

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of

Amendment of Certain of the Commission's
Part 1 Rules of Practice and Procedure and
Part 0 Rules of Commission Organization

GC Docket No. 10-44

**COMMENTS OF TCR SPORTS BROADCASTING HOLDING, L.L.P.,
d/b/a MID-ATLANTIC SPORTS NETWORK**

The *Procedures NPRM* offers several proposals that are intended to “increase efficiency and modernize [the Commission’s] procedures,” and “clarify certain procedural rules.”¹ TCR Sports Broadcasting Holding, L.L.P, d/b/a Mid-Atlantic Sports Network (“MASN”) supports those proposals. This overhaul of Commission procedures also should be extended to program-carriage complaints. Under the current rules, vertically integrated cable operators can withhold carriage even after an initial decision in favor of an unaffiliated programmer, and have every incentive to do so when money damages are not available in such cases.

This situation – which threatens the viability of independent networks like MASN – could be substantially remedied with two procedural “quick fixes.” First, the Commission should adopt a rule that an appeal from a decision (by an arbitrator, ALJ, or the Media Bureau) in a program-carriage case will be deemed denied unless the Commission specifically reverses that decision within a set period of time. Second, the Commission should adopt a rebuttable presumption of harm for unaffiliated regional sports networks (“RSNs”) that are denied carriage,

¹ Notice of Proposed Rulemaking ¶ 1, *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, FCC 10-32, GC Docket No. 10-44, (Feb. 22, 2010) (“*Procedures NPRM*”).

similar to the presumption the Commission recently adopted in the program-access context. These two rules, coupled with a clarification that monetary damages are available for past discriminatory withholding of carriage, would help ensure prompt and efficient resolution of program-carriage cases.

BACKGROUND

Both Congress and the Commission have repeatedly recognized that vertically integrated cable operators have a strong incentive to engage in unfair or exclusionary practices with respect to their affiliated programming – for example, by withholding affiliated programming from competing MVPDs or by refusing to carry unaffiliated programming networks. In the 1992 Cable Act, Congress sought comprehensively to address the anticompetitive and anticonsumer practices of vertically integrated cable companies. The Act required the Commission to promulgate rules prohibiting “unfair methods of competition or unfair or deceptive acts or practices” that have the “purpose or effect” of hindering competition.² To address circumstances in which a vertically integrated cable operator refuses to deal on fair and nondiscriminatory terms with an unaffiliated programmer, Congress required the Commission to promulgate regulations proscribing, among other things, program-carriage discrimination.³

Congress and the Commission have also emphasized that timely resolution of program-carriage complaints is essential, both to protect unaffiliated programmers from anticompetitive practices and to ensure that consumers are not denied access to must-have programming. The Cable Act states that the Commission’s program-carriage rules must “provide for expedited review of any complaints made by a video programming vendor pursuant to this section.”⁴

² 47 U.S.C. § 548(b).

³ *Id.* § 536(a)(3); 47 C.F.R. § 76.1301(c).

⁴ 47 U.S.C. § 536(a)(4).

Similarly, in the *Adelphia Order*, the Commission stressed the importance of rules that “alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes.”⁵ The Commission also emphasized that “[t]he timely resolution of carriage disputes is particularly important given the seasonal nature of RSN programming.”⁶ Accordingly, the Commission in the *Adelphia Order* adopted an expedited review process for independent RSNs that are denied carriage by Comcast or Time Warner.⁷

Despite its intention that program-carriage disputes be resolved expeditiously, certain procedural pitfalls in the Commission’s rules have allowed these disputes to drag on. And during these protracted carriage disputes, consumers have been denied access to must-have programming.

MASN’s ongoing dispute with Time Warner Cable in North Carolina is an unfortunate case in point. MASN first approached TWC regarding program carriage in 2005. After TWC rejected MASN’s proposals, MASN filed an arbitration demand pursuant to the *Adelphia Order* on June 5, 2007. A hearing was then held before an independent arbitrator, who concluded in January 2008 that TWC’s refusal to carry MASN amounted to illegal discrimination. TWC then sought to have that arbitrator disqualified on the basis of innocuous statements that he made to the press following his decision in favor of MASN. Another independent arbitrator was

⁵ See Memorandum Order and Opinion, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc., et al.*, 21 FCC Rcd 8203, ¶ 191 (2006) (“*Adelphia Order*”).

⁶ *Id.*

⁷ Under the *Adelphia Order*, independent RSNs may pursue a remedy through commercial arbitration in lieu of filing a traditional program-carriage complaint. *Id.* ¶¶ 190-191. Those arbitration proceedings are to take no more than 45 days, and the Commission is required to “issue its findings and conclusions not more than 60 days after receipt of a petition for review of the arbitrator’s award, which may be extended by the Commission for one period of 60 days.” *Id.* ¶ 190.

appointed, and MASN prevailed once again in June 2008. TWC then filed a 94-page petition for review with the Commission, alleging that the arbitrator made a host of different legal and factual errors. The Media Bureau denied this petition in its entirety on October 30, 2008.⁸ After losing for the third time, TWC filed an application for review before the full Commission on November 26, 2008. That application has now been pending before the Commission for almost 18 months.⁹

Both MASN and North Carolina consumers have been significantly harmed by the delay resulting from TWC's repeated appeals. For the last several years, TWC customers in eastern North Carolina – including customers in Raleigh-Durham, the state's most populous DMA – have been denied access to home-market Major League Baseball on cable television.¹⁰ MASN believes this is the only area of the United States in which TWC does not carry an RSN with home-market baseball games. Six members of the North Carolina Congressional delegation recently sent a letter to the Commission emphasizing that “further delay in a resolution could jeopardize another [baseball] season.”¹¹

Denials of carriage also make it more difficult for independent programmers to win new distribution rights for sports programming, thereby reducing competition among RSNs. For

⁸ See Order on Review, *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*, DA 08-2441 (M.B. Oct. 30, 2008) (“*Media Bureau Order*”).

⁹ TWC's application for review has been pending before the Commission for almost a year longer than any other application for review in a program-carriage case. See Questions for the Record from Chairman Jay Rockefeller to FCC Chairman Julius Genachowski, Senate Committee on Commerce, Science, and Transportation, Hearing on Consumers, Competition, and Consolidation in the Video and Broadband Market (Mar. 11, 2010) (noting that as of March 2010, four program-carriage appeals had been pending for five months and one appeal (TWC's) had been pending for 16 months).

¹⁰ *Media Bureau Order* ¶ 34.

¹¹ Letter from Rep. Howard Coble, *et al.*, to Hon. Julius Genachowski, *et al.* (Mar. 29, 2010); see also Luke Decock, *Time for FCC to Play Ball*, News & Observer (Mar. 31, 2010) (“Every decision MASN won, Time Warner would appeal. Litigation spawned litigation.”).

example, MASN had pursued the rights to Carolina Hurricanes hockey games, but the Hurricanes were unwilling to consider a deal without broader carriage on TWC.¹² Every passing day (or year) in which carriage is denied further hinders independent RSNs' ability to compete effectively against vertically integrated cable operators' own offerings.

ARGUMENT

THE COMMISSION SHOULD MODIFY ITS PROCEDURAL RULES TO ENSURE PROMPT RESOLUTION OF PROGRAM-CARRIAGE COMPLAINTS

MASN respectfully urges the Commission to adopt new procedural rules that will help ensure prompt and efficient resolution of program-carriage complaints.¹³ Along these lines, MASN proposes the following for the Commission's consideration.

First, the Commission should adopt a "shot clock" for program-carriage complaints, under which a petition for review of a neutral arbitrator's decision should be deemed denied unless the Commission acts on that petition within a fixed period of time (for example, as set forth in the *Adelphia Order*, 60 days, plus one optional 60-day extension).

The Commission has authority to adopt such a rule pursuant to 47 U.S.C. § 536(a)(4), which requires "expedited review of any complaints made by a video programming vendor pursuant to this section." Indeed, Congress itself employed a similar procedural mechanism in the Telecommunications Act of 1996, which provides that a forbearance petition shall be "deemed granted if the Commission does not deny the petition . . . within one year after the Commission receives it."¹⁴ The Commission, too, has promulgated similar rules with respect to

¹² *Media Bureau Order* ¶ 31 n.123.

¹³ Because the proposed rule changes are procedural in nature, notice and comment is not required under the Administrative Procedure Act. *See* 5 U.S.C. § 553(b) (notice of proposed rulemaking not required for "rules of agency organization, procedure, or practice").

¹⁴ 47 U.S.C. § 160(c).

state and local franchising authorities' ("LFAs") award of cable franchises. To prevent "unreasonable delays" in the franchising process, the Commission required LFAs to act on franchising applications within 90 days for applicants with existing cable franchises, and within six months for new applicants.¹⁵ If an LFA fails to act on a franchising application by the deadline, "the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application."¹⁶ The Sixth Circuit fully upheld the *Franchising Order*, noting that the Commission's goal of avoiding excessive delays was "more than reasonable."¹⁷

Second, the Commission should adopt in the program-carriage context the same evidentiary presumption that it has adopted in the program-access context. In its recent program-access order, the Commission reaffirmed its longstanding conclusion that RSN programming "is very likely to be both non-replicable and highly valued by consumers."¹⁸ In light of the extensive body of evidence about vertically integrated cable operators' incentives to engage in anticompetitive practices with respect to RSNs, the Commission held that "we will not require litigants and the Commission staff to undertake repetitive examinations of our RSN precedent and the historical evidence" in each case.¹⁹ Instead, the Commission "allow[ed] complainants to

¹⁵ Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Act of 1984 as Amended by the Cable Act of 1992*, 22 FCC Rcd 5101, ¶¶ 66-73 (2006) ("*Franchising Order*").

¹⁶ *Id.* ¶ 77.

¹⁷ *Alliance for Community Media v. FCC*, 529 F.3d 763, 780 (6th Cir. 2008).

¹⁸ First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 52 (2010) ("*2010 Program Access Order*").

¹⁹ *Id.*

invoke a rebuttable presumption that an unfair act involving a terrestrially delivered, cable-affiliated RSN has the purpose or effect” of hindering competition in the video marketplace.²⁰

Congress enacted both the program-access and program-carriage rules in the 1992 Cable Act as part of a comprehensive effort to regulate the threats posed by vertical integration in the video marketplace.²¹ The same rationale underlies both sets of rules: the need to prevent vertically integrated cable operators such as TWC from engaging in discriminatory, exclusionary, and anti-competitive practices. Both sets of rules seek to accomplish that objective by prohibiting affiliation-based discrimination by vertically integrated programmers and distributors.²²

The Commission should thus adopt the same evidentiary presumption in the program-carriage context that it has adopted in the program-access context. To prevail on a program-carriage claim, the plaintiff must demonstrate that the defendant has engaged in conduct “the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating . . . on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by

²⁰ *Id.*

²¹ See H.R. Rep. No. 102-862, at 55-56 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1237-38; S. Rep. No. 102-92, at 27 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1160 (“To ensure that cable operators do not favor their affiliated programmers over others, the legislation bars cable operators from discriminating To address the complaints of small cable operators that cable programmers will not deal with them or will unreasonably discriminate against them in the sale of programming, the legislation requires vertically integrated, national cable programmers to make programming available to all cable operators . . . on similar price, terms, and conditions.”).

²² See 47 U.S.C. § 548(c)(2)(B) (prohibiting “discrimination . . . in the prices, terms, and conditions of sale” of programming by affiliated programmers); *id.* § 536(a)(3) (prohibiting “discriminat[ion] in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage”).

such vendors.”²³ If a vertically integrated cable operator carries affiliated RSN programming but refuses to carry an unaffiliated RSN, there should be a rebuttable presumption that this act has the “effect” of “unreasonably restrain[ing]” the independent RSN’s ability to compete fairly. The burden would then shift to the cable operator to produce evidence showing that its conduct does not have such an effect.

Adopting this presumption would ensure symmetry between the program-access and program-carriage rules, and would also promote expeditious resolution of program-carriage complaints. In light of the Commission’s repeated findings about vertically integrated cable operators’ incentives to engage in unfair practices with respect to RSNs, unaffiliated programmers should not be required to rehash this evidence in every case.²⁴ It is more efficient – and more fair – for the initial evidentiary burden to be on the vertically integrated cable operator to show that its refusal to carry an independent RSN did *not* unreasonably restrain that RSN’s ability to compete fairly.

Finally, the Commission should clarify that monetary damages for discriminatory withholding of carriage are available to an injured programmer. Such damages – which are routinely available in normal cases at law – would disincentivize carriers from discriminating against independent programmers by imposing a cost for past refusals to carry and delays in achieving resolution of the case.

CONCLUSION

MASN applauds the Commission for working to make its procedural rules more efficient, and encourages the Commission to adopt the aforementioned rules, which would help protect

²³ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

²⁴ *See 2010 Program Access Order* ¶ 52.

consumers and unaffiliated programmers by ensuring prompt resolution of program-carriage complaints.

May 10, 2010

Respectfully submitted,

/s/ David C. Frederick

David C. Frederick

Jeffrey M. Harris

KELLOGG, HUBER, HANSEN, TODD,

EVANS & FIGEL, P.L.L.C.

1615 M Street, N.W., Suite 400

Washington, DC 20036

Counsel for TCR Sports Broadcasting

Holding, L.L.P. d/b/a Mid-Atlantic Sports

Network