

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matters of )  
 )  
 Herring Broadcasting, Inc. d/b/a WealthTV, )  
 Complainant )  
 v. )  
 Time Warner Cable Inc., )  
 Defendant )  
 )  
 Herring Broadcasting, Inc. d/b/a WealthTV, )  
 Complainant )  
 v. )  
 Bright House Networks, LLC, )  
 Defendant )  
 )  
 Herring Broadcasting, Inc. d/b/a WealthTV, )  
 Complainant )  
 v. )  
 Cox Communications, Inc., )  
 Defendant )  
 )  
 Herring Broadcasting, Inc. d/b/a WealthTV, )  
 Complainant )  
 v. )  
 Comcast Corporation, )  
 Defendant )  
 )  
 TCR Sports Broadcasting Holding, L.L.P., )  
 d/b/a Mid-Atlantic Sports Network, )  
 Complainant )  
 v. )  
 Comcast Corporation, )  
 Defendant )

MB Docket No. 08-214

File No. CSR-7709-P

FILED/ACCEPTED

DEC 30 2008

Federal Communications Commission  
Office of the Secretary

File No. CSR-7822-P

File No. CSR-7829-P

File No. CSR-7907-P

File No. CSR-8001-P

To: The Commission

EMERGENCY APPLICATION FOR REVIEW

December 30, 2008

No. of Copies rec'd 0414  
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## SUMMARY

The Media Bureau's *Christmas Eve Order* appears to be unprecedented in the annals of FCC history. The Media Bureau designated for hearing before an administrative law judge ("ALJ") six program carriage complaints because it could not resolve numerous factual disputes on the record before it. The Media Bureau directed the ALJ to decide all six cases in 60 days (by December 9, 2008) and indicated that the ALJ would recommend a decision to "the Commission" for further action. There was no indication in the *HDO* that the ALJ would be divested of jurisdiction after 60 days.

The ALJ immediately issued a scheduling order to move the cases along rapidly – in fact at a breakneck pace that would not have allowed for any discovery. Notably, even this accelerated schedule would not have resulted in the ALJ's recommended decision being issued within 60 days. While addressing the schedule further in a prehearing conference, the ALJ concluded that the schedule was "ludicrous" and would not provide for a full and fair adjudication of the numerous unresolved factual issues, including credibility determinations. After taking the issue under advisement, he further concluded, based on his 32 years of experience as a trial lawyer and judge, that given the complexity of the cases "the 60-day timeframe contemplated in the *HDO*" was inconsistent with due process and that limited discovery was necessary. The ALJ therefore set a more realistic, but still very expedited, schedule.

Just as the parties were actively engaged in document production and preparing expert witness reports, the Media Bureau abruptly changed its mind about the need for the factual disputes to be heard by an ALJ and "terminated" the hearing. Such action was plainly *ultra vires* and novel – clearly beyond the Media Bureau's delegated authority. Under the Commission's rules, once a case is designated for a hearing, it is the Presiding Judge, not the Media Bureau, that has authority over a pending hearing. Nor did anything in the *HDO* suggest that the Media Bureau had any continuing or future jurisdiction over the cases. The Media Bureau simply has no authority to divest an ALJ of jurisdiction over a pending hearing case. Moreover, the theory concocted by the Media Bureau that the *HDO*, "by its express terms," provided that the ALJ's jurisdiction "expired after" 60 days is inconsistent with precedent and wholly unsupported.

Equally important, the *Christmas Eve Order* must be overturned because, given the witness credibility issues that the Media Bureau itself appears to have acknowledged are central to these cases, due process and the *Second Report and Order* adopting the Commission's program carriage rules require a trial-type hearing. A trial-type hearing is also necessary to protect the integrity of the Commission's processes, particularly in light of the substantial efforts of the parties to develop a proper record as part of the hearing proceeding and the important First Amendment rights at stake here.

In light of the ALJ's experienced observation regarding the complexity of the cases, the Commission should return them promptly to the ALJ, who has the fact-finding and adjudication expertise necessary to decide them. Having the Media Bureau play the role of

fact-finder would, contrary to the public interest, divert the Media Bureau, and therefore the Commission, from the priority task of focusing on the digital television transition.\*/

Indeed, far from being a “requir[ed] action under the law,” the Media Bureau’s *Christmas Eve Order* is an unprecedented and unlawful rush to judgment. The Commission should promptly vacate the *Christmas Eve Order* and return these cases to the ALJ to continue the expedited hearing that is underway.

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\*/ See Letter from Congressman Henry A. Waxman and John D. Rockefeller to Chairman Kevin J. Martin (Dec. 12, 2008).

## EMERGENCY APPLICATION FOR REVIEW

Comcast Corporation ("Comcast"), by its attorneys, pursuant to section 5(c)(4) of the Communications Act of 1934, as amended (the "Communications Act"),<sup>1</sup> and on behalf of Bright House Networks, LLC, Cox Communications, Inc., and Time Warner Cable Inc., hereby requests that the Commission immediately review and vacate the Media Bureau's December 24, 2008 *Christmas Eve Order* that purports to seize jurisdiction from the Chief Administrative Law Judge ("ALJ") in the above-captioned hearing cases and promptly confirm that the Chief ALJ retains jurisdiction to continue the on-going hearing.<sup>2</sup> For the reasons discussed below, the Media Bureau's unprecedented ruling was *ultra vires* and legally incorrect. Moreover, due process, the Commission's program carriage procedures, and the integrity of the Commission's processes require a trial-type hearing, particularly in light of the sensitive First Amendment rights at issue here.<sup>3</sup>

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<sup>1</sup> 47 U.S.C. § 155(c)(4); *see also* 47 C.F.R. § 1.115. Because the Media Bureau's action under review here purportedly terminated Comcast's right to participate in the hearing proceeding, Comcast is entitled to file this application for review as a matter of right. *See* 47 C.F.R. § 76.10(a)(2)(i). In any event, to the extent necessary, given the strong public interest in promptly putting this proceeding back on a track of procedural regularity, there is good cause for entertaining this application for review now. *See* 47 C.F.R. § 1.3.

<sup>2</sup> *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable et al.*, DA 08-2805 (MB rel. Dec. 24, 2008) ("*Christmas Eve Order*"). Comcast notes that it is a party to only two of the above-captioned five cases covered by the *Christmas Eve Order*. For convenience of the Commission and other parties, Comcast is serving all the parties in the docket. We note that NFL Enterprises LLC ("NFL") filed a Motion for Clarification on December 29, 2008 requesting that the Media Bureau confirm that the *Christmas Eve Order* applies to it as well. Comcast will respond in due course.

<sup>3</sup> *See* 47 C.F.R. § 1.115(b)(2)(i),(ii),(v). Comcast is separately filing a motion to stay the *Christmas Eve Order*. Comcast is also joining a motion being filed with the ALJ requesting that the ALJ confirm that the hearing remains in effect notwithstanding the *Christmas Eve Order*.

## I. BACKGROUND

Under the Commission's program carriage rules, "[c]ases that require a relatively contained amount of discovery (limited to written interrogatories and document production) will be resolved at the staff level...."<sup>4</sup> If the staff determines that a complainant has made a *prima facie* case "and that disposition of the complaint will require the resolution of factual disputes or other extensive discovery," the staff "will refer the complaint to an ALJ for an administrative hearing" unless the parties agree to alternate dispute resolution ("ADR").<sup>5</sup> ALJs are "expected" to resolve such cases expeditiously, and the Presiding Judge's first order of business is to "hold an immediate status conference to establish timetables for discovery...."<sup>6</sup>

### A. The *Initial HDO*

On October 10, 2008, in its *Initial HDO*, the Media Bureau designated the above-captioned five program carriage cases (and one other case) for hearings before an ALJ.<sup>7</sup> After concluding that each of the complainants had stated a *prima facie* claim, the Media Bureau held that the claims "present several factual disputes, such that we are unable to determine on the basis of the existing records whether we can grant relief based on these claims."<sup>8</sup>

Accordingly, the *Initial HDO* designated each of the claims for hearing "at a date and place to be specified in a subsequent order by an Administrative Law Judge."<sup>9</sup> The *Initial HDO*

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<sup>4</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642, 2652 (1993) ("*Second Report and Order*").

<sup>5</sup> *Id.* at 2656.

<sup>6</sup> *Id.*

<sup>7</sup> *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, DA 08-2269 (MB rel. Oct. 10, 2008) ("*Initial HDO*"), modified by *Erratum* (MB rel. Oct. 15, 2008) ("*Supplemental HDO*"), published collectively at 23 FCC Rcd 14787 (MB 2008) ("*HDO*"). The program carriage rules are contained at 47 C.F.R. § 76.1301.

<sup>8</sup> *Initial HDO* ¶ 7.

<sup>9</sup> See, e.g., *id.* ¶¶ 134, 142.

further “ordered” that, “within 60 days,” the ALJ “will resolve all factual disputes and issue a recommended decision and remedy, if appropriate.”<sup>10</sup> The *Initial HDO* “direct[ed]” the ALJ to “return a recommended decision” to “the Commission,”<sup>11</sup> and indicated that “upon receipt of” the ALJ’s recommended decision “*the Commission*” would then “make the requisite legal determinations” and “decide upon appropriate remedies.”<sup>12</sup> Nowhere in the *Initial HDO* did the Bureau indicate that the ALJ’s jurisdiction to decide the case would expire after December 9, 2008 (the 60<sup>th</sup> day). Nor did the *Initial HDO* say anything about any continuing or future jurisdiction of the Media Bureau.

### **B. The Supplemental HDO**

The *Initial HDO* catalogued numerous areas of unresolved factual disputes, but it neglected to designate any specific issues for the ALJ to decide. Accordingly, on October 15, 2008, the Media Bureau issued the *Supplemental HDO*, which specified the issues for the ALJ to decide, leaving 55 days “on the clock.”<sup>13</sup> Specifically, the order designated issues relating to whether the cable operators discriminated on the basis of affiliation and the appropriate remedy for any such discrimination.<sup>14</sup> The *Supplemental HDO* also made the Enforcement Bureau a party to the proceeding. The *Supplemental HDO*, like the *Initial HDO*, said nothing about what

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<sup>10</sup> See, e.g., *id.* ¶¶ 136, 140, 144. See also *id.* ¶ 120. The *Initial HDO* also directed the parties to inform the Commission within 10 days whether they elected ADR. See, e.g., *id.* ¶¶ 135, 139, 143. All of the defendants elected ADR but none of the complainants did, so the hearing proceeded.

<sup>11</sup> *Id.* ¶ 120.

<sup>12</sup> *Id.* ¶ 121 (emphasis added).

<sup>13</sup> Despite the *Supplemental HDO*’s substantive modifications to the *Initial HDO*, the Media Bureau characterized the *Supplemental HDO* as an “erratum” that “correct[ed]” the *Initial HDO*. *Supplemental HDO* ¶ 1.

<sup>14</sup> In addition, for the NFL’s case against Comcast – the one case not subject to the *Christmas Eve Order* – the *Supplemental HDO* also designated a third issue relating to whether the cable operator unlawfully demanded a financial interest in the programming as a condition of carriage. *Supplemental HDO* ¶ 9.

would happen if the ALJ did not decide the cases within 60 days and said nothing about any continuing or future role in the case for the Media Bureau.

### C. The ALJs' Case Management

On October 21, 2008, the Chief Administrative Law Judge assigned all six cases to Judge Steinberg, the Commission's only other ALJ.<sup>15</sup> The next day, Judge Steinberg issued an initial hearing schedule that made clear that he could not decide the cases within the Media Bureau's arbitrary 60-day timeframe.<sup>16</sup> The schedule attempted to come close to meeting the Media Bureau's timeframe by eliminating discovery (even though the Commission explicitly has contemplated discovery in program carriage proceedings<sup>17</sup>) and by allowing only five hours of testimony (including both direct and cross-examination) in each case.<sup>18</sup> Even then, the Judge's schedule exceeded 60 days and it did not contemplate the time the Judge would need to write his decision.<sup>19</sup>

After considering scheduling more concretely at the October 27, 2008 initial prehearing conference, the Presiding Judge concluded that his schedule was "ludicrous" and that "it is not possible to do this within 60 days."<sup>20</sup> Accordingly, he suspended the procedural dates until after he ruled on pending motions requesting clarification or certification with respect to the

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<sup>15</sup> *Order*, FCC 08M-43 (ALJ rel. Oct. 22, 2008).

<sup>16</sup> *Order*, FCC 08M-44 (ALJ rel. Oct. 23, 2008).

<sup>17</sup> *See n. 6, supra* and accompanying text.

<sup>18</sup> FCC 08M-44 at 3; Hearing Tr. at 36.

<sup>19</sup> FCC 08M-44 at 3.

<sup>20</sup> Hearing Tr. at 36, 38.

designated issues and the ALJ's authority to devote more than 60 days to hearing the six cases.<sup>21</sup>

He reasoned that "it's more important to do things correctly than to do things quickly."<sup>22</sup>

The Presiding Judge then issued a decision on the pending motions finding that, based on his "more than 32-years of experience as a Trial Attorney and an Administrative Law Judge":<sup>23</sup>

The 60-day timeframe in the *HDO* cannot be achieved. . . . 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*.<sup>24</sup>

In keeping with the *HDO*, the ALJ assured the parties that "the proceeding will be expedited to the extent possible,"<sup>25</sup> but noted:

This is an extremely complex proceeding involving six separate program carriage complaints, three Complainants and four Defendants. Each of these six cases presents its own 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 Defendants. In addition, the credibility of several witnesses will be at issue due to their differing recollections, and expert witnesses' statements are involved. Moreover, in order to expedite the cross-examination of the witnesses and avoid surprise, some limited discovery should be undertaken.<sup>26</sup>

The Judge therefore concluded:

[T]he 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. To rule otherwise would raise the distinct possibility

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<sup>21</sup> *Id.* at 37.

<sup>22</sup> *Id.*

<sup>23</sup> *Memorandum Opinion and Order*, FCC 08M-47 at n.8 (ALJ rel. Nov. 20, 2008), *modified by Erratum*, (ALJ rel. Nov. 21, 2008) (collectively "*ALJ Due Process Order*").

<sup>24</sup> *Id.* ¶ 7.

<sup>25</sup> *Id.* at n.9.

<sup>26</sup> *Id.* ¶ 7.

of a remand for evidentiary hearings resulting, ultimately, in an unnecessary and undue delay in the final resolution of this complicated proceeding.<sup>27</sup>

The Presiding Judge carefully articulated the basis of his authority to exceed the Media Bureau's 60-day timeframe:

The Presiding Judge has ample authority to proceed in this manner. See Sections 1.243(f) of the Commission's Rules; *Broadcast Data Corp.*, 97 FCC 2d 650, 652 (Rev. Bd. 1984) (ALJ's power to regulate hearing is "plenary" and "invests [him] with great latitude"); *Industrial Business Corp.*, 47 FCC 2d 891, 894 (Rev. Bd. 1974) (ALJ "has plenary authority to regulate the course of the hearing") and cases cited at note 22 of Cox's Reply in Support of Motion to Clarify HDO, filed on November 3, 2008. See also Sections 1.205, 1.248(b)(2), and 1.253(b) of the Rules.<sup>28</sup>

Two business days after release of the Presiding Judge's *Due Process Order*, the Chief ALJ reassigned the cases to himself in light of Judge Steinberg's impending retirement, and scheduled another prehearing conference for the following day.<sup>29</sup> During the prehearing conference, in reaffirming the need for discovery, the Chief ALJ indicated that "credibility is going to be very important, and it seems the best way to start with that is to take a witness'[s]

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<sup>27</sup> *Id.* (citations omitted).

<sup>28</sup> *Id.* at n.10. Section 1.243(f) of the Rules gives the ALJ authority to "[r]egulate the course of the hearing" until such time as he issues his decision or the hearing is transferred to the Commission or another ALJ. Section 1.205 gives the ALJ authority to grant continuances and extensions of time "unless the time for performance or filing is limited by statute." Section 1.248(b)(2) provides that, "[e]xcept as circumstances otherwise require, the presiding officer shall allow a reasonable period prior to commencement of the hearing for the orderly completion of all prehearing procedures, including discovery...." Section 1.253 provides the ALJ with authority to specify the days for hearing sessions. Footnote 22 to the referenced Cox's Reply cited four additional decisions regarding the ALJ's broad authority to regulate a hearing – *Amendment of Part 1, Rules of Practice and Procedure to Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings*, 52 RR 2d 913, 920 (1982); *Selma Television, Inc.*, 3 FCC 2d 63 (1966); *WMOZ, Inc.*, 5 RR 2d 732 (1965); *Lompoc Valley Cable TV, Inc.*, 3 RR 2d 523 (1964).

<sup>29</sup> *Order*, FCC 08M-48 (ALJ rel. Nov. 24, 2008).

deposition.”<sup>30</sup> Shortly thereafter (on December 1, 2008), the Chief ALJ set a revised schedule for discovery and the hearing, with discovery to close February 20, 2009, pre-trial briefs due four business days thereafter, hearing exhibits due one day after that, and the hearing to begin March 17, 2009.<sup>31</sup>

**D. The Enforcement Bureau’s Agreement with the ALJs**

The Enforcement Bureau has expressed its agreement with the ALJs on two central issues: (1) that discovery is necessary to due process, and (2) that the schedule set by the Presiding Judge is consistent with Commission precedent and the Media Bureau’s *HDO*. As to the first point, the Enforcement Bureau stated – on the record at a prehearing conference attended by the Chief of the Enforcement Bureau – 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.”<sup>32</sup> As to the second point, the Bureau stated – on the record at the same conference – that the hearing schedule established by the Presiding Judge is “consistent with what the Commission and the Media Bureau wanted.”<sup>33</sup>

The other parties similarly acted on the assumption that the 60-day time frame was an aspirational directive for expedition rather than a jurisdictional deadline. In their motions requesting the Media Bureau to “revo[ke]” or “reconsider” the *HDO*, neither WealthTV nor

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<sup>30</sup> Hearing Tr. 85.

<sup>31</sup> *Order*, FCC 08M-50 (ALJ rel. Dec. 2, 2008).

<sup>32</sup> Hearing Tr. at 115 (Mr. Schonman); *see also id.* at 139-40 (Mr. Schonman and Ms. Monteith) (arguing for a hearing date to commence in early March, and urging the ALJ to set the earlier hearing date then contemplated “in the interest of the Commission, the Media Bureau, [and] the Enforcement Bureau.”)

<sup>33</sup> *Id.* at 116 (Mr. Schonman).

MASN suggested that the ALJ's authority would expire after December 9.<sup>34</sup> Indeed, they and the other parties continued after December 9 to proceed actively with discovery under the most recent schedule. Consistent with that schedule, for example, on December 12, Comcast and MASN exchanged summaries of expert witness testimony and WealthTV provided defendants with identification of expert witnesses and summaries of expert testimony. On December 15, Comcast and MASN exchanged objections and responses to requests for production of documents and Comcast and other defendants provided objections to WealthTV's requests for the production of documents. On December 16, WealthTV provided Comcast and other defendants with objections and responses to requests for production of documents. On December 22, Comcast and other WealthTV defendants provided WealthTV with identification of expert witnesses and summaries of expert testimony. As agreed between the parties, expert reports are due to be exchanged in January and much data has been compiled relevant to the designated issues. The ALJs have also continued actively to manage the proceeding after December 9.<sup>35</sup>

**E. The Media Bureau's *Christmas Eve Order***

The Media Bureau's *Christmas Eve Order* declared for the first time that the 60-day time deadline set forth in the *HDO* was jurisdictional and that "by the express terms of the *HDO*, the

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<sup>34</sup> See WealthTV's Motion for Revocation of Hearing Designation Order at 1, 3, 5 (Nov. 24, 2008); MASN's Motion for Reconsideration of Hearing Designation Order at 1, 7 (Nov. 26, 2008). WealthTV argued in a Supplement filed December 3, 2008 (at 4) that the 60-day period in the *HDO* "cannot properly be set aside or disregarded by the presiding judge." MASN argued in its Motion (at 4) that the ALJ "exceed[ed]" his delegated authority. Comcast and the other defendants filed oppositions, arguing that the motions were untimely, that the Media Bureau did not have authority to act on them and that, in any event, the ALJ acted lawfully. See, e.g., Comcast Opposition to Motion for Reconsideration of Hearing Designation Order (Dec. 8, 2008).

<sup>35</sup> See *Order*, FCC 08M-52 (ALJ rel. Dec. 10, 2008); *Revised Procedural and Hearing Order*, FCC 08M-53 (ALJ rel. Dec. 15, 2008); *Order*, FCC 08M-56 (ALJ rel. Dec. 24, 2008).

ALJ's authority to issue a recommended decision in these proceedings expired after December 9, 2008."<sup>36</sup> On the basis of this theory, it ordered that the ALJ hearing proceedings in "the above captioned" five cases "**ARE TERMINATED.**"<sup>37</sup> It also ordered that "the Media Bureau will proceed to resolve" the five cases.<sup>38</sup> The Media Bureau also suggested that, instead of continuing with the focused discovery already underway, it might initiate a new and separate discovery process to assist its decision-making process.<sup>39</sup> While the Media Bureau claimed that it was "not reviewing any decision of the ALJ" or ruling on the pending motions,<sup>40</sup> it terminated the hearing and reclaimed jurisdiction only in the cases (WealthTV and MASN) where complainants had complained to the Media Bureau about ALJ decisions and not in the case (NFL) where complainant had not done so.

Significantly, the *Christmas Eve Order* provided no explanation of how factual issues that previously required a hearing before an ALJ – as the Media Bureau concluded in the *HDO* – no longer required such a hearing.

## II. THE CHRISTMAS EVE ORDER IS UNLAWFUL

An FCC bureau has no power to terminate an administrative hearing based on a disagreement with the ALJ over how long the hearing should take in order to afford the parties due process. Further, it is affirmatively forbidden for a Bureau to terminate a hearing

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<sup>36</sup> *Christmas Eve Order*, DA 08-2805 ¶ 16. See also *id.* ¶ 19 (The 60 days "having passed, the ALJ has no further authority over these matters and revocation and reconsideration are unnecessary. Thus, the petitions to revoke or reconsider the HDO are moot."). The Media Bureau was inconsistent on the issue of whether 60 days from October 10 was December 9 or December 10. Compare *id.* ¶ 1 (December 9) with *id.* ¶ 19 (December 10).

<sup>37</sup> *Id.* ¶ 20 (boldface in original).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at n.57.

<sup>40</sup> *Id.* at n.60, ¶ 19.

retrospectively because of the danger – evident here – that termination will interfere with the ALJ's decisional independence. Moreover, nothing in the *HDO* divested the ALJ of jurisdiction.

**A. The Media Bureau Lacks Authority to Terminate the Hearing Proceeding**

There is no legal basis for the Media Bureau to take the extraordinary step of terminating an ALJ proceeding, so the *Christmas Eve Order* is *ultra vires*. Moreover, given the lack of citation to any examples where the Commission (or its staff) has ever treated such a timeframe as jurisdictional or seized a case back from an ALJ for not deciding a case within a timeframe, the Media Bureau's action presents "novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines," and is thus outside its delegated authority.<sup>41</sup>

There is nothing in the Commission's rules or the *Second Report and Order* that permits the Media Bureau to terminate a hearing proceeding and take the case away from the ALJ.<sup>42</sup> Once the Media Bureau designated these cases for hearing and the 30-day time period for reconsideration of that action lapsed,<sup>43</sup> the Media Bureau was divested of any independent authority over this matter.

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<sup>41</sup> 47 C.F.R. § 0.283(c).

<sup>42</sup> None of the cases cited by the Media Bureau remotely suggest that it has the authority to terminate an ongoing proceeding before an ALJ. In *Tequesta*, the Commission affirmed an ALJ's final decision to consider *de novo* an issue that was unresolved in a hearing designation order. See *Tequesta Television, Inc.*, 2 FCC Rcd 41, 42 (1987). In *Anax* and *Yemm*, the Commission reversed final ALJ decisions that found facts expressly contrary to facts found by the referring bureaus in the hearing designation orders. See *Anax Broadcasting, Inc.*, 87 FCC2d 483 (1981) (citing *Frank H. Yemm*, 39 RR 2d 1657, 1659 (1977)). *Algreg* merely involves a Review Board affirmance of an ALJ's decision to permit a third party to participate in a hearing proceeding in accordance with the requirements of a hearing designation order. *Algreg Cellular Engineering*, 9 FCC Rcd 5098 ¶ 75 (Rev. Bd. 1994). None of these cases even suggest, let alone establish, that a referring bureau may interfere in an ongoing hearing proceeding properly before an ALJ.

<sup>43</sup> 47 C.F.R. §§ 1.106, 1.108; see also 47 U.S.C. § 405.

The Commission's rules provide the Presiding Judge with plenary authority to continue the hearing and issue a decision in the case, with limited exceptions of no relevance here. Under section 1.243 of the Commission's Rules, "[f]rom the time he is designated to preside *until issuance of his decision or the transfer of the proceeding to the Commission or to another presiding officer*," the Presiding Judge has authority, among other things, to "[r]egulate the course of the hearing" and "[t]ake actions and make decisions in conformity with the Administrative Procedure Act..."<sup>44</sup> Section 0.341 of the Commission's rules – laying out the ALJ's delegated authority – is to the same effect.<sup>45</sup> The hearing proceedings here have not been transferred to the Commission or another ALJ for decision. Thus, under the Commission's rules, the ALJ continues to have jurisdiction to proceed and the Media Bureau may not "terminate" the hearing any more than it could strike witnesses, disallow evidence, extend or contract hearing dates, or otherwise take over the cases.

Section 1.267(a) of the Commission's Rules bolsters this point. Under this rule, the Presiding Judge, with certain exceptions not applicable here, is *required* to issue ("shall prepare") an initial or recommended decision in a case designated for hearing.<sup>46</sup> Other than under the specified exceptions, the "authority of the Presiding Officer over the proceedings shall cease when he has filed his Initial or Recommended Decision, or if it is a case in which he is to file no decision, when he has certified the case for decision."<sup>47</sup> Under section 1.205 of the Rules, the ALJ also has authority to grant continuances and extensions of time except as "limited by

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<sup>44</sup> 47 C.F.R. § 1.243 (emphasis added).

<sup>45</sup> *Id.* § 0.341(a)-(c).

<sup>46</sup> *Id.* § 1.267(a) (citing *id.* §§ 1.94, 1.251, 1.274, 1.302, and 47 U.S.C. §§ 201-205).

<sup>47</sup> 47 C.F.R. § 1.267(c).

statute.”<sup>48</sup> The Media Bureau cannot simply ignore these rules because it would now rather decide the case itself than let the hearing run its course.<sup>49</sup>

It should also be emphasized that, contrary to the suggestion in the *Christmas Eve Order*, the ALJs were not somehow acting pursuant to “delegated authority” from the Media Bureau.<sup>50</sup> Rather, as the Commission has explicitly recognized, the ALJs’ “control” over a 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.”<sup>51</sup>

Finally, the Media Bureau claims not to have reviewed the ALJ’s decisions.<sup>52</sup> But the reality is very different. The *Christmas Eve Order* does not just claim that the ALJ’s authority has expired, but it critiques his rulings on the merits.<sup>53</sup> This violates section 5(c) of the Communications Act and related implementing rules precluding Media Bureau review of such orders and providing for review by the Commission.<sup>54</sup>

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<sup>48</sup> *Id.* § 1.205.

<sup>49</sup> See *Achernar Broad Co. v FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) (“agencies are bound to adhere to their own rules and procedures.”)

<sup>50</sup> See *Christmas Eve Order* ¶ 14.

<sup>51</sup> 47 C.F.R. § 0.201(a)(2) Note.

<sup>52</sup> See *Christmas Eve Order* at n.60.

<sup>53</sup> *Id.* ¶ 16 (“Unfortunately, rather than set an expedited hearing schedule consistent with the HDO deadline, the ALJ greatly expanded the designated issues for hearing, then determined that the 60-day deadline for a recommended decision could not be achieved.”); *id.* ¶ 17 (“[T]he ALJ had no authority to expand the designated issues for hearing ... or extend the deadline for issuing a recommended decision.”).

<sup>54</sup> 47 U.S.C. § 155(c)(1),(8); 47 C.F.R. §§ 1.271, 1.276, 1.277, 1.301, 1.302.

**B. Not Only Does the Media Bureau Lack Authority To Revoke the ALJ's Jurisdiction, but also the *HDO* Did Not Eliminate the ALJ's Jurisdiction After 60 Days**

**1. The Media Bureau's new interpretation of the *HDO* is inconsistent with its own actions and Commission precedent**

Under the Administrative Procedure Act ("APA"), an administrative agency may not "unduly interfere with a judge's independence to control the course of the proceeding."<sup>55</sup> As the Supreme Court has recognized, the APA hearing process is "currently structured 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."<sup>56</sup> As a result, even if the Media Bureau might theoretically have the power to limit the jurisdiction of an ALJ in some circumstances, it was forbidden from doing so – as here – in a manner that interfered with the ALJ's independence.

The timing and nature of the Media Bureau's actions here – and their inconsistency with the Bureau's own actions and Commission precedent – highlight the Bureau's improper interference with the ALJ's authority. It has been evident since shortly after the *HDO*, when the Presiding Judge issued his first scheduling order, that he would not issue a recommended decision by December 9, 2008. That fact was discussed further at the October 27, 2008 prehearing conference. The Media Bureau, however, remained silent despite several opportunities to state the view, if it had one, that the judge would lose jurisdiction on December 9. For instance, the Media Bureau could have immediately reconsidered the *HDO* on its own

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<sup>55</sup> *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 n.26 (1990) ("*Hearing Expedition Order*") (citing *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

<sup>56</sup> *Butz v. Economou*, 438 U.S. at 513.

motion.<sup>57</sup> Similarly, beginning November 26, 2008, the Media Bureau received a series of pleadings addressing the fact that the 60-day deadline would not be met, but again it remained silent. Even after the deadline passed on December 9, 2008, the Media Bureau took more than two weeks to announce the view that the ALJ's jurisdiction already had terminated (after the parties already had exchanged discovery requests and responses and were expeditiously preparing their respective document productions and expert reports). The timing of the Media Bureau's actions alone suggests that the Media Bureau's interpretation of the *HDO* is a *post hoc* effort to undo those ALJ decisions it does not like and restore its own control over these cases.

The Media Bureau's action here also cannot be squared with its treatment of the arbitrator's decision in the recent *MASN/Time Warner* case. There, the Commission's *Adelphia Order* directed an arbitrator to issue a decision in certain program carriage complaints within 45 days.<sup>58</sup> The arbitrator significantly exceeded that deadline. Nevertheless, the Media Bureau did not consider the arbitrator's jurisdiction to have terminated, but treated the arbitrator's decision as valid and reviewed it on the merits. The Media Bureau did not treat the decision as outside of the authority delegated to the arbitrator.<sup>59</sup>

The Media Bureau's *post hoc* interpretation of the *HDO* is also inconsistent with contemporaneous interpretations of another similar deadline by other Commission staff. For instance, the Wireline Competition Bureau regularly acts on requests for review of decisions of

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<sup>57</sup> 47 C.F.R. § 1.108.

<sup>58</sup> *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Commc'ns Corporation, Assignors to Time Warner Cable Inc. et al.*, 21 FCC Rcd 8203, 8288 (2006) ("*Adelphia Order*").

<sup>59</sup> *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*, DA 08-2441, ¶¶ 3-4 and *passim* (MB rel. Oct. 30, 2008) ("*MASN/Time Warner*"). Whether the Bureau acted correctly in reviewing the arbitrator's decision itself, rather than allowing the Commission to conduct that review, is a separate question that is pending before the Commission.

the Universal Service Administrator that are months or years beyond the deadline set by the Commission for such action, and did so as recently as two months ago.<sup>60</sup> Nowhere is it suggested that the Wireline Competition Bureau's decisions are *ultra vires* because the Bureau exceeded the relevant deadline.

The history of the Commission's approach to time limits on ALJs further supports a conclusion that the *HDO*'s deadline should be read as providing guidance, not limiting jurisdiction. In taking action to expedite the then-existing ALJ comparative hearing process, the Commission did not adopt jurisdictional time deadlines on ALJ decisions. Rather, it adopted a "time guideline," specifically, a "goal" for ALJs to resolve "routine" cases within nine months of designation for hearing, including 90 days from the last pleading for the ALJs to "make every effort to prepare and release" a decision.<sup>61</sup> In adopting such time guidelines, the Commission was conscious of its obligation under the APA not to "unduly circumscribe[] an ALJ's independence...."<sup>62</sup>

The Media Bureau's reading of the *HDO* as imposing a 60-day *jurisdictional deadline*, however, *does* interfere with the ALJ's independence. In a ruling reflecting his independence,

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<sup>60</sup> See, e.g., *Requests for Review of Decisions of the Universal Service Administrator*, 23 FCC Rcd 15406 (WCB 2008) (deciding 21 cases, dating as far back as 2005, notwithstanding 47 C.F.R. § 54.724, which requires staff action within 90 days unless extended).

<sup>61</sup> *Hearing Expedition Order*, 6 FCC Rcd at 162-63. The Commission recognized that more complicated, non-routine cases would take longer. *Id.* The Commission has similarly imposed non-binding time guidelines rather than jurisdictional limitations on ALJs in other contexts. See, e.g., *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, 22555 (1997) ("The hearing designation order may set a recommended deadline for the ALJ..."); *MobileMedia Corp.*, 12 FCC Rcd 14896, 14902 (1997) (in order to "expedit[e] the hearing proceeding to the fullest possible extent," the Commission directed the ALJ to "endeavor to issue his recommended decision within six months...").

<sup>62</sup> *Hearing Expedition Order*, 6 FCC Rcd 157 at 163 n.26 (concluding that nine-month time guideline was consistent with independence of ALJ required by APA).

the ALJ made a considered, reasoned determination, aided by full briefing, that, notwithstanding the 60-day timeframe set forth in the *HDO*, due process required more than 60 days to conduct six hearings. The Media Bureau seeks to terminate the hearing because it disagrees with the ALJ's conclusion. Affirming the Media Bureau would undermine the ALJ's independent decision-making authority and send a strong signal to ALJs generally that Commission staff designating cases for hearing may scrutinize their management of hearings and may interfere with the ALJ's handling of the proceeding, even to the point of attempting to reclaim jurisdiction whenever the Media Bureau decides it does not like the course of events. Indeed, under the Media Bureau's theory, it could have waited until the ALJ issued a recommended decision and only then decided whether to declare it unlawful under the *HDO* (if it did not like the outcome) or let Commission review proceed (if it did like the outcome).<sup>63</sup> More generally, the Media Bureau's novel interpretation of its authority is not only at odds with years of accepted practice but, if credited here, would unnecessarily raise (or allow others to raise) questions about the vitality of long-settled matters.

The Media Bureau's actions here, if left unchecked, plainly would erode the independence of ALJs, which is guaranteed by the APA.<sup>64</sup> The Commission cannot lawfully allow the Media Bureau to interfere with the ALJ in this way.

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<sup>63</sup> Under the Media Bureau's interpretation, it could also use timeframes in hearing designation orders to give its cases priority over hearing cases designated by other bureaus or even the Commission, something it lacks authority to do.

<sup>64</sup> *Cf. Aacon Auto Transport, Inc., v. ICC*, 792 F.2d 1156, 1163 (D.C. Cir. 1986) ("The Commission cannot, of course, change ALJs if the intent or effect of its action is to interfere with the independence of the ALJ or otherwise to deprive a party of a fair hearing.").

**2. The language of the *HDO* is legally insufficient to divest the ALJ of jurisdiction over this matter**

A useful and relevant analogy to construing the deadline set by the *HDO* can be found in the way congressional deadlines are interpreted. “It is well settled ... that where Congress has placed an agency under a legal obligation to render a decision within a stated time period but has not set forth the consequences of exceeding that period, ordinarily the time period is directory rather than mandatory, and an agency will not lose jurisdiction over the matter upon expiration of that period.”<sup>65</sup> The relevant question in deciding whether missing a deadline divests the agency of jurisdiction is whether “Congress intended the agency to lose its power to act.”<sup>66</sup>

The Commission has itself embraced this precedent, noting that the D.C. Circuit has “repeatedly concluded that missing a statutory deadline does not divest an agency of authority over a case or issue.”<sup>67</sup> The Commission has indicated that “where Congress does not specify otherwise, agencies do not lose their power to act after the statutory deadline.... We note that where Congress intends the failure to meet a deadline to have a regulatory consequence, it is quite able to indicate its intent.”<sup>68</sup> The same principle applies to the Commission itself (or its staff) – even assuming the Media Bureau has authority to revoke an ALJ’s jurisdiction, if it intended the 60-day deadline to have been jurisdictional, it would have said so in the *HDO*.

Applying that precedent to the closely analogous context of an administrative deadline, it is readily apparent that the 60-day deadline in the *HDO* was discretionary rather than

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<sup>65</sup> *Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994) (citation omitted).

<sup>66</sup> *Id.* (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)).

<sup>67</sup> *1993 Annual Access Tariff Filings*, 19 FCC Rcd 14949, 14960 (2004) (citation omitted).

<sup>68</sup> *2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4739 n.70 (2002).

mandatory.<sup>69</sup> In determining whether a deadline divests the agency of jurisdiction, courts look first to the language of the deadline to determine whether Congress “specif[ied] ... any consequences for missing the ... deadline.”<sup>70</sup> In this regard, “use of the word ‘shall’” is “insufficient” to “divest ... jurisdiction at the expiration of the time limit.”<sup>71</sup> There is *nothing* in the ordering clauses of the *HDO* indicating that the ALJ will lose jurisdiction if he fails to decide the cases within that period; indeed, there is no discussion of any consequences at all. Nor is there any reference to continuing or future jurisdiction of the Media Bureau. As just noted with respect to use of the word “shall,” the fact that the *HDO* states that the ALJ “will” issue a decision within the 60-day deadline is insufficient to make the deadline jurisdictional.<sup>72</sup>

If the Media Bureau had wanted the ALJ’s jurisdiction to “terminate” or “cease to be effective” after December 9, it would have said so, as the Commission has done in other contexts.<sup>73</sup> This conclusion is consistent with the fact that the congressional directive cited by the Media Bureau for imposing the 60-day deadline – that the Commission provide for

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<sup>69</sup> Similarly, the 45-day deadline set forth in *TCR Sports Broadcasting Holding, LLP v. Comcast Corp.*, 21 FCC Rcd 8989 (2006), is best read as an aspirational goal rather than jurisdictional limitation. Moreover, that case never went to hearing, so it was never determined whether the 45-day deadline was reasonable.

<sup>70</sup> *Gottlieb v. Pena*, 41 F.3d at 733.

<sup>71</sup> *Id.* (quoting *Brock v. Pierce County*, 476 U.S. at 262).

<sup>72</sup> In the absence of express language, courts have looked to legislative history to see if there is “persuasive extrinsic evidence that Congress intended” the deadline to “divest” the agency of authority to act. *Id.* at 735 (citations omitted). Here, there is nothing at all – let alone “persuasive extrinsic evidence” – that suggests in any way that the ALJ’s jurisdiction would be revoked or terminate after 60 days.

<sup>73</sup> See, e.g., *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 18455, 18468-69 (1996) (text of Commission order says that rule “will terminate five years” after a specified date); *id.* at Appendix C (accompanying rule says that the rule “shall cease to be effective five years” after the specified date).

“expedited review” of program carriage complaints – itself does not specify any consequences for non-compliance and is thus not jurisdictional.<sup>74</sup>

### III. A TRIAL-TYPE HEARING IS REQUIRED

#### A. Due Process Requires a Trial-Type Hearing

The *HDO* is replete with conflicting testimony that will require resolution through live testimony and credibility determinations.<sup>75</sup> The Supreme Court has held that, as a matter of constitutional due process, when “issues of witness credibility and veracity” are “critical to the decisionmaking process ... ‘written submissions are a wholly unsatisfactory basis for decision.’”<sup>76</sup> This is precisely the case here. Judge Steinberg concluded that “the credibility of several witnesses will be at issue due to their differing recollections....”<sup>77</sup> Similarly, Judge Sippel stated that “credibility is going to be very important....”<sup>78</sup>

For the Media Bureau to proceed to decide the case now without a trial-type hearing to evaluate these credibility (and related demeanor) issues would thus violate due process. The fact that the Media Bureau has authority under the *Second Report and Order* to order discovery does not support a contrary conclusion. The Media Bureau is not authorized and does not have the tools to decide credibility based on witness demeanor during live testimony.

Continuing the hearing is also essential for fair and full decision-making given the significant time and effort the parties have expended in pursuing relevant evidence in discovery

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<sup>74</sup> See 47 U.S.C. § 536(a)(4). Compare with *id.* § 160(c) (petitions for forbearance are “deemed granted” if not acted on within a specified time period). Ironically, notwithstanding the “expedited review” provision of the statute, the Media Bureau took up to nearly 10 months just to determine that complainants presented a *prima facie* case.

<sup>75</sup> See, e.g., *HDO* ¶¶ 49-50, 62, 64-67, 94-96.

<sup>76</sup> *Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)).

<sup>77</sup> *ALJ Due Process Order* ¶ 7.

<sup>78</sup> Hearing Tr. at 85.

and in preparing for hearing. A decision will be made on a much more robust record if the hearing proceeds as opposed to returning to the initial record before the Media Bureau (even if limited discovery is ordered).<sup>79</sup> Material such as new expert reports, document production and live witness testimony cannot simply be ignored in favor of a truncated fact-finding exercise apparently designed to achieve a pre-determined result by a date certain. A full and fair hearing here is particularly important given the sensitive First Amendment issues in program carriage proceedings, in which the Commission professes authority to substitute its judgment for the constitutionally protected editorial judgment of a cable operator.

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<sup>79</sup> For instance, on November 10, 2008, WealthTV submitted a Second Designation of Exhibits, listing hundreds of pages of new documentary evidence it intended to present as part of its direct case and emphasizing that WealthTV will further “supplement this Second Designation prior to the procedural deadline for exchanging direct case exhibits and lists of witnesses once such a deadline is re-established.” Herring Broadcasting, Inc., d/b/a WealthTV’s Second Designation of Exhibits at 2 (filed Nov. 10, 2008). Three days later, WealthTV submitted a Second Designation of Witnesses identifying a new expert witness, Gary Turner, to address “the importance of a networks’ achieving certain household coverage thresholds in order to attain long term viability and how defendants’ unlawful refusal of carriage damaged WealthTV.” Herring Broadcasting, Inc., d/b/a WealthTV’s Second Designation of Witnesses at 2 (filed Nov. 13, 2008); *see also* Herring Broadcasting, Inc., d/b/a WealthTV’s Designation of Expert Witnesses (provided to defendants Dec. 12, 2008). The WealthTV defendants have identified three new expert witnesses – Larry Gerbrandt, Howard Homonoff, and Dr. Janusz Ordover – who will address a variety of issues including: the significant dissimilarities between WealthTV and MOJO, such as the differences in programming mix between the networks, the two networks’ targeted demographics, and their distinct look and feel; the value of so-called “hunting licenses” to new and unproven networks; and the fact that the defendants’ conduct did not unreasonably restrain WealthTV’s ability to compete fairly. *See* Time Warner Cable Inc., Identification of Testifying Expert (provided to WealthTV Dec. 22, 2008); Bright House Networks, LLC’s Designation of Experts (provided to WealthTV Dec. 22, 2008); Comcast Corporation, Preliminary Identification of Expert Witnesses and Summary of Testimony (provided to WealthTV Dec. 22, 2008). Comcast has identified new expert witnesses to testify on the issue of whether Comcast’s decision not to carry MASN in Harrisburg, PA, Tri-Cities, VA, and Roanoke/ Lynchburg, VA was based on reasonable business justifications or reflected an intent to protect Comcast’s financial interests there. *See* TCR Sports Broadcasting Holding, L.L.P.’s Expected Expert Opinion Summary (exchanged with Comcast Dec. 12, 2008); Comcast Corporation’s Preliminary Summary of Expected Expert Witness Testimony (exchanged with MASN Dec. 12, 2008).

**B. The *Second Report and Order* Requires a Trial-Type Hearing**

While section 76.7(g) provides the Media Bureau with “discretion” to designate a program carriage complaint for hearing,<sup>80</sup> such discretion is necessarily cabined by the Commission’s instructions in the *Second Report and Order*. The Commission could not have been clearer that designation for hearing is required in cases, like these, where there are factual disputes to be resolved:

If the staff determines that the complainant has established a prima facie case, and that disposition of the complaint will require the resolution of factual disputes or other extensive discovery . . . the staff will refer the complaint to an ALJ for an administrative hearing.<sup>81</sup>

Here, the Media Bureau expressly determined that the cases entailed factual disputes that had to be resolved by a hearing before an ALJ. Nothing has changed that would eliminate the need for a hearing and the Bureau’s decision to proceed without a hearing is doubly suspect given that the Bureau already decided once that a hearing was required.

**C. The Integrity of the Commission’s Processes Requires a Trial-Type Hearing**

The Supreme Court has recognized that “justice, indeed, must satisfy the appearance of justice.”<sup>82</sup> Further, the appearance of injustice can be remedied by “providing for a neutral adjudicator to ‘conduct a *de novo* review of all factual and legal issues.’”<sup>83</sup> This lesson by the Supreme Court has particular application here.

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<sup>80</sup> 47 C.F.R. § 76.7(g).

<sup>81</sup> *Second Report and Order*, 9 FCC Rcd at 2656.

<sup>82</sup> *Concrete Pipe & Prods. v. Const. Laborers Pension Trust*, 508 U.S. 602, 619 (1993) (citation omitted).

<sup>83</sup> *Id.* (citations omitted).

By designating these cases for hearing, the Media Bureau necessarily concluded that it was “unable to resolve” the complaints “on the sole basis of a written record...”<sup>84</sup> It is illogical for the Media Bureau to decide now that it is able to do so after all, based solely on the fact did not like the schedule by which the ALJ is conducting the hearing. (This is particularly the case after the Media Bureau itself took far more than 60 days after nearly all the cases were fully briefed to issue its *prima facie* findings in the *HDO*). Such an “abrupt shift[] in policy constitute[s] [a] danger signal[].”<sup>85</sup>

The various mischaracterizations and erroneous conclusions made by the Media Bureau in the *Christmas Eve Order* heighten concerns about the effect of further Media Bureau involvement on the integrity of the Commission’s processes.

- The *Christmas Eve Order* states that the *HDO* “by [its] express terms” indicates that “the ALJ’s authority to issue a recommended decision in these proceedings expired” 60 days after the *HDO*.<sup>86</sup> To the contrary, as noted, the *HDO* was silent on the issue of what impact a failure to comply with the 60-day deadline would have on the ALJ’s authority.
- The *Christmas Eve Order* states that the *HDO* defined “the issues designated for hearing” as limited to “whether the cable operators discriminated against the complainant programmers in favor of their affiliated programming service.”<sup>87</sup> The *Christmas Eve Order* neglects to mention, however, that question of discrimination is the ultimate statutory question and involves numerous individual factual questions. Further, the *HDO* designated a second issue for each of the above-captioned cases relating to the appropriate remedy for any violation.
- The *Christmas Eve Order* states that the ALJ improperly “disregard[ed] the facts and conclusions recited in the *HDO*,” and improperly provided for “*de novo* consideration” in the hearing.<sup>88</sup> To the contrary, the ALJ simply followed the dictates of the APA that it is

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<sup>84</sup> *Second Report and Order*, 9 FCC Rcd at 2652.

<sup>85</sup> *Office of Commc’ns of the United Church of Christ v FCC*, 707 F. 2d 1413, 1425 (D.C. Cir. 1983).

<sup>86</sup> *Christmas Eve Order* ¶ 16.

<sup>87</sup> *Id.* ¶ 17.

<sup>88</sup> *Id.* We note that, in any event, the ALJ has authority to “enlarge, change or delete the issues.” 47 C.F.R. § 1.229(a).

up to the complainants to prove their cases and that a decision must be reached based on the whole record.<sup>89</sup>

- The *Christmas Eve Order* suggests that the *HDO's* 60-day deadline provided “adequate time” for the parties to present their cases so that the ALJ could issue his decision within 60 days.<sup>90</sup> This notion is farcical to anyone with even a passing understanding of the hearing process and the history of FCC hearings. As Judge Steinberg noted, the idea of conducting six hearings in 60 days is “ludicrous.”<sup>91</sup> In this regard, in the last 15 years, the fastest decision in a hearing case has been issued seven months after designation.<sup>92</sup>
- The *Christmas Eve Order* states that the ALJ “greatly expanded the designated issues for hearing...”<sup>93</sup> In fact, the ALJ simply modified the language of the designated issues to be more neutral and consistent with the underlying rule: “[A]s correctly noted by the [Enforcement] Bureau, the text of the issues designated for hearing does not accurately reflect the language of the rule, and emphasizes one remedy over another.”<sup>94</sup>

The Media Bureau’s *Christmas Eve Order* – if not promptly vacated – “may damage[] the credibility of the Commission, ... undermine[] the integrity of the staff,” and give the impression that the case has not been handled transparently and fairly.<sup>95</sup> In contrast, “[t]he independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process ... by ensuring impartial decisionmaking.”<sup>96</sup>

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<sup>89</sup> 5 U.S.C. §§556(c)(4), 556(d). See also *Ass’n of Administrative Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (citations omitted) (emphasis added) (“the ALJ must scrupulously and conscientiously probe into, inquire of, and explore for *all* the relevant facts.... The ALJ must develop *all* of the evidence....”).

<sup>90</sup> *Christmas Eve Order* ¶ 17. See also *id.* (the 60-day deadline “provided sufficient time to address these matters....”).

<sup>91</sup> Hearing Tr. at 36.

<sup>92</sup> See Comcast Request for Certification to the Commission at 9, Attachment A (CSR-08-214; Oct. 20, 2008).

<sup>93</sup> *Christmas Eve Order* ¶ 16.

<sup>94</sup> *ALJ Due Process Order* ¶ 8.

<sup>95</sup> “Deception and Distrust: The Federal Communications Commission Under Kevin J. Martin,” A Majority Staff Report Prepared for the Use of the Committee on Energy and Commerce, U.S. House of Representatives 2 (December 2008).

<sup>96</sup> *Nash v. Califano*, 613 F.2d 10, 16 (2d Cir. 1980).

**IV. CONCLUSION**

The Media Bureau's *Christmas Eve Order* is unprecedented and unlawful. The Commission should promptly vacate the *Christmas Eve Order* and return these cases to the ALJ to continue the expedited hearing that is underway.

Respectfully submitted,

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Date: December 30, 2008

**CERTIFICATE OF SERVICE**

I, Marc D. Knox, hereby certify that, on December 30, 2008, copies of the attached Emergency Application for Review were served by United States Mail, first class postage prepaid, and email to the following:

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