

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

|                                    |   |                      |
|------------------------------------|---|----------------------|
| In the Matter of                   | ) | MB Docket No. 08-214 |
|                                    | ) |                      |
|                                    | ) |                      |
| NFL Enterprises LLC,               | ) | File No. CSR-7876-P  |
| Complainant                        | ) |                      |
| v.                                 | ) |                      |
| Comcast Cable Communications, LLC, | ) |                      |
| Defendant                          | ) |                      |

To: Marlene H. Dortch, Secretary  
Federal Communications Commission

Attn: Chief Administrative Law Judge Richard L. Sippel

**NFL ENTERPRISES LLC’S RESPONSE  
TO COMCAST’S SUPPLEMENT TO MOTION  
FOR REAFFIRMATION OF SCHEDULING ORDER OR,  
IN THE ALTERNATIVE, FOR CERTIFICATION  
OF AN APPLICATION FOR REVIEW**

**BACKGROUND**

This proceeding is one of six proceedings consolidated in Media Bureau Docket No. 08-214.

On December 24, 2008, in response to motions filed by the complainants in the other five consolidated proceedings, the Media Bureau released a Memorandum Opinion and Order, DA 08-2805 (the “December 24 Order”), addressing the Memorandum Opinion and Hearing Designation Order, DA 08-2269 (“HDO”), entered in the consolidated proceedings on October 10, 2008.

Because the December 24 Order did not refer to File No. CSR-7876-P, to which NFL Enterprises LLC and Comcast Cable Communications, Inc. are parties, NFL Enterprises filed a motion seeking clarification from the Media Bureau as to whether in

this proceeding, as in the other five, (a) “the ALJ’s authority to issue a recommended decision . . . expired after December 9, 2008” and (b) “the Media Bureau will proceed to resolve the above-captioned program carriage dispute[s] without the benefit of a recommended decision from the ALJ.” (December 24 Order at ¶¶ 16, 2.)

In an Order released December 31, the Media Bureau clarified and confirmed that its December 24 Order applied to this proceeding as well, stating that it would handle the NFL Enterprises matter in the same manner as the five other cases. Memorandum Opinion and Order, DA 08-2819.

The Defendants in the other five proceedings have asked the ALJ to ignore the Media Bureau’s December 24 Order and instead to reaffirm his own scheduling order, entered December 15. (The December 15 scheduling order covered only the WealthTV cases, but it largely reiterated a similar order released on December 2 covering all six cases.) On January 2, 2009, Comcast supplemented its motion, indicating that it seeks the same relief in this proceeding.

On January 6, 2009, the Chief Administrative Law Judge issued an Order stating that “procedural dates previously set require and deserve compliance by all parties,” and requiring the parties to file status reports concerning, among other things, proposed dates for the continuation of hearing proceedings before the Chief Administrative Law Judge. FCC 09M-01.

While this paper responds to Comcast’s supplement filed on January 2, the discussion below is also relevant to the Chief Administrative Law Judge’s Order of January 6.

## DISCUSSION

The principal objective of NFL Enterprises – securing a prompt and fair resolution to the program carriage complaint that it filed eight months ago – has not changed. NFL Enterprises has filed this response primarily because of its concern that a “reaffirmation” of the ALJ’s previously entered scheduling order – or the entry of a new or modified schedule – would create chaos in these proceedings and lead to further delays.

NFL Enterprises reads the HDO as MASN and WealthTV – as well as the Media Bureau – read it. In other words, we read the HDO as delegating authority to the ALJ for only 60 days. The language of the HDO appears to be mandatory: “[W]e . . . *order* that the ALJ return a recommended Decision in th[ese] matters to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Order*.” (HDO at ¶ 3 (emphasis added).) The Media Bureau referred repeatedly to the 60-day deadline, and it specifically provided for an extension of that deadline in only one circumstance: the pursuit of alternative dispute resolution by the parties. (*Id. passim*.) In any event, were there any question as to the Media Bureau’s intent in issuing the HDO, we think that such question would be most authoritatively resolved by the Media Bureau’s interpretation of its own prior order. (December 24 Order at ¶¶ 14-19.)

Our reading of the Media Bureau’s HDO is influenced by the fact that, where hearing designation orders are intended to contain only aspirational time limits, they make that intent unambiguously clear. *See, e.g., MobileMedia Corp.*, 12 FCC Rcd. 14896, ¶ 13 (1997) (“The presiding Administrative Law Judge is directed to *endeavor to issue* his recommended decision within six months of the release of this order.”)

(emphasis added); *id.* at ¶ 15 (instructing ALJ to “*make every effort* to conclude the case, including certifying the record to the Commission, within six months of the release of this order”) (emphasis added); *see also RKO General, Inc.*, 4 FCC Rcd. 1532, ¶ 10 (1989) (“After the Board has received exceptions and replies, it shall, *with highest priority*, proceed to review the ALJ’s ranking of the applicants and issue decisions denying those applicants not ranking first.”) (emphasis added).

And, for the reasons advanced by MASN and Wealth TV, we also believe that the Media Bureau, which had discretion in the first instance about whether or not to refer the case to an ALJ,<sup>1</sup> had authority to limit the scope of the delegation and to reassert its authority over the proceedings in the event that the limitations were exceeded. *See, e.g., TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd. 8989, ¶¶ 1, 13 (2006) (limiting delegation by imposing 45-day time limit for ALJ to issue recommended decision in carriage complaint proceeding); *Tequesta Television, Inc.*, 2 FCC Rcd. 41, ¶ 10 (FCC 1987) (“[A]n ALJ may not countermand a designation order issued under delegated authority as to matters already considered by the delegating authority.”); 47 C.F.R. § 0.204(a) (“Any official . . . to whom authority is delegated in this subpart is authorized to issue orders . . . *pursuant to such authority* . . . .”) (emphasis added).

Leaving the formal issues of authority aside, Comcast’s motion threatens needlessly to complicate and confuse these proceedings. The cable operators already have filed an emergency application with the Commission for review of the December 24

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<sup>1</sup> *See In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd. 2642, MM Docket No. 92-265, ¶ 31 (1993) (“Second Report and Order”) (the Commission staff may either “determine and outline the appropriate procedures for discovery, or will refer the case to an ALJ for an administrative hearing”).

Order, as well as for an emergency stay pending that review, and responses to those filings have been or will soon be filed. Adding to the number of pleadings and orders to be resolved would only delay resolution of the merits of the long-pending complaint.

Moreover, if the ALJ were to reaffirm his scheduling order or enter a new or modified schedule, there would be considerable uncertainty regarding the parties' compliance obligations, including, for example, with respect to each other's discovery demands. (The existing demands and responses – served prior to the now-apparent expiration of the ALJ's authority – were based on the premise that the ALJ's scheduling order controlled.) In that circumstance, it would be unclear whether the parties had a general duty to respond; it would also be unclear whether the ALJ had authority to resolve disputes concerning the scope of responses. In addition, an even more serious obstacle to the continuation of discovery before the ALJ would be presented, given attendant uncertainty regarding the ALJ's authority to enter an appropriate protective order to govern the parties' exchange of proprietary information and materials.

The Commission has recognized that the controlling statute, Section 616, contains an “explicit direction to the Commission to handle program carriage complaints expeditiously.” *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd. 2642, MM Docket No. 92-265, ¶ 23 (1993) (“Second Report and Order”). That statutory direction confirms the importance of providing prompt and fair resolutions to program carriage disputes – the key objective of NFL Enterprises in this case. That statutory direction would be undermined by the issuance of any order that would

effectively pit two arms of the Commission against each other. Accordingly, we respectfully submit that the relief sought by Comcast should be denied.

Respectfully submitted,



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January 7, 2009

## CERTIFICATE OF SERVICE

I, Robert M. Sherman, certify that on this 7th day of January, 2009, I caused a true and correct copy of the foregoing NFL Enterprises LLC's Response to Comcast's Supplement to Motion for Reaffirmation of Scheduling Order or, in the Alternative, for Certification of an Application for Review to be served via electronic mail upon:

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