

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
WASHINGTON

JONATHAN D. BLAKE
TEL 202.662.5506
FAX 202.778.6291
JBLAKE@COV.COM

January 23, 2009

BY E-MAIL

Honorable Michael J. Copps, Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B115
Washington, DC 20554

Re: MB Docket Number 08-214, File No. CSR-7876-P

Dear Chairman Copps:

Congratulations on your new responsibilities.

I write as counsel for NFL Enterprises, LLC, Complainant in the above-captioned proceeding, in response to the letter sent to you late yesterday by Kathryn Zachem on behalf of Comcast Corporation.

This is a proceeding alleging violations by Comcast of the anti-discrimination and other provisions of Section 616 of the Communications Act of 1934, 47 U.S.C. § 536. The Media Bureau found in early October that Enterprises had established, with *prima facie* evidence, that Comcast had discriminated against the NFL Network in favor of its own affiliated sports networks Versus and the Golf Channel. The issue presented by Ms. Zachem's letter is how to bring this proceeding, and the five other proceedings with which it is consolidated, to a conclusion.

Congress specifically directed that complaints of discrimination by vertically integrated cable carriers be concluded on an "expedited" basis. *See* 47 U.S.C. § 536(a)(4) (directing Commission to "provide for expedited review of any complaints made by a video programming vendor pursuant to this section"). The Commission itself has recognized this explicit directive. *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") (recognizing "the statute's explicit direction to the Commission to handle program carriage complaints expeditiously").

Honorable Michael J. Copps
January 23, 2009
Page 2 of 3

Nonetheless, more than eight months after the filing of Enterprises' complaint and nearly four months after the Media Bureau's findings of a *prima facie* violation, a recommended decision has yet to be reached in this proceeding or in any of the five other consolidated proceedings, some of which have been pending even longer than this one. The Order issued last week by the Media Bureau prescribes a path that would lead to a recommended decision by late February. Given how long these matters have been pending and the length of time that millions of consumers have been denied access to valuable programming, that timeline is far short of expedition, but it is constructive progress. We strongly urge that that progress not be interrupted.

Our primary interest is in seeing that this case and the others are handled fairly and expeditiously. We have expressed that interest and priority at every opportunity, in every pleading before the Commission, the Media Bureau, and the Presiding Administrative Law Judge. In contrast, Comcast and its cohorts have set out on a different course, taking advantage of every opportunity to create procedural obstacles and to cause delay. The most recent example is their response to the Presiding Administrative Law Judge's January 6 request for "new dates proposed for *expediting*" procedures, Order, FCC 09M-01 (rel. Jan. 6, 2009) (emphasis added): the cable companies proposed commencing the first of six evidentiary hearings on April 7, 2009 – three weeks *later* than the March 17 date contemplated by the Presiding ALJ, *see* Defendants' Joint Status Report Pursuant to January 6, 2009 Order (Jan. 7, 2009)). Under that schedule, recommended decisions in the six proceedings would likely not be issued until Labor Day, and the process of Commission review would undoubtedly extend for months thereafter.

There is no question that the Media Bureau has authority to resolve any disputed issues in this proceeding, without the help of an Administrative Law Judge, and to issue a recommended decision. *See* 47 C.F.R. § 76.7(f)(2) ("If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff *may* advise the parties that the proceeding will be referred to an [ALJ].") (emphasis added); *id.* § 76.7(g)(1) ("After reviewing the pleadings, and at any stage of the proceeding thereafter, the Commission staff *may, in its discretion, designate any proceeding or discrete issues arising out of any proceeding for an adjudicatory hearing before an [ALJ].*") (emphasis added). Nor is there any question that the Media Bureau has authority itself to issue discovery and information requests to secure additional information necessary to resolve the issues before it. *Id.* § 76.7(f)(1) ("The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories, depositions or document production.").

The parties have been working diligently to provide information and responses to the *focused* requests for additional information sought by the Media Bureau. That information, which is due to be filed Wednesday, January 28, also seeks each party's "best and final offer" of carriage terms to support a remedy in the event that the Commission finds a violation. Regardless of how the Commission ultimately resolves the procedural issues raised by Comcast's petition and motions, which are the subject of very extensive briefing, there is no

COVINGTON & BURLING LLP

Honorable Michael J. Copps
January 23, 2009
Page 3 of 3

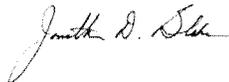
justification for interrupting the ongoing process before the Media Bureau, which has the potential to provide a basis for a recommended decision, or at the very least, to narrow any remaining issues for the ultimate decisionmaker.

Moreover, proceeding with the Media Bureau process seems especially sensible and consistent with the statutory directive for expedition given that the recent retirement of Judge Steinberg has left only one ALJ in that office and there are six proceedings to be resolved and six recommend opinions to be written.

We understand that you and the Commission have many issues on your plate that demand attention. But we urge you to allow the progress and momentum toward resolution of this case to continue, and not to add further delays to a process that has already fallen far short of the statutory directive of "expedited review."

A copy of this letter is being submitted into the record of this proceeding.

Sincerely,



Jonathan D. Blake

cc (via email):

All parties
Hon. Jonathan Adelstein
Hon. Robert McDowell
Rosemary Harold
Rudy Brioché
Rick Chessen
Hon. Richard L. Sippel
Monica Desai
Matthew Berry