

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

In the Matter of)	
)	
beIN Sports, LLC,)	MB Docket No. 18-384
Complainant,)	
)	File No. CSR-8972-P
v.)	
)	
Comcast Cable Communications, L.L.C.,)	
And)	
Comcast Corporation,)	
Defendants)	

ORDER

Adopted: March 29, 2019

Released: March 29, 2019

By the Chief, Media Bureau:

I. INTRODUCTION

1. By this Order, we dismiss with prejudice the February 5, 2019 program carriage complaint (Third Complaint) filed by beIN Sports, LLC (beIN Sports)¹ against Comcast Corporation and Comcast Cable Communications, LLC (collectively, Comcast) in the above-referenced proceeding. As set forth below, we find that, in filing the Third Complaint, beIN Sports failed to comply with the procedural requirements of the Commission’s rules governing program carriage complaints. Specifically, beIN Sports submitted an additional pleading absent a request from the Media Bureau (Bureau) and failed to satisfy its obligation to present “extraordinary circumstances” that could permit our acceptance of this otherwise prohibited pleading. Thus, we grant Comcast’s motion to strike the Third Complaint.²

II. BACKGROUND

2. *Commission Program Carriage and Pleading Rules.* Section 616 of the Communications Act of 1934, as amended (the Act),³ directs the Commission to establish rules governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors (MVPDs) and video programming vendors (VPVs).⁴ The Act directs the Commission to “provide for expedited review” of any complaints made by VPVs pursuant to section 616.⁵ Under its rules implementing section 616, the Commission established a pleading cycle governing program carriage complaint proceedings that is designed to ensure that we fulfill our mandate to review such complaints

¹ Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P (filed Feb. 5, 2019) (Third Complaint).

² See Comcast Cable Communications, LLC and Comcast Corporation Motion to Strike, MB Docket No. 18-384, File No. CSR-8972-P (filed Feb. 15, 2018) (Motion to Strike).

³ 47 U.S.C. § 536.

⁴ See *id.* § 536(a).

⁵ *Id.* § 536(a)(4).

expeditiously.⁶ Consistent with that mandate, the rules governing program carriage complaints provide that additional motions or pleadings outside of the established pleading cycle will not be accepted without a specific request from Bureau staff⁷ or, absent such a request, a showing of “extraordinary circumstances.”⁸ In addition, Commission rules require program carriage complainants to plead all matters “fully and with specificity”⁹ and to “state fully and precisely all pertinent facts and considerations” relied upon to support the need for relief requested and to demonstrate that such relief would serve the public interest.¹⁰

3. *Program Carriage Complaints.* On March 15, 2018, beIN Sports, a VPV,¹¹ filed a program carriage complaint against Comcast, an MVPD,¹² with the Commission,¹³ alleging that Comcast discriminated against beIN Sports in the selection, terms, and conditions for carriage of two beIN Sports networks, beIN and beIN en Español, in violation of section 616(a)(3) of the Act,¹⁴ section 76.1301(c) of the Commission’s rules,¹⁵ the Commission’s order approving Comcast’s acquisition of NBCUniversal, and the Comcast-NBCU conditions (First Complaint).¹⁶ On August 2, 2018, the Bureau issued an order finding that beIN Sports had failed to establish a *prima facie* case of program carriage discrimination in the First Complaint¹⁷ and dismissed it without prejudice.¹⁸

4. On December 13, 2018, beIN Sports filed its Second Complaint against Comcast,¹⁹ alleging the same violations laid out in the First Complaint with additional information that beIN Sports claims addresses the deficiencies identified by the Bureau when it dismissed the First Complaint.²⁰ On February 5, 2019, beIN Sports filed its Third Complaint against Comcast, repeating some of the claims of the Second Complaint and with an additional allegation of unreasonable refusal to deal.²¹ Specifically, the Third Complaint alleges that Comcast unreasonably refused to deal with beIN Sports in October and November 2018.²²

5. *Motion to Strike.* On February 15, 2019, Comcast filed a motion to strike the Third

⁶ See 47 CFR § 76.1302 (establishing a pleading cycle imposing deadlines of: 1) within 60 days after service of a complaint for a defendant’s answer; 2) within 20 days of service of a defendant’s answer for a complainant’s reply; 3) within 60 calendar days after the complainant’s reply to the defendant’s answer for the Chief of the Media Bureau to release a *prima facie* determination; 4) within 60 calendar days of release of the *prima facie* determination for a decision on the merits without discovery; and 5) within 150 calendar days of release of the *prima facie* determination for a decision on the merits with discovery); see also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, MB Docket No. 92-265, 9 FCC Rcd 2642, 2652, para. 23 (1993) (*1993 Program Carriage Order*) (concluding that this complaint process would “provide the most flexible and expeditious means” for adjudicating program carriage complaints pursuant to Section 616’s “explicit direction . . . to handle program carriage complaints expeditiously”).

⁷ See *1993 Program Carriage Order*, 9 FCC Rcd at 2652, para. 23 (providing that additional filings would not be “accepted or entertained *unless specifically requested by the reviewing staff*”) (emphasis added).

⁸ 47 CFR § 76.7(d) (stating that “additional motions or pleadings by any party will not be accepted,” except as provided in the section or “upon a showing of extraordinary circumstances”); see also *id.* § 76.1302(a) (stating that Section 76.7, 47 CFR § 76.7, of the Commission’s rules governs program carriage complaint proceedings).

⁹ *Id.* § 76.6(a)(1). This provision applies to all pleadings filed pursuant to Part 76 of the Commission’s rules.

¹⁰ *Id.* § 76.7(a)(4)(i).

¹¹ *beIN Sports, LLC, Complainant, v. Comcast Cable Communications, LLC and Comcast Corporation*, Memorandum Opinion and Order, MB Docket No. 18-90, 33 FCC Rcd 7476, 7480, para. 12 (MB 2018) (*beIN I MO&O*) (finding that beIN Sports provided sufficient evidence to demonstrate that it is a VPV as defined in the Act and the Commission’s rules); see 47 CFR § 76.1302(d)(1).

Complaint.²³ On February 22, 2019, beIN Sports filed an opposition to Comcast's motion to strike.²⁴

III. DISCUSSION

6. Based on our review of the Third Complaint, we find that beIN Sports failed to comply with the procedural requirements of our rules governing program carriage complaints. Specifically, beIN Sports submitted its Third Complaint absent a request from Bureau staff²⁵ and failed to demonstrate extraordinary circumstances that could justify the acceptance of an additional, otherwise prohibited pleading outside the established pleading cycle.²⁶ Furthermore, we find that if beIN Sports wanted the Bureau to consider its failure to deal allegation, then it should have fully pleaded that claim in its Second Complaint because that allegation arises from the same set of facts and circumstances in the Second Complaint.²⁷

7. beIN Sports incorrectly contends that it could freely amend its Second Complaint and that it was under no obligation to incorporate the refusal to deal allegation in the Second Complaint.²⁸ In fact, an additional pleading in an ongoing program carriage dispute must either be requested by Bureau staff or accompanied by a showing of extraordinary circumstances that justifies the acceptance of an additional, otherwise prohibited pleading.²⁹ In this case, neither occurred. We did not request an additional pleading. beIN Sports neither claimed nor provided evidence that any "extraordinary circumstances" arose that explain why its refusal to deal allegation "could not have been addressed in the normal pleading cycle"³⁰ for the Second Complaint.³¹

8. Indeed, the events and facts upon which the new allegation in the Third Complaint are predicated occurred and were known before beIN Sports filed the Second Complaint and arise from the same dispute.³² Specifically, beIN Sports filed the Second Complaint on December 13, 2018, after the time beIN Sports alleges that Comcast unreasonably refused to deal with beIN Sports in October and November 2018.³³ Thus, we find no reason why beIN Sports could not have included the "refusal to

(Continued from previous page)

¹² See *beIN I MO&O*, 33 FCC Rcd at 7480, para. 12 (finding that beIN Sports provided sufficient evidence to demonstrate that Comcast is an MVPD as defined in the Act and the Commission's rules); see 47 U.S.C. § 522(13); 47 CFR § 76.1302(d)(2).

¹³ Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-90, File No. CSR-8954-P (filed Mar. 15, 2018) (First Complaint).

¹⁴ *beIN I MO&O*, 33 FCC Rcd at 7476, para. 1 (citing 47 U.S.C. § 536(a)(3) (prohibiting multichannel video programming distributors from unreasonably restraining of the ability of unaffiliated video programming vendors by discriminating on the basis of affiliation or non-affiliation)).

¹⁵ *Id.* (citing 47 CFR § 76.1301(c) (implementing 47 U.S.C. § 536(a)(3))).

¹⁶ *Id.* (citing *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)).

¹⁷ *beIN I MO&O*, 33 FCC Rcd at 7481, para. 17.

¹⁸ *Id.* at 7481, para. 18.

¹⁹ Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384, File No. CSR-8972-P (filed Dec. 13, 2018) (Second Complaint).

²⁰ *Id.* at 5-6, paras. 7, 9-10 (citing *beIN I MO&O*, 33 FCC Rcd at 7480, para. 13).

²¹ Third Complaint at 1, para. 1. We note that the Commission has not adopted a proposed good faith negotiation requirement for program carriage negotiations between vertically-integrated MVPDs and VPVs. See *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in*

deal” allegation in its Second Complaint. Instead, beIN Sports states in its correspondence with Comcast that it did not wish to complicate the filing of the Second Complaint with an additional claim and that it believed including the refusal to deal allegation would have been “counterproductive.”³⁴ This evidence suggests that beIN Sports is engaging in negotiating tactics and, as Comcast notes, such procedural gamesmanship is not permitted under the Commission’s rules.³⁵

9. In its Opposition to Motion to Strike, beIN Sports further asserts that we nonetheless should accept the Third Complaint under what beIN Sports characterizes as the controlling precedent in *MASN*, but that case is inapposite.³⁶ In *MASN*, a new program carriage dispute arose after Mid-Atlantic Sports Network and Comcast settled their previous dispute, presenting a different set of facts and circumstances for a new program carriage complaint.³⁷ The instant case is distinguishable from *MASN* because the dispute between beIN Sports and Comcast is ongoing and the Third Complaint addresses the same dispute and facts that were in existence at the time beIN Sports filed the Second Complaint. Contrary to beIN Sports’s assertions, the Third Complaint is in fact an “extension of arguments already made in [the Second Complaint]”³⁸ and beIN Sports’s choice to exclude its allegation of refusal to deal does not negate the reality that both complaints share a “common nucleus of operative facts.”³⁹ Because the relevant facts were known at the time the Second Complaint was filed,⁴⁰ we conclude that beIN Sports also failed to comply with Commission rules requiring program carriage complainants to plead all claims “fully and with specificity” and to “state fully and precisely all pertinent facts and considerations.”⁴¹

(Continued from previous page) _____

Video Programming Distribution and Carriage, Notice of Proposed Rulemaking, 26 FCC Rcd 11494, 11537-40, paras. 68-71 (2011). Therefore, contrary to beIN Sports’s characterization of its allegation of refusal to deal in the Third Complaint, refusal to deal is not a cause of action in itself; a complainant must demonstrate discrimination under Section 76.1302(d)(3)(iii) of our rules. See 47 CFR § 76.1302(d)(3)(iii); see also *1993 Program Carriage Order*, 9 FCC Rcd at 2649, para. 17.

²² Motion to Strike at 2.

²³ See generally Motion to Strike.

²⁴ beIN Sports, LLC Opposition to Motion to Strike, MB Docket No. 18-384, File No. CSR-8972-P (filed Feb. 22, 2019) (Opp. to Motion to Strike).

²⁵ See *supra* note 7.

²⁶ See 47 CFR § 76.7(d).

²⁷ See *id.* §§ 76.6(a)(1) (stating that “[a]ll matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity”); 76.7(a)(4)(i) (stating that a complaint shall “state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest”).

²⁸ Motion to Strike at 2, para. 3 (citing Third Complaint, Exh. 19 at 2 (Letter from Pantelis Michalopoulos and Georgios Lerios, Steptoe & Johnson, LLP, Counsel for beIN Sports, to Francis Buono, Senior Vice President and Senior Deputy General Counsel, et al., Comcast (Jan. 10, 2019))).

²⁹ See *1993 Program Carriage Order*, 9 FCC Rcd at 2652, para. 23; 47 CFR § 76.7(d); *supra* para. 2 & note 7; see also Motion to Strike at 3, para. 5 & n.8.

³⁰ *Dan Reynolds v. TCA Cable Partners d/b/a Cox Comm’n.*, Memorandum Opinion and Order, 18 FCC Rcd 26693, 26693, para. 2 (MB 2003) (applying the extraordinary circumstances rule); 47 CFR § 76.7(d).

³¹ See Motion to Strike at 4, para. 5. Moreover, beIN Sports made no attempt to obtain Bureau approval before filing the Third Complaint. See *id.* at 4, para. 5 & n.10.

³² See *id.* at 2, paras. 1-2.

³³ *Id.* at 2, para. 2.

IV. CONCLUSION

10. For the foregoing reasons, we dismiss with prejudice the Third Complaint filed by beIN Sports in the above-referenced proceeding.

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i), 4(j), and 616(a)(4) of the Communications Act as amended, 47 U.S.C. §§ 154(i), 154(j) and 536(a)(4), and sections 76.6(a)(1), 76.7(a)(4)(i), and 76.7(d) of the Commission's rules, 47 C.F.R. §§ 76.6(a)(1), 76.7(a)(4)(i), and 76.7(d), that the Motion to Strike of Comcast, filed herein on February 15, 2019, is **GRANTED** and the February 5, 2019 program carriage complaint in the above-captioned proceeding is **DISMISSED** with prejudice.

12. This action is taken pursuant to authority delegated by section 0.283 of the Commission's rules.⁴²

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

(Continued from previous page) _____

³⁴ See *supra* note 28.

³⁵ See Motion to Strike at 4, para. 6 (citing 47 CFR § 76.6(a)(4) (stating that submissions shall “not [be] interposed for any improper purpose” and permitting the Commission to impose sanctions for violations of this provision); 47 CFR § 76.6(c) (stating that parties may not file frivolous pleadings with the Commission and that such abuse of process may be subject to appropriate sanctions)).

³⁶ See Opp. to Motion to Strike at 1, para. 1 (citing *TCR Sports Broad. Holding, LLP, d/b/a Mid-Atlantic Sports Network v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14835, paras. 106-07 (2008) (*MASN*)).

³⁷ See *MASN*, 23 FCC Rcd at 14835, para. 107.

³⁸ See Opp. to Motion to Strike at 3.

³⁹ See *MASN*, 23 FCC Rcd at 14835, paras. 106-07. As noted above, refusal to deal is not in itself a cause of action. See *supra* note 21. However, even assuming *arguendo* that refusal to deal were in itself a cause of action, the standard of review beIN Sports proposes is inapplicable to the instant case. See Opp. to Motion to Strike at 3 (stating that the standard for claim-splitting is whether, were the plaintiff's first suit final, the second suit would be precluded under *res judicata* doctrine) (citations omitted). Contrary to beIN Sports's characterization of the facts of the instant case, there would be claim preclusion with respect to the refusal to deal claim had the Bureau entered a final judgment on the Second Complaint because both complaints arise from the same dispute and share a “common nucleus of operative facts.” Cf. *MASN*, 23 FCC Rcd at 14835, paras. 106-07 (finding that *res judicata* doctrine did not apply because the complaint at issue presented a different set of facts and circumstances than a prior complaint).

⁴⁰ See *supra* para. 7.

⁴¹ 47 CFR §§ 76.6(a)(1); 76.7(a)(4)(i). As discussed above, refusal to deal is not in itself a cause of action; instead, refusal to deal evidence might properly have been included in the Second Complaint as part of beIN Sports's discrimination claim. See *supra* note 21.

⁴² *Id.* § 0.283.