

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

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| In the Matter of |) | |
| |) | |
| The Tennis Channel, Inc., |) | MB Docket No. 10-204 |
| Complainant |) | File No. CSR-8258-P |
| v. |) | |
| Comcast Cable Communications, LLC, |) | |
| Defendant |) | |

APPLICATION FOR REVIEW OF COMCAST CABLE COMMUNICATIONS, LLC

Comcast Cable Communications, LLC (“Comcast”), pursuant to 47 C.F.R. § 1.115(e)(3) and (f), hereby files its Application for Review of the *Hearing Designation Order* in this proceeding.¹ Tennis Channel, Inc.’s (“TTC”) complaint should have been dismissed under the applicable statute of limitations, which bars claims brought more than one year after the parties enter into a carriage contract.² The Media Bureau (the “Bureau”), however, ruled that the complaint was not time-barred because TTC filed within one year of presenting to Comcast a notice of intent to file a program carriage complaint.³ The Bureau’s ruling was erroneous and should be set aside.

The FCC’s one-year limitation period for filing a program carriage complaint begins running based on any one of three triggering events: (1) an MVPD and programming vendor enter a carriage agreement that allegedly violates the applicable rules; (2) an MVPD makes an

¹ *The Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, 25 FCC Rcd 14149 (MB 2010) (“*HDO*”). Comcast is separately filing Exceptions to the Initial Decision today.

² 47 C.F.R. § 76.1302(f)(1) (Section 76.1302 was amended in October 2011; subsection 76.1302(f) can now be found without change at 76.1302(h). This Application refers to the rules as in place during the Bureau’s decision.). *See also EchoStar Commc’ns Corp. v. Fox/Liberty Networks, LLC*, 13 FCC Rcd 21841, 21848-49 ¶¶ 17-18 (CSB 1998).

³ *HDO*, 25 FCC Rcd at 14154-56 ¶¶ 11-12.

offer of carriage that allegedly violates the applicable rules; or (3) “a party has notified [an MVPD] that it intends to file a complaint . . . based on violations of one or more of the [program carriage] rules.”⁴ Here, there is no dispute that the parties signed a carriage agreement in March 2005 and that Comcast’s carriage of TTC has been and continues to be consistent with the terms of that agreement.⁵ Having freely negotiated and entered into an affiliation agreement with Comcast in 2005 that authorizes the current level of carriage, the first prong of the limitation rule properly bars TTC from using the program carriage rules to undo that agreement more than four years later.⁶

The second prong of the limitations rule is not at issue in this case and the Bureau erroneously interpreted the third prong of the FCC’s limitation rule as permitting TTC’s complaint because TTC filed within one year of giving Comcast pre-filing notice.⁷ Interpreting the limitations rule as the Bureau has done here renders the first prong meaningless and “undermines the fundamental purpose of a statute of limitations.”⁸

The limitations rule must be read to give each element meaning.⁹ Properly read, the third

⁴ 47 C.F.R. § 76.1302(f).

⁵ Comcast Exhs. 84, 85, 86; Tennis Channel Opening, Apr. 25, 2011 Tr. 121:16-19.

⁶ In short, the time for filing a claim under the first prong expired in March 2006. 47 C.F.R. § 76.1302(f)(1).

⁷ *See id.* § 76.1302(f)(3); *HDO*, 25 FCC Rcd at 14154-56 ¶¶ 11-12. TTC makes no allegation that Comcast took any action outside of the terms of their agreement that might justify restarting the limitations period.

⁸ *Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 26 FCC Rcd 11494, 11522 ¶ 38 (2011) (“2011 Report & Order”).

⁹ *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (recognizing “one of the most basic interpretive canons, that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .’”) (internal citation omitted). The limitations rule must also be read in parallel with the limitations rules for program access and open video system complaints, which provide that the limitations period

prong of the limitations rule concerns a refusal to deal and other similar conduct that is not expressly covered by the first and second prongs. Indeed, as originally promulgated, the third prong expressly applied only where an MVPD had denied or refused to acknowledge a request to negotiate for carriage.¹⁰ Although the FCC amended this language in 1994, there is nothing to suggest that it intended to create a loophole so broad as to result in an oxymoronic, unlimited limitations period. The FCC merely made conforming amendments to reflect its intent to afford MVPDs standing to file program carriage complaints.¹¹

The Bureau, however, improperly reads the third element of the limitations rule in a way that renders the first prong functionally meaningless by allowing parties to “reset” the limitations period at any time merely by unilaterally demanding a material change to the terms of an existing agreement and delivering a notice of its intent to file a complaint if its demand is not met. Under the Bureau’s reading, a party can use the third prong of the limitations rule to re-open carriage agreements at any time, undermining the ability of the counter-party to rely on a contract, and

cannot be “restarted” merely by asking to renegotiate an existing agreement or sending a new pre-filing notice. *1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, Report & Order, 14 FCC Rcd 418, 424 ¶ 18 (1999); *see also id.*, Order on Reconsideration, 14 FCC Rcd 16433, 16435 ¶ 5 (1999) (“The dispute resolution processes in Part 76 for program access, program carriage, and open video system complaints follow similar procedural rules. . . . The rules contain three like provisions which set forth one year limitations periods for bringing complaints.”).

¹⁰ As originally drafted, the third prong of the limitations rule provided that the one-year limitations period began running, when “the complainant has notified [an MVPD] that it intends to file a complaint with the [FCC] based on a request for carriage or to negotiate for carriage of its programming on defendant’s distribution system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.” 47 C.F.R. § 76.1302(r)(3) (1993). By definition, a denial of a request for carriage or to negotiate for carriage cannot occur when the MVPD and programmer already have a governing carriage contract.

¹¹ *Implementation of Cable Television Consumer Protection and Competition Act of 1992 Development of Competition & Diversity in Video Programming Distribution & Carriage*, 9 FCC Rcd 4415, 4418-19 ¶ 24 (1994) (amending the program carriage rules to afford MVPDs standing to file program carriage complaints).

leading to instability and disruption in the marketplace which depends upon stable, enforceable carriage agreements between MVPDs and programming networks.

Finally, evidence adduced at hearing, which the Bureau admittedly did not have the benefit of, further demonstrates the fallacy underlying the Bureau's reading of the third prong of the limitations rule. This evidence demonstrates conclusively that TTC brought its complaint not to remedy Comcast's allegedly discriminatory refusal to re-tier TTC in 2009, but rather as the culmination of a strategic effort, begun no later than January 2007, to undo the terms of its carriage agreement with Comcast.

It is clear from facts adduced at hearing that, although the "gravamen" of TTC's claim as it was presented to the Bureau was the carriage disparity between Comcast's carriage of TTC and its carriage of the affiliated networks Golf Channel and Versus,¹² TTC knew when it executed the affiliation agreement with Comcast that it was contracting for sports tier carriage.¹³ At that time Golf Channel and Versus had already achieved broad distribution on Comcast and throughout the industry.¹⁴ TTC subsequently became dissatisfied with its carriage agreement with Comcast¹⁵ and decided to use litigation to revise that agreement.

In January 2007, TTC prepared a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹² *HDO*, 25 FCC Rcd at 14156-57 ¶¶ 12-13.

¹³ Comcast Exh. 52; Comcast Exh. 75 (Bond Written Direct) ¶ 5; Bond Direct, Apr. 29, 2011 Tr. 1985:20-1988:13.

¹⁴ Bond Direct, Apr. 29, 2011 Tr. 1964:3-9.

¹⁵ Comcast Exhs. 268, 701 at TTCCOM_00067839; Solomon Cross, Apr. 25, 2011 Tr. 395:11-17.

[REDACTED]

[REDACTED] }¹⁶ TTC apparently believed it had a “fully baked” program carriage claim as early as April 2008,¹⁷ but chose to wait to file this claim for tactical litigation reasons, namely to see how the NFL Network’s program carriage claim against Comcast was resolved. In e-mail correspondence, TTC’s CEO and one of its directors { [REDACTED]

[REDACTED]

[REDACTED] }¹⁸ Comcast and the NFL settled their dispute in May 2009, and that same month TTC made its proposal for increased distribution. Comcast countered, TTC dismissed the counter and broke off negotiations, and then TTC waited months – until the Comcast/NBCUniversal transaction was announced – to tender its notice of intent to file a complaint.¹⁹

In short, TTC’s allegations of unlawful discrimination were nothing more than stale claims raised as part of a long-term effort to renegotiate the terms of its affiliation agreement with Comcast. Allowing TTC to restart its claim in this manner is contrary to the fundamental purpose of a statute of limitations – “protect[ing] a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time.”²⁰

For these reasons, the FCC should reverse the *HDO* and dismiss TTC’s complaint as untimely under 47 C.F.R. § 76.1302(f)(1).

¹⁶ Comcast Exh. 24. { [REDACTED] } See Comcast Exhs. 136, 137, 271, 522, 626.

¹⁷ Solomon Direct, Apr. 25, 2011 Tr. 269:20-270:8; Comcast Exh. 126.

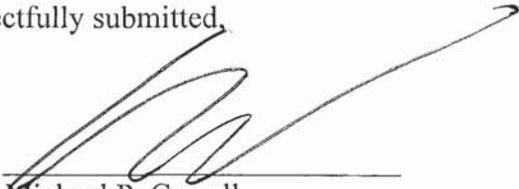
¹⁸ Comcast Exhs. 125, 126.

¹⁹ Solomon Cross, Apr. 25, 2011 Tr. 348:13-350:1; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2130:7; Comcast Exh. 579.

²⁰ *2011 Report & Order*, 26 FCC Rcd at 11522-23.

Respectfully submitted,

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January 19, 2012

CERTIFICATE OF SERVICE

I, David B. Toscano, do hereby certify that on this 19th day of January, 2012, I caused the foregoing Application for Review to be served upon the following individuals by hand-delivery and electronic mail.

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