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

In the Matter of	)	
THE TENNIS CHANNEL, INC., Complainant,	)	MB Docket No. 10-204 File No. CSR-8258-P
v.	)	
COMCAST CABLE COMMUNICATIONS, LLC, Defendant.	)	

TO: Marlene H. Dortch, Secretary
ATTN: Chief Administrative Law Judge Richard L. Sippel

PREHEARING CONFERENCE MEMORANDUM

The Tennis Channel, Inc. ("Tennis Channel") hereby responds to the Presiding Judge's November 30, 2010 order, which requests the parties to state their views on the "time needed to complete discovery and prepare for trial" and to raise "any questions or suggestions on trial procedures."[1] Tennis Channel's counsel have conferred with counsel for defendant Comcast Cable Communications, LLC ("Comcast") and, based on that discussion, we include in this memorandum a mutually agreeable proposed schedule intended to allow the parties the time needed to develop a complete record while complying with the statutory requirement, reinforced by the Hearing Designation Order,[2] that this case be given "expedited review."[3]

---

[1] *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 10M-20, at 1 n.2 (Chief ALJ Nov. 30, 2010).

[2] *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Hearing Designation Order & Notice of Opportunity for Hearing for Forfeiture, MB Docket No. 10-204, File No. CSR 8258-P, DA 10-1918 (Oct. 5, 2010), at ¶ 23 ("HDO") (directing the Presiding Judge to issue a decision "on an expedited basis").

Procedural Background

On January 5, 2010, Tennis Channel filed a complaint with the FCC challenging Comcast's violation of Section 616 of the Communications Act,[4] by refusing to grant Tennis Channel the favorable carriage it uniformly grants the similarly situated sports networks in which it holds a financial interest. On October 5, 2010, the Media Bureau issued a Hearing Designation Order ("HDO"), finding that Tennis Channel had made a *prima facie* case that the channel is (i) similarly situated to and competitive with Comcast-affiliated networks such as the Golf Channel and Versus; (ii) given less favorable carriage by Comcast than it gives to its own networks; and (iii) unreasonably restrained in its ability to compete fairly as a result of Comcast's discriminatory conduct.[5]

Pursuant to the HDO,[6] Comcast and Tennis Channel elected to seek resolution of the matter through a private mediation. On November 18, 2010, the parties jointly notified the Commission that they had been unable to resolve the dispute in this fashion.[7] Pursuant to the HDO, the matter was thus referred to the Presiding Judge for a hearing on the designated issues.[8]

The HDO directed the Presiding Judge to hold a hearing and issue an Initial Decision on the following issues:

---

[3] 47 U.S.C. § 536(a)(4).

[4] 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c).

[5] *HDO*, *supra* ¶¶ 17-21.

[6] *See HDO* ¶ 22.

[7] *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Second Joint Notice Concerning Status of Alternative Dispute Resolution, MB Docket No. 10-204, File No. CSR-8258-P (filed Nov. 18, 2010).

[8] *HDO* ¶ 23.

(a) . . . whether Comcast engaged in conduct the effect of which is to unreasonably restrain the ability of The Tennis Channel to compete fairly by discriminating in video programming distribution on the basis of complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by The Tennis Channel. . .;

(b) . . . whether Comcast should be required to carry The Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers, and if so, the price, terms, and conditions thereof; and/or whether Comcast should be required to implement such other carriage-related remedial measures as are deemed appropriate; and

(c) . . . whether a forfeiture should be imposed on Comcast.[9]

The Hearing Designation Order also summarily rejected, on the basis of binding legal precedent, certain defenses raised by Comcast and directed the Presiding Judge to resolve the remaining factual disputes.[10]

Time Needed to Conduct Discovery

Tennis Channel estimates that the discovery process can be conducted within eleven weeks and completed by March 11, 2011. To complete discovery on this timetable, Tennis Channel respectfully requests that the Presiding Judge allow tailored document discovery and limited depositions that are focused on the factual issues surrounding Comcast's 2009 decision to refuse to Tennis Channel the favorable carriage it grants its affiliated networks.[11] Tennis Channel also anticipates conducting tailored discovery concerning certain defenses that Comcast has raised in its Answer.

---

[9] *HDO* ¶ 24.

[10] *See, e.g.*, *HDO* ¶¶ 2 n.4, 12 n.57, 22 n.118.

[11] Specifically, the parties should be ordered to exchange a limited number of document requests that are narrowly tailored to result in the production of relevant and admissible evidence.

Tennis Channel notes that the scope of discovery is limited by the HDO's holding that this case does not "involve[] a request to renegotiate a term in an existing contract" and its rejection of Comcast's argument that the case was barred by its program carriage agreement with Tennis Channel.[12] Instead, the Bureau found, the case "involve[s] [a] contract[] which left a carriage decision to the defendant's discretion, and the gravamen of the complaint[] is whether the defendant's exercise of such discretion was consistent with its obligations under Section 616(a)(3)." The Media Bureau therefore excluded issues relating to Comcast's rights under the parties' 2005 agreement from its hearing designation: "It is [Comcast's] refusal [to exercise its discretion in a non-discriminatory fashion], *not the terms of the contract*, which forms the basis for The Tennis Channel's complaint."[13]

In rejecting Comcast's contract defense, the Media Bureau followed precedent created both by the Bureau[14] and the Chief Administrative Law Judge.[15] It further explained that a contrary holding would violate the public interest and the Commission's statutory mandate under Section 616, because it would improperly trigger the statute of limitations and could thereby "preclude programmers from bringing legitimate claims regarding allegedly discriminatory actions occurring more than one year after a contract was executed."[16]

---

[12] *HDO* ¶ 15 n.80.

[13] *HDO* ¶ 12 (emphasis added).

[14] Although it noted that "Comcast claims that these cases were wrongly decided, [the Media Bureau] disagree[d] and [found] no reason to ignore or reverse this precedent." *HDO* ¶ 13 n.63.

[15] *HDO* ¶ 15 n.81 (citing *NFL Enterprises LLC v. Comcast Cable Comms., LLC*, Mem. Op. & Order, FCC 09M-36, ¶ 3 (Chief ALJ 2009) ("NFL Enterprises seeks to vindicate its alleged private contractual rights in the New York litigation and its alleged federal and regulatory rights in this case . . . . The statutory and regulation issues in this case are separate and distinct from the contractual issues in the New York action.")).

[16] *HDO* ¶ 15 n.82.

As the Chief Administrative Law Judge has held, "rulings on the law in [a hearing designation order] are binding on the Presiding Judge."[17] Other hearing officials have followed this principle,[18] and the Commission itself has reiterated that issues decided in an HDO are "beyond [the] jurisdiction" of the hearing authority.[19]

In this case, the Media Bureau decided in the HDO that this case does not "involve[] a request to renegotiate a term in an existing contract" and that arguments arising from Comcast's claim to the contrary—such as its assertion that Tennis Channel's claim is time-barred—are outside the scope of the hearing.[20] Those matters, therefore, should be excluded from discovery.

Pre-Trial Schedule

Based on this discovery schedule and to assist the Presiding Judge in reaching a decision "on an expedited basis,"[21] Tennis Channel and Comcast have agreed to complete the discovery process and be prepared for a hearing the week of March 28, 2011, should that fit with the Presiding Judge's calendar. Consistent with that timing and subject to the Presiding Judge's preferences, the parties have jointly agreed to the pre-trial schedule set forth in the attached

---

[17] *Peninsula Communications, Inc.*, Initial Decision of Chief Admin. Law Judge Richard L. Sippel, 18 FCC Rcd 12349, 12370 (Chief ALJ 2003), *vacated on other grounds*, 20 FCC Rcd 11408 (FCC 2005).

[18] *See, e.g.*, *American Mobilphone, Inc. & Ram Technologies, Inc.*, 10 FCC Rcd 12297, 12299 (WTB 1995) (ALJ acknowledged that he had "'no jurisdiction' to enter a holding as to" a matter not designated for hearing); *Calvary Educational Broad. Network, Inc.*, 9 FCC Rcd 575, 577 (Rev. Bd. 1994) (Review Board is "bound by [a] determination as set forth in [a] Hearing Designation Order"); *Real Life Educational Found. of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2578 (Rev. Bd. 1991) ("We recognize that the Board is bound by a hearing designation order . . . where 'specific reasons are stated for . . . action or inaction in a designation order.'").

[19] *Algreg Cellular Engineering*, 12 FCC Rcd 8148, 8155 (FCC 1997).

[20] *HDO* ¶ 15 n.80. *See also HDO* ¶ 23 ("we direct the Presiding Judge to . . . conduct a *de novo* examination of all *relevant* evidence in order to make an Initial Decision on each of the *outstanding* factual and legal issues"—but not on the issues already decided) (emphasis added).

[21] *HDO* ¶ 23.

Proposed Order. Tennis Channel believes that this schedule will provide ample time for the parties to conduct targeted discovery and develop a record that will facilitate a full and fair hearing.

Questions and Suggestions on Trial Procedures

Tennis Channel proposes that the hearing be streamlined by omitting full live direct examinations and, instead, having the parties exchange and submit to the Presiding Judge written direct testimonies for each witness in advance. At the hearing, the parties would be permitted to conduct brief live direct examinations to highlight important aspects of testimony, with the remainder of the time reserved for cross-examination and redirect. In order to ensure that each party is afforded a full and fair opportunity to be heard, Tennis Channel respectfully requests that the Presiding Judge provide guidance to the parties concerning the amount of time that should be spent on cross-examination of each witness.

* * *

Tennis Channel appreciates the opportunity to provide these suggestions to the Presiding Judge and would be pleased to supply any additional information that would be helpful to the Presiding Judge in advance of the prehearing conference scheduled for December 14.

Respectfully submitted,

Stephen A. Weiswasser
Paul W. Schmidt
Robert M. Sherman
Leah E. Pogoriler
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Counsel to The Tennis Channel, Inc.

December 8, 2010

CERTIFICATE OF SERVICE

I, Robert M. Sherman, hereby certify that on this eighth day of December, 2010, I caused a true and correct copy of the foregoing Prehearing Conference Memorandum to be served by first class mail, postage prepaid, upon:

Michael P. Carroll
David B. Toscano
Edward N. Moss
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, New York 10017

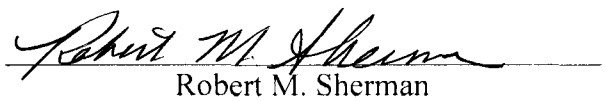
James L. Casserly
David P. Murray
Michael Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, D.C. 20006-1238

David H. Solomon
J. Wade Lindsay
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, D.C. 20037

Counsel to Comcast Cable Communications, LLC

Gary Oshinsky
Investigations and Hearings Division, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Suite 4-C330
Washington, D.C. 20554

William Knowles-Kellett
Investigations and Hearings Division, Enforcement Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325



Robert M. Sherman

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

In the Matter of	)	
	)	
THE TENNIS CHANNEL, INC.	)	MB Docket No. 10-204
	)	File No. CSR-8258-P
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC	)	

[PROPOSED] PROCEDURAL AND HEARING ORDER

Issued: December ____, 2010 Released: December ____, 2010

IT IS ORDERED that incident to the Prehearing Conference held on December 14, 2010, the following procedural and hearing dates governing the above-captioned action ARE ESTABLISHED.

December 17, 2010	Document requests served; proposed protective order(s) submitted for entry.
December 29, 2010	Responses and objections to document requests served.
December 29, 2010	Document production begins; parties may serve fact deposition notices.
January 28, 2011	Document production ends.
February 18, 2011	Complainant's final expert reports filed.
February 25, 2011	Defendant's final expert reports filed; parties may serve expert deposition notices.
March 11, 2011	Deadline for completing depositions; discovery ends.
March 18, 2010	Trial briefs (optional) exchanged by **12:00 noon.**

March 18, 2011	Hearing exhibits and written direct testimony exchanged by **12:00 noon.**[1]
March 28, 2011	Document Admissions Session commencing at **10:00 a.m.**
March 29, 2011	Hearing commences at **9:30 a.m.**[2]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Chief Administrative Law Judge

---

[1] Hearing exhibits and written direct testimony must be received by all parties and the Presiding Judge not later than this date. Exhibits are to be serially numbered and assembled in binders. The name of the party introducing the exhibits must be shown on each exhibit (*e.g.*, Tennis Channel Exh. 1). All pages within each exhibit must be consecutively numbered and internal numbering by hand is accepted. Tabbed dividers indicating exhibit numbers shall be used. If official notice of documents is requested, they must be assembled, identified by source, given an exhibit number, and exchanged on the date set. Index with descriptive title of each exhibit, number of pages in each exhibit, and identification of the sponsoring witness(es) of each exhibit shall be included.

[2] Each party has the option of conducting a direct examination of each of its witnesses to address any factual issues raised for the first time in the opposing party's written direct testimony and to briefly summarize the witness's written direct testimony before being subject to cross-examination and redirect.