

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

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

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Chief Administrative Law Judge Richard L. Sippel

**ENTERPRISES’ OPPOSITION TO
MOTION OPPOSING THE TAKING OF DEPOSITIONS**

Comcast has filed yet another motion in an effort to distort the merits of this case. NFL Enterprises LLC (“Enterprises”) limits its response to the narrow discovery question actually raised by Comcast’s motion.

Comcast asks the Presiding Judge to prohibit Enterprises from taking fact depositions in this case even though Comcast’s counsel argued strenuously at the last pre-hearing conference that “the depositions of fact witnesses are critical.”¹ Comcast already has deposed two of Enterprises’ fact witnesses on matters related to this proceeding, and it is has a date scheduled for the third, but it now has objected to Enterprises’ taking limited depositions of *Comcast’s* key witnesses in this proceeding – Brian L. Roberts, Stephen B. Burke, and Madison Bond. The testimony of these witnesses will be central to the case that Comcast presents in this Section 616 proceeding, and Enterprises has not yet had the opportunity to depose them in connection with such testimony.

¹ Tr. of Prehearing Conf. at 229 (Jan. 29, 2009).

As Comcast points out, these witnesses were deposed in the course of the New York contract litigation proceeding. *But they were deposed only with respect to matters relevant to the New York contract litigation*, and not with respect to matters relevant only to the Section 616 claims that are raised in this FCC proceeding. Thus, while there is some overlap between these two parallel proceedings, on which Enterprises deposed these witnesses, Enterprises avoided questioning on matters relating only to the FCC proceeding. Enterprises so limited its questioning pursuant to an order of the judge presiding over the New York proceeding. That order provided that the parties could not take discovery relevant solely to the FCC proceeding. Comcast suggests that some “overlapping issues” are relevant to both the New York matter and this proceeding, but it does not suggest – nor could it reasonably suggest – that there are no issues that relate only to the FCC proceeding.

In light of the New York judge’s order, Enterprises did not ask Comcast’s witnesses about the content of their FCC declarations. It did not mark the witnesses’ FCC declarations as exhibits during their depositions. It did not ask these witnesses about any documents that they authored or received that were produced in the FCC proceeding. The fact that Enterprises acted in good faith by limiting its questioning in compliance with the New York Court’s order, with the consequence that FCC depositions are now necessary in order to cover FCC matters, should not be held against Enterprises, nor does it reflect bad faith as Comcast suggests.²

² Comcast’s claim that Enterprises “was not restricted in its questioning” (Motion at 7) has no foundation. That counsel for Comcast may have asserted during a deposition that he viewed a single question as having no relevance to the New York proceeding is immaterial. Indeed, Enterprises’ counsel indicated that the question was “directly related to the New York proceeding,” and Comcast has not explained why that is not true. (*See* Motion, Exh. E, at 261.) Nor does this exchange trump the New York judge’s order or

Comcast's argument that depositions in this proceeding – which Comcast itself urged the Presiding Judge to require – would waste its witnesses' time rings particularly false. As Enterprises' counsel has informed Comcast's counsel on numerous occasions, Enterprises is willing to agree to substantial limits on the depositions at issue. At the outset, we have agreed to spend no more than twelve hours total with the three witnesses. We have made clear that we intend to ask only about matters relevant to the FCC proceeding. We have committed not to ask questions already covered in the depositions taken in the New York proceeding.³ We have explained, in brief, that our sole purpose is to spend a limited amount of time asking limited questions directly relating to this FCC proceeding that we have not yet been allowed to ask.

Counsel for Comcast have purported not to be satisfied with these assurances, demanding in addition a list of topics to be covered even though they have never offered Enterprises similar information in advance of depositions they have taken of Enterprises' witnesses. Tellingly, Comcast did not agree to provide the witnesses if given such a list. Moreover, when Enterprises previously provided time limits in response to Comcast's request for such limits (which Enterprises understood to be Comcast's sole concern regarding the scope of these depositions), Comcast simply disregarded Enterprises proposal and demanded more limits without ever promising to produce witnesses. In short, Comcast's requests³ seem aimed more at delay than any legitimate request.

otherwise imply that Enterprises suddenly was free during the depositions, noticed in the New York proceeding, to ask questions relating solely to the FCC proceeding.

³ Contrary to Comcast's claim (at 4), we have not agreed to refrain from using documents about which the witnesses have already been asked. There may be documents as to which questions relating to the New York proceeding were asked, but questions relating only to the FCC proceeding were not asked.

Enterprises has provided Comcast with its statement as to what it views as the contours of these depositions: limited in subject matter to issues relevant to the FCC matter, including the witnesses' declarations; limited in subject matter by not re-hashing matters covered with the witnesses in their New York depositions; and limited in time to twelve hours between the three witnesses. Enterprises has declined to go further and submit what in essence would be its deposition outlines, on the ground that such an astonishing and unprecedented requirement is unfair and unworkable. Among other infirmities, including Comcast's refusal to commit to produce its witnesses even if this demand were met, this approach would likely result in endless colloquies during each deposition regarding whether particular questions are or are not within the scope of the "approved" outline. The Commission's rules require simply that a witness be on notice of the general subject matter of his deposition. Because Enterprises already has agreed to limit the scope of these depositions appreciably, no more should be required.

In an effort to mischaracterize Enterprises' position, Comcast presents out of context several quotations from various prehearing conferences. The record clearly shows that counsel for Enterprises was seeking the establishment of a schedule consistent with the limited nature of the issues properly in dispute, and with the congressional intent, embodied in statute, that Section 616 cases be handled on an expedited basis. Within that context, counsel for Enterprises explained that depositions were not necessary for either side. Counsel for Enterprises explained that *if* Comcast were to *expand the issues* beyond those properly raised by Section 616, Enterprises would need to be able to gather evidence to address those issues – including by taking depositions. The point was preserved at the prehearing conference (Tr. of Prehearing Conf. at 225-40 (Jan. 29,

2009)), and it is more compelling now that Comcast has deposed two of Enterprises' witnesses on FCC matters and has demonstrated at every turn – including its current sweeping discovery requests – that it intends to litigate this FCC proceeding largely by reference to extraneous matters.

As Enterprises will show, the vast majority of Comcast's arguments are designed to distract from the fundamental issues in this case. But if Comcast plans to make those arguments, Enterprises is entitled to investigate their factual foundations, if any such foundations exist. There are still many issues in the FCC proceeding as to which Enterprises has not yet had this opportunity.

Comcast also complains that Enterprises' deposition notices were sent 13 to 15 days before the dates of its witnesses' depositions, rather than the 21-day default described in the Rules. But the Presiding Judge already resolved that issue against Comcast in a discussion with the Enforcement Bureau during a pre-hearing conference:

MR. SCHONMAN: I wonder if you might solicit opinions from the various parties on curtailing the notice of deposition period from 21 days back to something shorter than that, because that could take the better part of a month.

[COUNSEL FOR TIME WARNER]: We'll work that out.

JUDGE SIPPEL: I'm assuming that that's not going to be a factor. They're not going to stand on 20-day rules or something like, no. If we run into the problem, you let me know, and we'll address -- it's not going to happen. It's just not going to happen. They have more important things to think about.⁴

Moreover, Comcast ignores that it caused the delay in this process.

Enterprises attempted to work cooperatively with Comcast in scheduling these witnesses,

⁴ Tr. of Prehearing Conf. at 159 (Nov. 25, 2008).

by first requesting their depositions on February 25 and then, when Comcast ignored this request, requesting them again on March 6. It was at that point, when Comcast made clear that it might not produce these witnesses, that Enterprises formally noticed their depositions (still indicating its flexibility, now lost by the passage of time, to negotiate dates for their appearance).

Enterprises can hardly be faulted for waiting to issue its formal deposition notices until after providing informal notice to Comcast's counsel of its desire to depose these witnesses and waiting for Comcast's counsel to provide convenient dates. That is particularly so given that Comcast's counsel led Enterprises to believe that it was in good faith arranging those dates with its witnesses. Upon learning that Comcast did not intend to provide its preferred dates, Enterprises noticed the depositions for the latest possible dates before the deposition deadline in this case.

Finally, Comcast's cynical counter-demand for depositions of Paul Tagliabue, Frank Hawkins, and Ronald Furman deserves short response. Comcast does not bother to hide the tit-for-tat nature of its request, stating that it "did not notice second depositions of those NFL witnesses because it has [sic] does not believe that second depositions are appropriate." Motion at 8. Having *conceded* that it does not believe these depositions to be appropriate, Comcast has no good faith basis for its about-face demand for their testimony. Nevertheless, Enterprises offers the following proposed resolution with respect to these witnesses:

- **Paul Tagliabue:** The former NFL Commissioner is scheduled to be deposed March 31. Enterprises does not believe Comcast can with any fairness depose its FCC witnesses while refusing to produce its own FCC witnesses, so Enterprises will not produce Mr. Tagliabue on March 31 unless ordered to do so or unless Comcast is ordered to produce its witnesses.

- **Frank Hawkins:** Mr. Hawkins was deposed on December 17, 2008. By agreement of the parties, Mr. Hawkins' deposition was noticed in both the New York and FCC proceedings. Mr. Hawkins has thus already been deposed regarding matters relevant to both proceedings. Comcast does not mention this fact, because this fact defeats any reasonable request for a re-deposition of Mr. Hawkins.
- **Ron Furman:** Ron Furman was deposed on January 23, 2009. Comcast claims that it was "blocked" from pursuing lines of questioning relevant to the FCC proceeding, but in truth, Comcast marked Mr. Furman's FCC declaration as an exhibit and asked detailed questions relating to Mr. Furman's FCC declaration and expected FCC testimony. (*See* Motion, Exh. E, at 261 (marking Mr. Furman's FCC declaration as an exhibit, and undertaking one-and-a-half hours of questioning regarding his and Mr. Hawkins' FCC declarations).) While Enterprises noted its objection to Comcast's violation of the New York judge's order, it did not prevent Mr. Furman from answering Comcast's FCC questions. (*Id.* at 262 ("MR. PHILLIPS: Well, having noted my objection to it let's hear your questions.")) Comcast later requested an FCC deposition of Mr. Furman but promptly dropped that request, apparently having made the tactical decision that it was better off relying on the advantage it gained from its flouting of the New York limitations with Mr. Furman, even as Enterprises respected those limitations with Messrs. Roberts, Burke, and Bond.

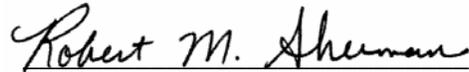
Having flouted the New York judge's order and obtained everything it sought from Mr. Furman (and, as noted above, everything it sought from Mr. Hawkins), Comcast should not be permitted to take the cynical position that there is no need for further depositions – a burden that falls entirely on Enterprises, which complied with the New York judge's order – and that if Enterprises gets what it is entitled to, Comcast should somehow get even more.

CONCLUSION

For the reasons stated above, Comcast's motion should be denied. The depositions of Messrs. Roberts, Burke, and Bond should proceed as noticed, subject to the reasonable limitations set forth above by Enterprises. Comcast has already had (Hawkins and Furman) or can have (Tagliabue) the opportunity to depose the three

Enterprises witnesses mentioned in its paper. No further relief or orders with respect to those witnesses is necessary or appropriate.

Respectfully submitted,

A handwritten signature in cursive script that reads "Robert M. Sherman". The signature is written in black ink and is positioned above a horizontal line.

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March 19, 2009

CERTIFICATE OF SERVICE

I, Robert M. Sherman, certify that on this 19th day of March, 2009, I caused a true and correct copy of the foregoing Opposition to Motion Opposing the Taking of Depositions to be served via electronic mail upon:

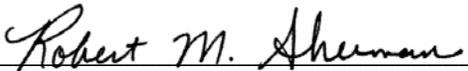
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