

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

In the Matter of	)	
	)	
NFL Enterprises LLC,	)	MB Docket No. 08-214
Complainant	)	File No. CSR-7876-P
v. <sup>1</sup>	)	
Comcast Cable Communications, LLC,	)	
Defendant	)	
To: The Commission		

FILED/ACCEPTED  
JAN 26 2009  
Federal Communications Commission  
Office of the Secretary

**REPLY IN FURTHER SUPPORT OF  
EMERGENCY APPLICATION FOR REVIEW**

Defendant Comcast Cable Communications, LLC ("Comcast") respectfully submits this Reply in further support of its Supplement to Emergency Application for Review ("Supplement"). In the Supplement, Comcast requests that the Commission vacate the Media Bureau's unprecedented *New Year's Eve Order*,<sup>1</sup> which unlawfully seized this case from the Administrative Law Judge ("ALJ") designated to hear it.

In its Response, Complainant NFL Enterprises LLC ("NFL") acknowledges that "conflicting claims of jurisdiction are . . . being made" by the Media Bureau and the ALJ, and agrees with Comcast that a "prompt ruling" by the Commission to resolve this "fundamental problem" is necessary.<sup>2</sup> Although the NFL has implicitly conceded that its complaint raises credibility issues,<sup>3</sup> it does not seek a fair hearing before the ALJ

<sup>1</sup> *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, MB Docket No. 08-214, *Memorandum Opinion and Order*, DA 08-2819 (MB rel. Dec. 31, 2008).

<sup>2</sup> NFL Response at 5.

<sup>3</sup> See NFL's Status Report at 3 (Jan. 7, 2009) (offering to "defer" resolution of its "financial interest" claim in favor of resolving its discrimination claim, which supposedly does not turn on "witnesses' credibility or who said what to whom"). The NFL also has emphasized the importance of the right of rebuttal. See NFL's First Designation of Witnesses & Exhibits at 3, 5-6 (Oct. 31, 2008) (reserving the right to "rebut evidence and/or testimony presented by" Comcast); NFL's Expert Opinion Summary (Dec. 12,

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pursuant to the Administrative Procedure Act (“APA”), but instead requests that the Commission affirm the Media Bureau’s illegal attempt to usurp the ALJ’s jurisdiction.

The NFL’s request is nothing more than a plea for expedition at the cost of fundamental fairness. Although the NFL pays lip service to fairness, the NFL does not – and cannot – argue that a hearing before the ALJ would not be just.<sup>4</sup>

In contrast, defendants have demonstrated that resolution of the cases by the Media Bureau on a paper record would be fundamentally unfair.<sup>5</sup> That unfairness became even more apparent from the Bureau’s *Supplemental Information Order*.<sup>6</sup> In that order, the Bureau indicated that it intends to resolve this case by an arbitrary deadline without document discovery, depositions, live cross-examined testimony or post-trial briefing – all of which the Bureau’s own *HDO* necessarily contemplated and which the ALJs have found to be essential to due process in these circumstances.<sup>7</sup> The Media

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2008) (“This summary and Dr. Singer’s forthcoming expert report are subject to supplementation or revision in light of documents or information that may be produced in discovery, by Comcast’s summary of its proffered experts’ expected opinions, and/or by these proffered experts’ reports and deposition testimony.”).

<sup>4</sup> The only deposition of an NFL witness that was taken in the proceeding before the ALJ showed the importance of cross-examination to the fairness of a proceeding. For example, that witness undermined the NFL’s denial that the NFLN carries “niche” programming by testifying that the network is “extremely appealing to a niche of viewers.” Hawkins Dep. at 39.

<sup>5</sup> Emergency Application for Review at 5-6, 19-23 (Dec. 30, 2008); see Supplement to Emergency Application for Review (Jan. 2, 2009).

<sup>6</sup> *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, Order, DA 09-55(MB rel. Jan. 16, 2009) (“*Supplemental Information Order*”).

<sup>7</sup> *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, Memorandum Opinion and Order, FCC 08M-47 ¶ 7 & n.8 (ALJ rel. Nov. 20, 2008), modified by Erratum, (ALJ rel. Nov. 21, 2008); see also *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, Memorandum Opinion and Order, FCC 09M-05, at ¶8 (rel. Jan. 12, 2009) (“as an examination of the HDO will reveal, each factual situation appears to be unique and intricate” and “the credibility of several

Bureau lacks the fact-finding experience necessary to decide this complex case, which involves credibility determinations that can be resolved only in a trial-type hearing.<sup>8</sup>

Further, although the NFL's request for expanded basic carriage was untimely,<sup>9</sup> and although the Media Bureau previously designated the issue of remedy to the ALJ for a hearing,<sup>10</sup> the *Supplemental Information Order* suggests that the Bureau has improperly pre-judged the remedy to entail "carriage on the expanded basic tier."<sup>11</sup> Moreover, the Bureau is requiring the parties simultaneously to submit "a best and final offer for the price of carriage" and "explain the justification for such offer."<sup>12</sup> But the Bureau has not given the parties any guidance on how it will evaluate the offers, and has ignored all of the other terms (*e.g.*, term, renewal rights, advertising, marketing support, Most Favored Nations) that significantly affect pricing – thereby adding to the unfairness and unworkability of the Bureau's intended resolution of the case.<sup>13</sup>

Significantly, the NFL's argument that resolution by the Media Bureau will expedite the ultimate decision is wrong. In fact, the NFL's tactical choice to seek Media

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witnesses will be at issue due to their differing recollections and expert witnesses' statements are also involved").

<sup>8</sup> The Chief ALJ has acknowledged that "credibility is going to be very important." Hearing Tr. at 85; *see also Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, MB Docket No. 08-214, *Order*, FCC 09M-05, ¶ 3, 6 (ALJ rel. Jan. 12, 2009) (recognizing complexity of factual issues in dispute).

<sup>9</sup> Request for Certification to the Commission at 13 n.52 (Oct. 20, 2008).

<sup>10</sup> *HDO* ¶ 138(c).

<sup>11</sup> *Supplemental Information Order* at 5 n.18.

<sup>12</sup> *Id.* ¶ 9.

<sup>13</sup> In addition, simultaneous disclosure of price flies in the face of the Commission's rules, which place the burden first on the complainant of stating the terms it seeks, which the NFL has never done, in order to allow the defendant an opportunity to respond. *See* 47 C.F.R. §§ 76.6(a)(1), 76.1302(d)(2); *In re Implementation of Section 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 & Order, 9 FCC Rcd 2642 ¶ 27 (1993).

Bureau resolution has led to delay. After the Media Bureau's *Christmas Eve Order* reasserted jurisdiction *only* in the MASN and WealthTV cases,<sup>14</sup> the NFL refused to cooperate in discovery in the proceeding before the ALJ and moved for "clarification" that the Media Bureau also was reasserting jurisdiction over the NFL's complaint (rather than seeking clarification that the ALJ retained jurisdiction).<sup>15</sup> The NFL's motion prompted the Media Bureau to make the first of the "conflicting claims of jurisdiction" in this case,<sup>16</sup> which the NFL now blames for "[f]urther delay and confusion."<sup>17</sup> The Media Bureau then delayed for more than two weeks before attempting to move its (illegal) proceeding forward by issuing its *Supplemental Information Order*.<sup>18</sup> Further, if the Media Bureau decides this case without a hearing, the result will be "the distinct possibility of a remand for additional evidentiary hearings resulting, ultimately, in an unnecessary and undue delay in the final resolution of this complex proceeding."<sup>19</sup>

Contrary to the NFL's baseless accusation that Comcast has "sought to cause delay and chaos,"<sup>20</sup> Comcast favors expedition, but not at the cost of fairness. A hearing

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<sup>14</sup> *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable et al.*, MB Docket No. 08-214, *Memorandum Opinion and Order*, DA 08-2805 (MB rel. Dec. 24, 2008) ("*Christmas Eve Order*").

<sup>15</sup> NFL's Motion for Clarification (Dec. 29, 2008). The NFL's accuses Comcast of "invit[ing]" the ALJ "to commit legal error," NFL Response at 7, but it was the NFL that invited the Media Bureau to commit legal error in this case.

<sup>16</sup> *New Year's Eve Order*.

<sup>17</sup> NFL's Response to Comcast's Supplement to Emergency Application for Review at 2 (Jan. 15, 2009).

<sup>18</sup> *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, *Order*, DA 09-55 (MB rel. Jan. 16, 2009). Having itself taken more than two weeks simply to formulate those discovery requests, the Media Bureau is allowing the parties only six business days to respond to them.

<sup>19</sup> *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, *Memorandum Opinion and Order*, FCC 08M-47 ¶ 7 (ALJ rel. Nov. 20, 2008), *modified by Erratum*, (ALJ. rel. Nov. 21, 2008).

<sup>20</sup> NFL Response at 7.

before the ALJ will advance both goals.

The NFL's litigation tactics are best understood in the context of its stated goal in this proceeding, which is to manufacture negotiating leverage. At the first prehearing conference before the ALJ, the NFL's counsel stated, on the record, that "[t]he NFL Network has a huge interest in getting this resolved, *which will have to be by negotiation, but the course of this hearing can help that . . .*"<sup>21</sup> The NFL's counsel continued by stating that his client "need[ed] to move forward *as quickly as possible* with getting the proceeding moving forward *as a framework for trying to resolve the disputes.*"<sup>22</sup>

On the facts of this case – which show that the NFL is trying to force an overpriced network on one of the many major multichannel video programming distributors that have concluded that it does not warrant broad distribution – the NFL's interest in short-term negotiating leverage is furthered by arbitrarily rushed decision-making. On the other hand, the NFL's interest in leverage is undermined by a fair proceeding in which each side has the opportunity for adequate discovery and a hearing by a professional adjudicator who can resolve fact issues, including credibility contests. Under no circumstances can a party's pleas for expedition take precedence over the requirements of the APA and due process. That is particularly true here, where the NFL's interest in expedition is nothing more than an admitted negotiating tactic.

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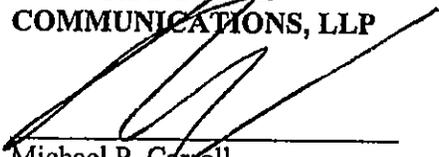
<sup>21</sup> Hearing Tr. at 39 (emphasis added).

<sup>22</sup> *Id.* at 40 (emphasis added); *see also id.* at 40-41 (reiterating that "the course of the hearing would be helpful in terms of trying to resolve the disputes").

For these reasons and those set forth in the Emergency Application for Review and Comcast's Supplement to Emergency Application for Review, Comcast respectfully requests that the Commission vacate the Media Bureau's *New Year's Eve Order* and return this case to the ALJ for an expedited hearing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jennifer A. Ain, hereby certify that, on January 26, 2009, copies of Defendant Comcast Cable Communications, LLC's Reply in Further Support of Emergency Application for Review were served by electronic mail on the following:

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