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**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.)
Comcast Cable Communications, LLC,)
Defendant)

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Richard L. Sippel
Chief Administrative Law Judge

**DEFENDANT’S MOTION FOR RULING ON
JUDICIAL ESTOPPEL AND LACHES ISSUES**

Defendant Comcast Cable Communications, LLC (“Comcast”) hereby moves for a ruling precluding Complainant NFL Enterprises LLC (the “NFL”) from disavowing in this proceeding the contract with Comcast that it is seeking to enforce in the New York state courts. This ruling should be made on the grounds of judicial estoppel and laches. Although Comcast has set forth this issue in its pre-trial brief, we have separately briefed the issue for the Presiding Judge because of the central importance of this legal issue.

PRELIMINARY STATEMENT

The NFL’s complaint is a blatant attempt to take two bites at the same apple. When the NFL thought it was advantageous, it brought a lawsuit in New York state court to enforce its contract with Comcast. Frustrated by its prospects in the New York action, and nearly a year after Comcast informed the NFL that it would exercise its contractual right to place the NFL Network (“NFLN”) on a sports tier, the NFL brought this action, seeking to disavow the same contract by seeking carriage terms inconsistent with Comcast’s rights under it.

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The NFL's attempt to exploit this regulatory proceeding amounts to an act of impermissible gamesmanship. The NFL brought this action in front of the Commission seeking the extra-contractual remedies of carriage on Expanded Basic for a term beyond the expiration date of the contract, April 30, 2009, after more than a year-and-a-half of state court litigation, from which the NFL reaped substantial benefits at Comcast's expense. Only after its prospects of success in that action waned did the NFL choose to repudiate its position in the New York action, and pursue its current position before the Commission, which flatly contradicts the NFL's earlier assertion that its contract with Comcast governed the terms of NFLN's carriage on Comcast systems. The NFL continues to reap the benefits of its inconsistent position in the New York action, and the Presiding Judge here must stop the NFL from further undermining the integrity of the courts and the Commission. We respectfully request that the Presiding Judge rule on the grounds of judicial estoppel and laches that the NFL may not disavow in this proceeding the contract that it seeks to enforce in its New York court case.

BACKGROUND

On August 11, 2004, the NFL signed two agreements with Comcast: an affiliation agreement under which Comcast agreed to carry the NFLN on its systems until April 30, 2009, and a negotiation agreement under which the NFL agreed to give Comcast a chance to bid for the live telecast rights to certain NFL games. As the NFL has maintained in the New York action, the 2004 contract fully governs the terms under which Comcast would carry the NFLN, [REDACTED]

[REDACTED]

The 2004 affiliation agreement provided that for the first two years Comcast would

¹ [REDACTED]

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provide carriage at its second-most penetrated digital level (D2). After that, carriage would continue at the same level (D2) or be moved to a sports tier, depending on whether certain conditions were met. For the first two years of the contract, Comcast provided carriage at the D2 level without complaint by the NFL. [REDACTED]

[REDACTED]

In October 2006, however, the NFL filed suit in New York court and complained that Comcast was threatening to move carriage of the NFLN to a sports tier in violation of the D2 carriage requirement in the contract. [REDACTED]

[REDACTED]

On May 4, 2007, the New York court ruled in favor of Comcast and held that a plain reading of the contract showed that Comcast had the right to tier the NFLN as it had proposed. The NFL appealed that ruling, and in February 2008, the New York appellate court partially reversed and ruled that the contract language itself was not plain enough and that the NFL was entitled to discovery and a chance to present evidence to support its interpretation of the contract. Discovery in the New York action has been ongoing since then and, although trial has not yet been scheduled, pursuant to New York practice, it will likely occur in late 2009 or early 2010.

Shortly after winning summary judgment in the New York trial court, Comcast informed the NFL in May 2007 that it was going to move the NFLN to a sports tier. [REDACTED]

² [REDACTED]

³ [REDACTED]

REDACTED

[REDACTED]
[REDACTED]

In May 2008, nearly a year after Comcast informed the NFL that it was going to place the NFLN on a sports tier, [REDACTED]
[REDACTED] the NFL abruptly changed course and filed this action before the Commission. In this action, the NFL seeks not to enforce the 2004 contract, as it had in the New York action, but instead to disavow the 2004 contract. [REDACTED]
[REDACTED]

[REDACTED] in this action, the NFL disavows the 2004 contract and seeks an order requiring carriage at a service level (Expanded Basic) that is far broader than both the D2 and sports tier levels in the contract.⁵ The NFL also seeks an order here that would extend the length of Comcast's carriage of the NFLN beyond the express five-year term agreed to in the 2004 contract.⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

4 [REDACTED]
[REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED] The contract also has specific pricing provisions that the NFL seeks to disavow in this action.

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ARGUMENT

The NFL's requested remedies in this action – carriage on Expanded Basic for some unknown period of time after the expiration of the contract – are barred on the grounds of judicial estoppel and laches. The NFL's positions here directly contradict its positions in the New York action. The NFL has received the benefit of continued payments and discovery from Comcast in the New York action by convincing the court to accept those inconsistent positions, giving the NFL an unfair advantage while harming Comcast. Moreover, [REDACTED] [REDACTED] the NFL waited almost a year to bring this action, and is thus barred by the doctrine of laches from proceeding. The NFL should be barred from disavowing the contract that it seeks to enforce in the New York action in order to seek extra-contractual remedies here.

I. JUDICIAL ESTOPPEL BARS THE NFL FROM SEEKING EXTRA-CONTRACTUAL REMEDIES

Judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a position that party took in a prior proceeding.⁸ The doctrine protects the judicial system and the “integrity of the judicial process. . . . The object is to safeguard the administration of justice by placing a restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings.”⁹

⁸ See *State of New Hampshire v. State of Maine*, 532 U.S. 742, 749-50 (2001) (“[C]ourts have uniformly recognized that [the doctrine’s] purpose is ‘to protect the integrity of the judicial process’ by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment.’” (citations omitted)).

⁹ *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980). The doctrine applies where an assertion has been made in an administrative forum. See, e.g., *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (assuming that administrative agency has power to apply doctrine of judicial estoppel in situations analogous to its application by court); see also *In the Matter of Time Warner Cable*, 21 FCC Rcd. 9016 ¶ 13 n.25 (2006) (applying judicial estoppel).

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It is an equitable remedy that “prevent[s] a party from playing fast and loose with the courts.”¹⁰

When deciding whether to apply this doctrine, the Presiding Judge should consider whether the following factors are met:

First, a party’s later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.¹¹

These factors are not meant to be inflexible or exhaustive – the remedy is an equitable one, and a tribunal can consider additional context-specific factors.¹² The overarching determination for a tribunal deciding whether to apply the doctrine of judicial estoppel is whether a party is attempting to make “improper use of judicial machinery.”¹³

All of these factors are met in this case. First, the positions taken by the NFL in the New York action are clearly inconsistent with the position taken in the FCC action. The NFL’s position in the New York action is that the NFL’s interpretation of the contract should be enforced for the length of the contract term, [REDACTED]. The NFL’s position before the FCC is that the contract should not be enforced, and the FCC should order that the NFL should be carried on Expanded Basic for some unknown term. These positions are based on diametrically opposed assertions [REDACTED].

¹⁰ *Konstantinidis*, 626 F.2d at 937 (citation and internal quotation marks omitted); see also *New Hampshire*, 532 U.S. at 750.

¹¹ *New Hampshire*, 532 U.S. at 750-51 (citations and internal quotation marks omitted); see also *Walker v. England*, 590 F. Supp. 2d 113, 136 (D.D.C. 2008).

¹² *New Hampshire*, 532 U.S. at 751; 18 Moore’s Fed. Practice § 134.31 (Matthew Bender 3d ed.) (“Because the doctrine is equitable in nature, it should be applied flexibly, with an intent to achieve substantial justice.”).

¹³ See *New Hampshire*, 532 U.S. at 749-50 (quoting *Konstantinidis*, 626 F.2d at 938).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] These positions are irreconcilable.¹⁶

With respect to the second factor, the NFL succeeded in the prior proceeding in convincing the New York courts to accept its position for purposes of proceeding to trial, and it reaped the benefit of discovery from Comcast and of Comcast’s continued payments under the contract that the NFL sought to enforce. A party need not have prevailed in another litigation for judicial estoppel to apply to positions taken in that litigation – courts can accept an assertion in a variety of ways, triggering the application of the doctrine.¹⁷ The First Department of New York accepted the NFL’s assertion that it was suing for enforcement of the contract, reversed a lower court ruling in favor of Comcast, and ordered discovery to proceed so that the NFL might try to support its contract argument. The NFL claimed the benefit of that ruling by engaging in discovery against Comcast for the past year, and by continuing to pursue its contract claim against Comcast in New York.

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ See, e.g., *Moses v. Howard Univ. Hosp.*, 567 F. Supp. 2d 62, 67 (D.D.C. 2008) (“Many courts have applied the doctrine of judicial estoppel to bar plaintiffs from pursuing claims – including employment discrimination claims – because those plaintiffs failed to disclose the existence of their claims to bankruptcy courts in prior or parallel bankruptcy proceedings.”); *Elemery v. Holzmann*, 533 F. Supp. 2d 116, 125 (D.D.C. 2008) (refusing to permit plaintiff “to revise her factual allegations to fit her newly chosen forum”); *Walker*, 590 F. Supp. 2d at 136.

¹⁷ See *Walker*, 590 F. Supp. 2d at 136 (court accepted party’s prior position by ruling in party’s favor on a motion to amend); *In Def. of Animals v. USDA*, 589 F. Supp. 2d 41, 43 (D.D.C. 2008) (finding party was judicially estopped from changing its position to one that was inconsistent with a position the party had “maintained for years in this action”).

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Finally, the third factor is clearly met here: the NFL has already derived an unfair advantage and imposed an unfair detriment on Comcast, and must be estopped from doing so any further.¹⁸ Defending against two litigations that seek completely inconsistent remedies is expensive, time-consuming, and extremely difficult, as it is never clear which remedies are the ones the NFL is really pursuing. By convincing the New York courts that it was suing for enforcement of the contract, the NFL was permitted to press forward with that case. As a result, the NFL received the substantial benefit of thousands of pages of documents and has taken numerous depositions, which the NFL is using to inform its litigation in this action. Moreover, Comcast has detrimentally relied on the NFL's contention that it was suing for enforcement of the contract by continuing to pay the NFL for the duration of that contract. The Presiding Judge must prevent the NFL from further benefiting from this decision to "play[] fast and loose with the courts" and undermining the integrity of the judicial process.¹⁹

II. LACHES BARS THE NFL FROM SEEKING EXTRA-CONTRACTUAL REMEDIES

The equitable defense of laches "is founded on the notion that equity aids the vigilant and not those who slumber on their rights."²⁰ The party asserting the defense must demonstrate "(1)

¹⁸ See *In Def. of Animals*, 589 F. Supp. 2d at 43 (finding that an intervenor defendant was judicially estopped from changing its position because "although [the intervenor defendant] may not have derived an obvious benefit previously by joining the government's contention that the documents were obtained involuntarily, plaintiff . . . has detrimentally relied on [the intervenor defendant's] previous inconsistent assertions.").

¹⁹ See *Konstantinidis*, 626 F.2d at 937.

²⁰ *NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985). Laches "is available quite apart and separate from the defense of the running of the statute of limitations." Williston on Contracts § 79:11. It "is not, like limitation, a mere matter of time, but rather turns on whether the party seeking relief delayed inexcusably or unreasonably in filing suit in a way that was prejudicial to the other party." *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 49 (D.C. Cir. 2005) (quotations omitted).

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lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.”²¹ To establish the defense, the evidence must show both that “the delay was unreasonable and that it prejudiced the defendant.”²²

The first element is clearly met here. The NFL knew the facts underlying its claim in this action since at least May 2007, when the New York court confirmed Comcast’s contractual right to tier the NFLN, and Comcast informed the NFL that it would exercise that right – if not since the fall of 2004, when the NFL knew that the NFLN was not carried on the same tier as Versus and Golf. Nevertheless, the NFL “stood mute” and waited nearly a year to file this action.²³

The second element, injurious reliance by the defendant, is met here as well because Comcast “has changed [its] position in a manner which would not have occurred if the [NFL] had not delayed.”²⁴ Here, the NFL’s unreasonable delay in seeking extra-contractual remedies in this forum caused Comcast to incur significant financial prejudice by relying on the terms of the contract and continuing to pay the NFL substantial license fees pursuant to that contract, which it would not have done had the NFL asserted that the contract should not be enforced.

²¹ *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002) (quotations omitted); *Indiana Mobile Telephone Corp.*, 2 FCC Rcd. 6272 ¶ 8 (1987) (holding that “the party alleging laches has the burden of establishing that it has been prejudiced by [another party’s] inexcusable delay in asserting a known right” and finding that defendants had carried that burden) (internal citation and quotation marks omitted)).

²² *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C. Cir. 1966); see *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 171 (D.C. Cir. 2003).

²³ *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1355 (2d Cir. 1991); see also *CarrAmerica*, 321 F.3d at 172 (applying laches to bar claims where claimants were “well aware” of the facts that “form[ed] the basis of their” claim for more than nineteen months before they actually raised the claim).

²⁴ *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 809 (8th Cir. 1979).

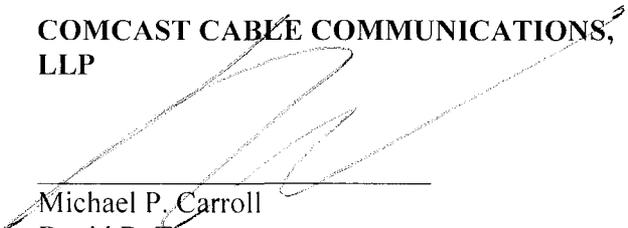
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CONCLUSION

For these reasons, Comcast respectfully requests that the Presiding Judge rule that the NFL may not in this proceeding disavow the 2004 contract that it is seeking to enforce before the New York courts.

Respectfully submitted,

**COMCAST CABLE COMMUNICATIONS,
LLP**



Michael P. Carroll
David B. Toscano
Antonio J. Perez-Marques
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4547

David H. Solomon
L. Andrew Tollin
WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
(202) 783-4141

James L. Casserly
Michael H. Hammer
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

Attorneys for Comcast Cable Communications,
LLP

Dated: April 6, 2009

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CERTIFICATE OF SERVICE

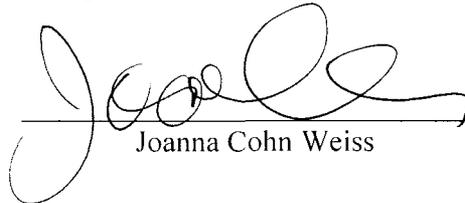
I, Joanna Cohn Weiss, hereby certify that, on April 6, 2009, copies of the attached Defendant's Motion Opposing the Taking of Depositions were served by e-mail on the following individuals:

Jonathan D. Blake
Gregg H. Levy
Paul Schmidt
Robert M. Sherman
Leah E. Pogoriler
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Kris Anne Monteith
Gary P. Schonman
Elizabeth Mumaw
William Davenport
Hillary DeNigro
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mary Gosse*
Office of Administrative Law Judges
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554


Joanna Cohn Weiss

* Courtesy copy

Exhibit A

Exhibit Redacted

Exhibit B

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Exhibit C

Exhibit Redacted

Exhibit D

Exhibit Redacted

Exhibit E

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