

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
beIN Sports, LLC,
Complainant,
v.
Comcast Cable Communications, L.L.C.,
And
Comcast Corporation,
Defendants
MB Docket No. 18-90
File No. CSR-8954-P

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 2018

Released: August 2, 2018

By the Chief, Media Bureau

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we dismiss the above-captioned program carriage complaint filed by beIN Sports, LLC (beIN Sports) against Comcast Cable Communications, LLC and Comcast Corporation (collectively, Comcast).1 beIN Sports alleges that Comcast, a vertically integrated multichannel video programming distributor (MVPD), discriminated against it in the selection, terms, and conditions of carriage of two beIN Sports networks, beIN and beIN en Español (beIN-E), in violation of Section 616 of the Communications Act of 1934, as amended (the Act),2 Section 76.1301(c) of the Commission’s rules,3 the Commission’s order approving Comcast’s acquisition of NBCUniversal (NBCU), and the Comcast-NBCU conditions.4

2. After reviewing the Complaint, we find that beIN Sports has failed to put forth sufficient evidence of its program carriage claims to establish a prima facie case.5 In particular, we find that,

1 Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-90, File No. CSR-8954-P (filed March 15, 2018) (Complaint).

2 47 U.S.C. § 536(a)(3).

3 47 CFR § 76.1301(c).

4 47 U.S.C. § 536(a)(3); 47 CFR § 76.1301(c); Applications of Comcast Corporation, General Electric Company and NBCU Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4287, para. 121 & 4358, Appx. A, Sec. III (1) (2011) (Comcast-NBCU Order).

5 47 CFR § 76.1302(d).

although beIN Sports has satisfied some of the elements necessary to establish a *prima facie* case,⁶ it has failed to provide evidence sufficient under the Commission's rules to support its claim that beIN and beIN-E are "similarly situated" to the Comcast-affiliated programming vendors cited in the Complaint, NBC Sports Network (NBCSN) and Universo.⁷ Accordingly, we dismiss beIN Sports' Complaint.

II. BACKGROUND

3. *Program Carriage Provisions.* Section 616(a) of the Act directs the Commission to establish rules governing program carriage agreements and related practices between cable operators or other MVPDs and video programming vendors (VPVs) that, among other things:

prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated [VPV] to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.⁸

4. In implementing these statutory provisions, the Commission adopted Section 76.1301(c) of its rules, which closely tracks the language of Section 616(a)(3).⁹ The Commission's rules also include procedures for the review of program carriage complaints,¹⁰ and prescribe the evidence a complainant must provide in its complaint to establish a *prima facie* case of a violation of the program carriage provisions.¹¹ In evaluating whether a complainant has established a *prima facie* case, the Media Bureau may review the complaint and its attachments only, and may not consider any of the subsequent filings submitted by the parties.¹² With respect to allegations of unlawful discrimination, the program carriage rules require that a complainant provide either direct or circumstantial evidence to support its claim.¹³ In addition, the rules authorize the Chief of the Media Bureau to dismiss a program carriage complaint upon a finding that "the complainant has not established a *prima facie* case of a violation of § 76.1301."¹⁴

5. When the Commission approved Comcast's acquisition of NBCU, it imposed certain conditions concerning carriage of unaffiliated video programming. Among other conditions, the *Comcast-NBCU Order* barred Comcast from discriminating against VPVs, based on affiliation or non-affiliation, in the selection, price, terms, or conditions of carriage.¹⁵ The Commission directed

⁶ 47 CFR § 76.1302(d) (setting forth the elements needed to establish a *prima facie* violation of section 76.1301 of the Commission's rules).

⁷ 47 CFR § 76.1302(d)(3)(iii)(B)(2)(i).

⁸ 47 U.S.C. § 536(a)(3).

⁹ 47 CFR § 76.1301(c) ("No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.").

¹⁰ *Id.* § 76.1302.

¹¹ *Id.* § 76.1302(d).

¹² *See Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11506, para. 17 (2011) (*Program Carriage Order*).

¹³ *See id.* § 76.1302(d)(3)(iii)(B)(1), 76.1302(d)(3)(iii)(B) (2)(i)-(ii).

¹⁴ 47 CFR § 76.1302(g)(4).

¹⁵ *Comcast-NBCU Order*, 26 FCC Rcd at 4287, para. 121 & 4358, Appx. A, Sec. III (1).

complainants to bring claims for a violation of this condition pursuant to the program carriage procedures.¹⁶

6. When a VPV files a program carriage complaint, it carries the burden of proof to establish a *prima facie* case that the defendant MVPD has engaged in behavior that is prohibited by Section 616(a)(3) and the Commission’s program carriage rules.¹⁷ The rules provide that, to establish a *prima facie* case of discrimination based on circumstantial evidence,¹⁸ the complainant must provide evidence in its complaint that: (i) it is a VPV as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission’s rules;¹⁹ (ii) the defendant is an MVPD as defined in Section 602(13) of the Act and Section 76.1300(d);²⁰ (iii) the complainant programmer is similarly situated to a programmer affiliated with the defendant MVPD;²¹ (iv) the defendant MVPD has treated the complainant programmer differently from its similarly situated, affiliated programmer with respect to the selection, terms, or conditions for carriage;²² and (v) the defendant MVPD’s discriminatory conduct has the effect of unreasonably restraining the ability of the complainant programmer to compete fairly.²³ Under the *Comcast-NBCU Order* conditions, a VPV does not need to prove the last of these elements—*i.e.*, that it was unreasonably restrained from competing fairly—as it must under Section 616 of the Act and our program carriage rules.²⁴ However, the VPV must satisfy all of the other program carriage requirements in full.

7. *The Parties.* Incorporated in May 2012, beIN Sports is the owner of sports programming networks beIN and beIN-E, which are unaffiliated with any MVPD and “primarily distribute[] top-flight European soccer, including games of the Spanish La Liga, French Ligue 1 and Italian Serie A as well as FIFA World Cup Qualifiers. . . . In addition to soccer, beIN’s English- and Spanish-language programming includes sports-related news and original programming, motor sports, college sports, rugby, track and field, combat sports, Conference USA football matches, and multiple boxing promotions.”²⁵ Comcast began distributing beIN and beIN-E on certain Comcast systems in August 2012.²⁶ beIN and beIN-E are also distributed by AT&T, Verizon, Cablevision, Cox, and other MVPDs.²⁷

8. Comcast is a cable operator, with more than 22 million subscribers across the United States.²⁸ Comcast is a vertically integrated content provider, owning various broadcast and national cable

¹⁶ *Id.* at 4359.

¹⁷ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2654 (1993) (*1993 Program Carriage Order*).

¹⁸ Based on our reading of the Complaint, beIN Sports is seeking to prove its discrimination claim through circumstantial rather than direct evidence.

¹⁹ 47 CFR § 76.1302(d)(1).

²⁰ 47 U.S.C. § 522(13); 47 CFR § 76.1302(d)(2).

²¹ 47 CFR § 76.1302(d)(3)(iii)(B)(2)(i).

²² *Id.* § 76.1302(d)(3)(iii)(B)(2)(ii).

²³ *Id.* § 76.1302(d)(3)(iii)(A).

²⁴ *Id.* at 4287, para. 121. *See* 47 CFR § 76.1302(d)(3)(A).

²⁵ Complaint at 9.

²⁶ *Id.* at 18, para. 46.

²⁷ *Id.* at 9.

²⁸ *Id.* at 10.

networks, including NBCSN and Universo, the affiliated networks beIN cites in its Complaint.²⁹ According to the Complaint, NBCSN is “a national sports cable network that carries basketball, professional and college American football, soccer, hockey, motor sports, and golf among many other sports events. NBCSN marquee events include the Summer and Winter Olympics, soccer’s English Premier League, PGA, NFL, NBA, NHL, IAAF World Championships, and the Six Nations Championship.”³⁰ Universo is a Spanish-language network that “consists mostly of sports, scripted and reality series, and music programming.”³¹

9. *Existing Carriage and Negotiations.* beIN Sports was initially granted carriage on Comcast’s systems from August 2012 to [REDACTED].³² The initial carriage agreement between the parties gave Comcast [REDACTED].³³ The agreement also specifies that beIN and beIN-E are to be carried on Comcast’s Sports and Entertainment Package (SEP Tier) and beIN-E on Comcast’s XFINITY Latino Package (H Tier) for \$4.99 and \$9.99 a month, respectively, in addition to the price of a cable subscription.³⁴ According to beIN Sports, the two networks currently reach [REDACTED].³⁵ Comcast carries its affiliated networks on more highly penetrated tiers, with NBCSN carried on Comcast’s Starter Tier and Universo on Comcast’s Preferred Tier.³⁶

10. [REDACTED].³⁷ On [REDACTED] Comcast responded with a counteroffer that, among other stipulations, would [REDACTED].³⁸ beIN Sports responded with a counterproposal on [REDACTED].³⁹ beIN Sports argues that Comcast engaged in discriminatory conduct that was based solely on its non-affiliation with Comcast and would result in a reduction of beIN’s fee and [REDACTED].⁴⁰

11. *Carriage Complaint.* On February 13, 2018, beIN Sports notified Comcast of its intent to file a program carriage complaint.⁴¹ Comcast responded to that notification on [REDACTED].⁴² On

²⁹ *Id.* at 10-11.

³⁰ Complaint at 11.

³¹ *Id.* at 12-13.

³² *Id.* at 18, paras. 46-47.

³³ *Id.* at para. 47.

³⁴ *Id.* at 21, para. 50.

³⁵ *Id.*

³⁶ *Id.* beIN Sports notes that Comcast also offers Universo on its Starter tier in some areas, giving both affiliated networks access to the vast majority of Comcast’s subscribers. *Id.*

³⁷ *Id.* at 21, para. 51; *see* Exhibit 5.

³⁸ *Id.* at 2; *see id.* at Exhibit 6.

³⁹ *Id.* at 22, para 53. [REDACTED]. *See id.* at Exhibit 7. [REDACTED]. *Id.*

⁴⁰ *Id.* at 44, para. 96. beIN Sports claims that shortly after it signed the initial carriage agreement Comcast acquired the rights to European soccer programming, including the rights to broadcast the English Premier League and the 2018 and 2022 FIFA World Cups in the United States. *Id.* at 20, para. 49 (arguing “[t]he apparent reason [for Comcast’s adverse carriage decisions] is ... Comcast’s desire to favor its affiliates and starve beIN [and beIN-E] from viewing eyeballs....”).

⁴¹ *Id.* at 13, para. 35 & Exhibit 2.

⁴² *Id.* at Exhibit 3.

March 15, 2018, beIN Sports filed its Complaint against Comcast with the Commission. Comcast filed an Answer to beIN's complaint on May 14, 2018,⁴³ and beIN Sports filed a Reply on June 4, 2018.⁴⁴

III. DISCUSSION

12. Based on our review of the Complaint, we find that beIN Sports has failed to establish a *prima facie* case of program carriage discrimination in violation of Section 616(a)(3) of the Act, Section 76.1301(c) of the Commission's rules, and the *Comcast-NBCU Order* and conditions. As an initial matter, we find that beIN Sports has satisfied the first two elements of a *prima facie* case of discrimination.⁴⁵ In particular, we find that beIN Sports has provided evidence sufficient to demonstrate that it is a VPV and that Comcast is an MVPD as defined in the Act and the Commission's rules.⁴⁶

13. We also find, however, that beIN Sports has failed to provide evidence sufficient to support its claim that the programming it would provide under the renewal agreement is similarly situated to the video programming provided by Comcast's affiliated vendors, NBCSN and Universo, as required under Section 76.1302(d)(3)(iii).⁴⁷ We base this finding on the attachments to the Complaint, which include the term sheets that beIN Sports and Comcast had exchanged before the Complaint was filed.⁴⁸ These term sheets show significant uncertainty about what programming would be provided by beIN Sports in a renewal agreement. The current agreement between the parties includes [REDACTED].⁴⁹ In contrast, [REDACTED]⁵⁰ [REDACTED].⁵¹

14. A *prima facie* case that the programming on an unaffiliated network is "similarly situated" to programming on an affiliated network must be predicated on a greater degree of certainty about the programming that would be featured than that which is presented in the Complaint. Absent a more definitive indication of what programming would be featured on beIN and beIN-E under the renewal agreement, we cannot determine whether beIN Sports going forward would provide programming that is "similarly situated" to the programming on NBCSN and Universo.

⁴³ Comcast Answer to Program Carriage Complaint, MB Docket No. 18-90, File No. CRS-8258-P, at 68-69 (filed May 14, 2018).

⁴⁴ beIN Reply to Comcast Answer, MB Docket No. 18-90, File No. CRS-8258-P, at 68-69 (filed June 4, 2018). Although the parties filed additional pleadings after June 4, 2018, we will not consider them. *1993 Program Carriage Order*, 9 FCC Rcd at 2655, para. 30, n.51 (stating that additional pleadings will not be considered unless specifically requested by Commission staff).

⁴⁵ *Supra* para. 6 (setting forth the elements of a *prima facie* case of program carriage discrimination based on circumstantial evidence).

⁴⁶ *Supra* paras. 7-8; 47 CFR § 76.1302(d)(1), (d)(2). We also find that the Complaint establishes that Comcast has an "attributable interest" in NBCSN and Universo as that term is defined in Section 76.1300(b) of our rules, and thus is "affiliated" with such networks under Section 76.1300(a). Complaint at 10, para. 28. *See also 1993 Program Carriage Order*, 9 FCC Rcd at 2654 ("For complaints alleging discriminatory treatment that favors 'affiliated' programming vendors, the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor. . . .") (footnotes omitted).

⁴⁷ 47 CFR § 76.1302(d)(3)(iii). A *prima facie* determination that affiliated and unaffiliated video programming is similarly situated is based on the evidence provided by a complainant regarding a combination of factors, including program genre, ratings, license fees, target audience, target advertisers, and target programming. *Program Carriage Order*, 26 FCC Rcd at 11505, para. 14.

⁴⁸ *See Program Carriage Order*, 26 FCC Rcd at 11506, para. 17 ("[T]he Media Bureau's determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only.").

⁴⁹ Complaint at Exhibit 4, pages 3-7.

⁵⁰ *Id.* at Exhibit 5.

⁵¹ *See supra* note 41; Complaint at Exhibit 7 [REDACTED]

15. As an alternative and independent basis for our decision, we find that beIN Sports has failed to provide evidence sufficient to support its claim that Comcast has treated beIN or beIN-E differently from Comcast's affiliated program networks with respect to the selection, terms, or conditions of carriage, as required under Section 76.1302(d)(3)(iii).⁵² In particular, because of the significant uncertainty surrounding the programming that would be provided to Comcast in a renewal agreement with beIN Sports—evidence reinforced by the fact that [REDACTED]⁵³—we have no basis for finding that Comcast's proposed terms and conditions for carriage of that programming were discriminatory within the meaning of the Commission's rules.⁵⁴ Therefore, we conclude that beIN Sports has failed to meet its burden to establish a *prima facie* case that Comcast treated beIN or beIN-E differently from its similarly situated, affiliated programmers with respect to the selection, terms, or conditions for carriage.

16. Because beIN has failed to satisfy the *prima facie* test for program carriage discrimination, we need not address Comcast's assertion that beIN's complaint was untimely filed under the *Comcast-NBCU Order* and conditions.⁵⁵

IV. CONCLUSION

17. For the reasons stated above, we conclude that beIN Sports has failed to establish a *prima facie* showing that Comcast discriminated against beIN or beIN-E in favor of NBCSN or Universo on the basis of affiliation in violation of the Act, the Commission's program carriage rules, and the conditions set forth in the *Comcast-NBCU Order*.

V. ORDERING CLAUSE

18. Accordingly, **IT IS ORDERED**, that pursuant to sections 4(i), 4(j) and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 536, and section 76.1302(g) of the Commission's rules, 47 CFR § 76.1302(g), the above-captioned program carriage complaint is **DISMISSED** without prejudice. This action is taken pursuant to the authority delegated in sections 0.283 and 76.1302(g) of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

⁵² 47 CFR § 76.1302(d)(3)(iii).

⁵³ Complaint at Exhibit 6.

⁵⁴ See Complaint at Exhibit 3, p. 1 [REDACTED].

⁵⁵ Comcast Answer at 6, 60-61.