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

FCC 09M-36
07897

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

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MEMORANDUM OPINION AND ORDER

Issued: April 17, 2009

Released: April 17, 2009

Preliminary

1. On April 6, 2009, Comcast Communications, Inc. (“Comcast”) filed a Motion requesting a ruling that NFL Enterprises be barred from “disavowing in this proceeding the contract with Comcast that it is seeking to enforce in the New York state courts.” (Comcast Motion at 1.) Comcast bases its Motion on the doctrines of judicial estoppel and laches. Because neither judicial estoppel nor laches apply to this case, the Motion must be denied.

Discussion

Judicial Estoppel

2. The doctrine of judicial estoppel “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” Zedner v. United States, 547 U.S. 489, 504 (2006), quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000). Accord New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The courts consider the following factors in determining whether judicial estoppel should be applied to a particular case: (1) whether the party’s later position is “clearly inconsistent” with its earlier position; (2) “whether the party has succeeded in persuading a court to accept that party’s earlier position;” and (3) “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.” Zedner v. United States, 547 U.S. at 504. New Hampshire v. Maine, 532 U.S. at 750-51. As shown below, none of those factors are present here.

3. First, there is no inconsistency between NFL Enterprises’ position in the pending New York litigation and its position in this case. In the state litigation, NFL Enterprises argues that Comcast violated its affiliation agreement by moving NFL Enterprises’ programming to the

Sports Tier. In this proceeding, NFL Enterprises contends that Comcast's re-tiering violates section 616 of the Communications Act, 47 U.S.C. § 616, and the Commission's implementing rule, 47 C.F.R. § 1301. In other words, NFL Enterprises seeks to vindicate its alleged private contractual rights in the New York litigation and its alleged federal statutory and regulatory rights in this case. But NFL Enterprises is not attempting to "disavow[] in this proceeding" its contract with Comcast, as Comcast contends. (Comcast Motion at 1.) The statutory and regulation issues in this case are separate and distinct from the contractual issues in the New York action. Indeed, the merits of rights and obligations arising under the affiliation agreement being litigated in the New York action are not justiciable issues in this case. See Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., Memorandum Opinion and Hearing Designation Order, DA 08-2269 (MMB, released Oct. 15, 2008 at ¶ 72 ("HDO"))

4. ~~Second~~ Second, the New York courts have not accepted NFL Enterprises' interpretation of the affiliation agreement in the first instance. As Comcast acknowledges, in the New York litigation the parties are still engaged in discovery and no trial date has been set. (Comcast Motion at 3.) The fact that NFL Enterprises has not yet prevailed and may not prevail in the contract litigation is an important factor against the application of judicial estoppel. "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." New Hampshire v. Maine, 532 U.S. at 750-51 (internal citations omitted).

5. Third, application of the doctrine of judicial estoppel is not necessary to prevent unfairness in this case. NFL Enterprises does not obtain unfair advantage merely by pursuing its contractual and federal claims in different lawsuits, as Comcast alleges. Nor do the burdens arising from Comcast's defense of those actions — burdens borne by most litigants — impose an unfair detriment that would warrant the invocation of judicial estoppel.

Laches

6. The doctrine of laches is strictly equitable. It bars a litigant "from maintaining a suit if he unreasonably delays in filing a suit and as a result causes harm to the defendant." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002). In determining whether there is unreasonable delay, the courts first consider whether there is a limitations period that is prescribed by law. If so, and if the suit was filed within the prescribed limit, "the strong presumption is that laches is inapplicable." Internet Specialties West, Inc. v. Milon-Digiorgio Enterprise, Inc., 559 F.3d 985, 988 (9th Cir. 2009), quoting Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 838 (9th Cir. 2002). See United States v. Mack, 295 U.S. 480, 489 (1935) (laches within the term of the statute of limitations is no defense at law).

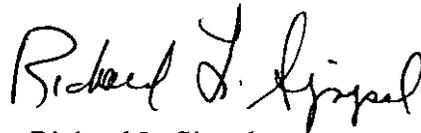
7. Here, Section 76.1303(f) of the Commission's rules establishes a one-year limitation for the filing of program carriage complaints. 47 C.F.R. § 76.1303(f). There is no dispute that NFL Enterprises filed its complaint timely. The Media Bureau ruled that NFL Enterprises had filed its complaint within the one-year period. HDO, ¶ 70. Comcast even acknowledges that NFL Enterprises filed its complaint within one year. (Comcast Motion at 9.) Thus, it is evident that NFL Enterprises, having complied with Section 76.1303(f), did not engage in any unreasonable delay in the filing of its Complaint. Moreover, NFL Enterprises, as a party

bringing an action before the Commission, has a right to rely upon the time limits prescribed by the agency's rules. And under any equitable consideration, it would be unfair to NFL Enterprises to dismiss its Complaint as for laches after it has acted in good faith in accordance with the Commission's rules.

Ruling

Accordingly, for reason stated above, IT IS ORDERED that Comcast Cable Communications' Motion Seeking Judicial Estoppel and Laches IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Richard L. Sippel". The signature is written in a cursive style with a large, stylized "R" and "S".

Richard L. Sippel
Chief Administrative Law Judge