 FCC Rcd 2642 (1993) at ¶¶ 24, 32, 34 ("*1993 Second Report and Order*").

[20] *Christmas Eve Order* at ¶ 14.

[21] *See, e.g., Frank H. Yemm*, 39 RR 2d 1657, 1659 (1977) (holding that the Communications Act precludes the Commission "from delegating authority to review actions taken under delegated authority").

Commission's rules expressly note, the authority to control the course and conduct of a designated hearing "stems from section 7 of the Administrative Procedure Act and section 409 of the Communications Act rather than from delegations of authority made pursuant to section 5(c) of the Communications Act."[22]

Thus, the "plenary authority"[23] that is vested in an ALJ to regulate the course of a designated hearing is not the product of a delegation of authority from the subdivision of the agency that originated the designation order, nor can that subdivision subsequently contract or otherwise limit that plenary authority. While the Media Bureau is correct that there are some inherent restraints on an ALJ's authority, that does not mean that a bureau has continuing jurisdiction and power over the course and conduct of a designated hearing.

For example, the Media Bureau cites *Anax Broadcasting Co., Inc.*[24] for the proposition that an ALJ has "no authority to act inconsistently with the terms of a Hearing Designation Order."[25] However, the issue in *Anax* was merely whether an ALJ could effectively countermand the issuance of a hearing designation order pursuant to a proper exercise of delegated authority by an operating bureau.[26] That is a far cry from holding that a bureau can impose limits on the authority committed to an ALJ to manage a case. Just as an ALJ has the undisputed authority to depart from the terms of an HDO by granting motions to clarify, enlarge, modify, or delete designated hearing issues, so too does he have the clear authority to depart

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[22] 47 C.F.R. § 0.201(a)(2) [Note to Paragraph (a)(2)] (emphasis supplied). Consistent with this position, and unlike other provisions of Part 0, Subpart B of the Commission's rules, the provision addressing the jurisdiction of an ALJ is not entitled "authority delegated" but rather is entitled "authority of administrative law judge." *Compare* 47 C.F.R. §§ 0.231, 0.241, 0.251, 0.261, 0.283, 0.291, 0.311, 0.331 *with* 47 C.F.R. § 0.341.

[23] *See, e.g., Algreg Cellular Engineering*, 9 FCC Rcd 5098, ¶ 74 (Rev. Bd. 1994). *See also Industrial Business Corp.*, Decision, 47 FCC 2d 891, ¶ 6 (Rev. Bd. 1974); *Selma Television, Inc.*, Memorandum Opinion and Order, 3 FCC 2d 63 (Rev. Bd. 1966).

[24] 87 FCC 2d 483 (1981).

[25] *Christmas Eve Order* at ¶ 16.

[26] *Anax, supra,* 87 FCC 2d 483 at ¶ 11. The other cases cited by the Media Bureau in the *Christmas Eve Order* are similarly inapposite to the issue presented here. *See, e.g., Tequesta Television, supra,* 2 FCC 2d 41 (1987).

from the designated "deadline" for completing action in a proceeding unless such timeframe is established by statute.[27]

Moreover, while an ALJ may be limited in its authority to reconsider matters that have been fully considered by the designating bureau, there is no evidence that the Media Bureau gave any thought at all to whether the 60-day period specified in the HDO was to be jurisdictional and binding or merely aspirational. In particular, notwithstanding the Media Bureau's assertion that the specified "deadline" for issuing a recommended decision was "a critical component of the HDO," there is absolutely nothing in the HDO that explains, justifies or rationalizes the 60-day timeframe for resolving the designated issues.[28]

In light of the Media Bureau's failure to give any indication that it had fully considered the effect of its 60-day timeframe, there is ample support in the law for the ALJs to have regarded it — and to continue to regard it — as non-binding and directional rather than mandatory and jurisdictional. The courts and the Commission itself have consistently indicated that where the consequences of failing to meet a stated administrative deadline are not expressly stated, the failure to meet that deadline will not result in a divestiture of authority over the matter in question.[29]

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[27] *See, e.g.,* 47 C.F.R. § 1.205 (authorizing ALJ, upon a showing of "good cause," to grant continuances and extensions of time for "any act required or allowed to be done within a specified time" unless the time for performance "is limited by statute." *See also* 47 C.F.R. § 1.243(f) (granting ALJ authority to "regulate the course of the hearing"). The "good cause shown" for the *November 20 Order* was the due process concerns raised by the provision in the HDO setting a 60-day timeframe for the adjudication of six distinct cases (the four separate WTV complaints against four cable operators, and the separate NFL and TCR complaints against Comcast), each of which has its own peculiar facts and which do not have all parties in common. It is beyond dispute that there is no statutory requirement that the proceeding be completed within 60 days.

[28] If, in fact, the 60-day deadline was so "critical" as to be beyond alteration, the following question presents itself: why did the Media Bureau remain silent when, on October 24, 2008, the presiding officer adopted an initial schedule which gave no indication as to when the recommended decision would be issued other than that it would be sometime after the December 9, 2008 "deadline." The Media Bureau similarly sat on its hands after that schedule was revoked and the presiding officer ruled that the 60-day schedule "cannot be achieved." The Media Bureau's silence on what it now claims to be a "critical" issue speaks volumes.

[29] *See, e.g., Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994), *citing Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (the relevant question in deciding whether a deadline results in a divestiture of jurisdiction is whether "Congress intended the agency to lose its power to act"). *See also 1993 Annual Access Tariff Filings*, 19 FCC Rcd 14949, 14960 (2004) (noting that the D.C. Circuit has "repeatedly concluded that missing a statutory deadline does

Even if there are circumstances short of a statutory deadline in which an operating bureau can establish and enforce an "expiration date" in an HDO, this case is not one of those circumstances. In particular, the Media Bureau's delegated authority does not extend to "matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines."[30] Yet, there is no precedent for either the Commission or the Media Bureau to have terminated a pending hearing on the grounds that the HDO authorizing the hearing has "expired." The Media Bureau emphasizes that the Commission has previously issued an HDO in a program carriage case with a 45-day deadline.[31] However, that case was settled and the issue of whether the ALJ was unalterably bound by that deadline and what the consequence would be had the ALJ attempted to change that deadline have never been addressed by the Commission, leaving the question novel and untested.[32]

In addition, the Media Bureau's attempt to establish and enforce a binding "shot clock" on the ALJ's resolution of the disputed factual issues in this case clearly represents a novel policy determination that is beyond the scope of the Media Bureau's delegated authority. Significantly, the Media Bureau's action is at odds with the Commission's determination in 1993 not to impose a fixed deadline on the resolution of program carriage complaints.[33] Moreover, notwithstanding the Media Bureau's assertion that "administrative delay in resolving program carriage disputes could result in irrevocable harm to an independent programmer" by

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not divest an agency of authority over a case or issue"). Thus, even if the Media Bureau had the authority to establish a binding deadline on the resolution of the designated hearing, the conclusion is inescapable that it failed to exercise that authority when it failed to indicate in any way that the deadline was jurisdictional in nature.

[30] 47 C.F.R. § 0.283(c).

[31] *Christmas Eve Order* at ¶ 17, *citing In the Matter of TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8995 (2006).

[32] The relevance of the Comcast/TCR HDO to the instant case is further limited by the unique circumstances surrounding the issuance of the HDO in that proceeding, including its relationship to the review of transactions surrounding the disposition of the bankrupt assets of Adelphia Communications Corp. and the fact that the Commission had adopted an arbitration condition in that proceeding that would otherwise have been inapplicable to the Comcast/TCR dispute.

[33] *1993 Second Report and Order, supra*, 9 FCC Rcd 2642 at ¶ 32, note 52.

"potentially" driving the programmer out of business,[34] there is no evidence whatsoever in this case that the procedural timetable established by the ALJ threatens WTV with such harm. Rather, the question of whether the potential for harm to a programmer from administrative delay warrants Commission reversal of its prior decision not to adopt a binding shot clock is an issue that should be – and, in fact, is being – considered by the full Commission in the context of a rulemaking proceeding, not preemptively by the Media Bureau acting on delegated authority.

Under the circumstances, and in light of the fact that the Media Bureau itself had taken anywhere from three to nearly ten months just to decide whether the complaints stated *prima facie* cases, the Media Bureau's after-the-fact interpretation of the 60-day timeframe in the HDO as a binding jurisdictional mandate can and should be given short shrift by the Presiding Officer. Judge Steinberg found, on the basis of his considerable experience and expertise, (and Chief Judge Sippel has agreed) that compliance with the 60-day period in a proceeding that encompasses six discrete complaints involving three different plaintiffs and four different defendants with unique facts and witnesses in each case, would be inconsistent with due process.[35] That finding, and the establishment of a practicable (yet expedited) hearing schedule was well within their authority to make under the Administrative Procedure Act and the Commission's rules and should be adhered to notwithstanding the Media Bureau's unlawful attempt to interfere with and indeed usurp that authority.[36]

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[34] *Christmas Eve Order* at ¶ 15.

[35] *See November 20 Order at* ¶ 7 ("it is the Presiding Judge's view that it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60-day time frame contemplated by the HDO"); Tr. at 62 (noting that Judge Steinberg had thought through the ruling on the 60-day timeframe "very carefully").

[36] The Media Bureau's position that the ALJ lacked the authority to modify the 60-day deadline is at odds not only with the ALJ's reasoned conclusion on the issue, but also with the position expressed by the Enforcement Bureau at the November 25, 2008 pre-hearing conference. *See, e.g.,* Tr. at 115 (Mr. Schonman) (acknowledging that limited discovery "is warranted, if for no other reason that it would avoid a remand after your decision comes out, where the parties claim they haven't been afforded due process"); Tr. at 116 (Mr. Schonman) (acknowledging that the hearing schedule established by the ALJ is "consistent with what the Commission and the Media Bureau wanted").

C. *The Christmas Eve Order Improperly Interferes With the ALJ's Statutorily Protected Decisional Independence.*

Yet another reason that the *Christmas Eve Order* is *ultra vires* and can be treated by the ALJ as non-binding is that it constitutes an improper attempt by the Media Bureau to interfere with the statutorily guaranteed decisional independence of the hearing process. As the Supreme Court has held, the Administrative Procedure Act structures the hearing process "so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by…other officials within the agency."[37] Thus, even the imposition of non-binding guidelines for the timing of a decision is permitted only if they do not "unduly interfere with a judge's independence to control the course of the proceeding."[38]

As discussed above, it has been apparent from the outset that neither Judge Steinberg nor Chief Judge Sippel regarded the 60-day timeframe as binding. The fact that the Media Bureau made no effort to clarify the HDO until well after 60 days had passed strongly suggests that the Media Bureau's decision was driven more by its desire to reassert control over the case than by any valid legal grounds for terminating the hearing. It is notable in this regard that the Media Bureau did not object in the recent *MASN/Time Warner Cable* case where an arbitrator assigned to the case significantly exceeded a 45-day deadline specified for resolution of the proceeding by the Commission.[39]

By selectively reading the 60-day timeframe in the HDO as jurisdictional, the Media Bureau clearly has taken a step that is at odds with the very structure of the hearing process, which is designed "to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by …other officials within the agency." If the ALJ

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[37] *Butz v. Economou*, 438 U.S. 478, 513 (1978)

[38] *Proposals to Reform the Commission's Comparative Hearing Process*, Report and Order, 6 FCC Rcd 157 (1990) at n.26 (*citing Butz v. Economou, supra).*

[39] *TCR Sports Broadcasting Holding L.L.P. v. Time Warner Cable Inc.*, DA 08-2441 (Media Bur., Oct. 30, 2008).

acquiesces in the Media Bureau's attempt to assert control over the course and conduct of this proceeding, it will be sending a message that an ALJ's management of a case is no longer "plenary" but rather is subject to second-guessing by the Commission and its operating bureaus. Taken to an extreme (albeit one that does not seem all that far-fetched in light of the *Christmas Eve Order*), the Media Bureau could overrule virtually any action that an ALJ might take, simply by carefully crafting "limited grants" of authority in hearing designation orders. The ALJ need not, and must not, countenance such an unlawful intrusion into his decisional independence.

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For all of the reasons set forth above in this Section, the *Christmas Eve Order* was unlawful, procedurally improper and beyond the Media Bureau's delegated authority. Accordingly, the ALJ should treat the *Christmas Eve Order* as *ultra vires* and proceed with the hearing. In particular, the ALJ should reaffirm that the scheduling order issued on December 15 remains in effect, but that all deadlines shall be extended by the number of days between December 24 and the release of the reaffirmed scheduling order.

II. <u>If The ALJ Has Any Doubt Regarding His Authority To Reaffirm Its Scheduling Order In This Proceeding, The ALJ Should Certify The Issue To The Full Commission For Immediate Resolution</u>.

When the defendants filed their Motions for Modification and Clarification that led to the *November 20 Order*, TWC made a timely request in the alternative that if the ALJ had any doubt as to his authority to decide the matter, he should certify the filing of an Application for Review of the HDO for the full Commission to determine whether the Media Bureau is authorized to bind an ALJ to an arbitrary 60-day timeframe.[40]

[40] TWC "Motion for Modification and Clarification or, in the Alternative, for Certification of Questions," Oct. 20, 2008, at 7-8. *See also* Comcast "Request for Certification to the Commission," Oct. 20, 2008; Cox "Motion to Clarify Hearing Designation Order or in the Alternative to Certify Questions to the Commission, Oct. 20, 2008; BHN "Request for Modification and Clarification of HDO or, In the Alternative, For Certification of Application for Review," Oct. 20, 2008.

The *November 20 Order* set forth a cogent and authoritative analysis to support the ALJ's authority to issue that order.[41] Moreover, the *November 20 Order* relies on sound policy rationale and administrative efficiency:

> This is an extremely complex proceeding involving six separate program carriage complaints, three Complainants, and four Defendants. Each of these six cases presents it owns peculiar facts and, as an examination of the *HDO* will reveal, each factual situation appears to be unique and intricate, and the complaints have been vigorously contested by the Defendants.
>
> * * *
>
> Under all of these circumstances, it is the Presiding Judge's view that it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60-day timeframe contemplated in the *HDO*. Thus, the public interest would be better served, and the scarce resources of the Commission would be better utilized, by allowing an adequate period of time, *ab initio*, to litigate these cases fully and properly. *See* Tr. 36, 38. To rule otherwise would raise the distinct possibility of a remand for additional evidentiary hearings resulting, ultimately, in an unnecessary and undue delay in the final resolution of this complicated proceeding.[42]

This reasoning was endorsed by Chief Judge Sippel at the prehearing conference on November 25, 2008.[43] Moreover, the Enforcement Bureau did not object substantively on the issue of disregarding the recommended 60-day timeframe in the HDO, but rather merely commented that the issue did not require certification to the full Commission, thus signaling acquiescence to resolution of this question by the ALJ.[44]

Now, over thirty days after issuance of the *November 20 Order*, well past the close of the pleading schedule applicable to TWC's motion, and after the parties have expended considerable resources to move forward with an expedited hearing process, the Media Bureau asserts that the ALJ was unalterably bound by the 60-day period.[45] Thus, under the circumstances, this is

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[41] *November 20 Order* at n. 10, citing, *inter alia*, Sections 1.243(f), 1.205, 1.248(b)(2) and 1.253(b) of the Rules.

[42] *Id.* at ¶ 7 (footnotes omitted).

[43] Tr. at 62. *See also Christmas Eve Order* at ¶ 11.

[44] Enforcement Bureau's Consolidated Comments, Oct. 31, 2008.

[45] Under the Commission's rules and precedents, the sole avenue for any interested party to challenge the interlocutory scheduling orders adopted by the ALJ (and, in particular, the *November 20 Order*), was through a

unquestionably a matter that "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation."[46]

In particular, the "substantial difference of opinion" is evident from the fact that two experienced ALJs have concluded that these cases cannot be resolved in 60 days without impinging the parties' due process rights, with the apparent support of the Enforcement Bureau,[47] whereas the Media Bureau has concluded to the contrary. Similarly, the issue of materially expediting the ultimate resolution of the litigation was specifically addressed in the *November 20 Order*:

> To rule otherwise would raise the distinct possibility of a remand for additional evidentiary hearings resulting, ultimately, in an unnecessary and undue delay in the final resolution of this complicated proceeding.[48]

In other words, if the Media Bureau is allowed to rule against the defendants without the opportunity for a trial-type hearing, the Commission will likely find it necessary after much more time has transpired (or else, even later, be required to do so by the Court of Appeals) to order further evidentiary hearings by an ALJ to make the necessary credibility judgments and other requisite fact-finding in this "extremely complex proceeding" that the Media Bureau previously conceded it was unable to make.

In addition, the parties would face the prospect of undue burdens, *e.g.*, of responding to whatever discovery the Media Bureau might order, only to go through another discovery process

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motion directed to the ALJ seeking leave to file to an appeal under Section 1.301. Neither the Media Bureau nor WTV has raised any issues that are appealable as of right under Section 1.301(a), nor requested authority from the Presiding Judge to file the Motion, as required under Section 1.301(b). Because neither the Media Bureau nor WTV complied with Section 1.301, the *Christmas Eve Order* provides no basis to overturn the *November 20 Order*. Nonetheless, as discussed herein, if the ALJ has any doubt about its authority to continue with this proceeding, it should revive TWC's certification request and present the issue to the full Commission for resolution.

[46] *See* Section 1.115(e)(3).

[47] *See* Tr. at 115 ("We think that some very limited discovery is warranted, if for no other reason that it would avoid a remand after your decision comes out, where the parties claim that they haven't been afforded their due process.")

[48] *November 20 Order* at ¶ 7.

upon remand for a true evidentiary hearing. On the other hand, if the full Commission were to address this issue now and rule against the Media Bureau, the fact that the losing party was afforded full due process, the opportunity for discovery, and the ability to develop a full and complete record free from artificial and arbitrary time constraints, would minimize the bases for appeal.[49]

CONCLUSION

TWC and the other defendants in these cases are fully prepared to move forward under an aggressive, expedited hearing schedule. Indeed, substantial progress has already been achieved: preliminary motions have been filed and resolved, two prehearing conferences have been held, an aggressive scheduling order has been agreed upon by the parties, expert witnesses have been identified and summaries of their intended testimony have been exchanged, a procedural stipulation and protective order have been negotiated and, but for the *Christmas Eve Order*, document production in the WTV cases could have been completed on December 31st. Without question, the most expeditious and administratively efficient course for resolution of these cases is for the ALJ to recognize that the *ultra vires Christmas Eve Order* is not binding, and proceed under a reaffirmed scheduling order as proposed herein.

But more is at stake here than simply the prompt resolution of these proceedings. The Media Bureau's actions go to the very heart of the integrity of the Commission's processes. As has been shown above, the authority of the ALJ over the hearing process is not "delegated" by the bureau that issued the HDO, or even by the Commission itself, but rather by Section 7 of the Administrative Procedure Act and Section 409 of the Communications Act.[50] Allowing parties

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[49] As the Commission has noted, the courts have expressed concern that "accelerated procedures might sacrifice the careful performance of the Commission's substantive tasks to mere speed." *Son Broadcasting, Inc.*, 88 FCC 2d 635 (1981), at n. 23, *citing Federal Broadcasting System v. FCC*, 225 F.2d 560, 567 (D.C. Cir. 1955) ("Speed of Commission action may in some cases point to a failure to make those essential findings which the agency must make. . .").

[50] *See* 47 C.F.R. § 0.201(a)(2) [Note].

to an ongoing administrative hearing or the bureau that issued the hearing designation order to "terminate" a hearing any time the ALJ issues an unfavorable interlocutory ruling would disturb the integrity of the hearing process and undermine the independence of the ALJ as well as fundamental due process rights guaranteed by the Constitution.

We urge the ALJ to faithfully carry out his responsibilities under Sections 0.341 and 1.243 of the Commission's rules to see these cases through to an initial recommended decision.

Respectfully submitted,

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Dated: December 30, 2008
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CERTIFICATE OF SERVICE

I, Jennifer Walker, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Motion for Reaffirmation of Scheduling Order or, in the Alternative, Request for Certification of an Application for Review" were served this 30th day of December, 2008, via first class mail, postage prepaid, upon the following:

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