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

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In the Matter of)	MB Docket No. 10-204
)	
THE TENNIS CHANNEL, INC.)	File No. CSR-8285-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS, LLC)	
)	
Complaint Alleging Program Carriage Discrimination)	

ORDER

Issued: February 28, 2011

Released: February 28, 2011

1. On February 15, 2011, the Tennis Channel, Inc. filed a motion asking the Presiding Judge to compel Comcast Cable Communications, LLC, to produce in full the documents Tennis Channel had requested in its Document Request No. 12, as supplemented.¹ On February 18, 2011, Comcast filed an opposition to Tennis Channel’s motion to compel² and four days later the Tennis Channel filed a reply to that opposition.³ For the reasons set forth below, Tennis Channel’s motion is granted in part and denied in part.

BACKGROUND

2. On December 9, 2010, the Presiding Judge released an order establishing an “expedited discovery and procedural schedule” proposed by the parties that included document requests.⁴ Eight days later the Tennis Channel submitted 12 document requests to Comcast.⁵ In Document Request No. 12, the Tennis Channel asked Comcast

¹ “Tennis Channel’s Motion to Compel Production of Documents by Comcast” (Feb. 15, 2011). Tennis Channel filed a clarification to this request in a letter on February 17, 2011.

² “Comcast’s Opposition to Tennis Channel’s Motion to Compel” (Feb. 18, 2011).

³ “Tennis Channel’s Reply in Support of Motion to Compel Production of Documents” (Feb. 22, 2011) (“Tennis Channel’s Reply”).

⁴ Order, FCC 10M-22 (released Dec. 9, 2010) at 1.

⁵ “Document Requests of the Tennis Channel, Inc.” (Dec. 17, 2011).

for “[a]ll documents concerning sports programming or program services produced in the twenty-four (24) months preceding [its] response to this request in response to a government request, including non-public versions of Comcast’s responses to [specified] FCC Requests” in the FCC’s proceeding considering Comcast’s acquisition of control of NBC Universal.⁶

3. On January 20, 2011, the Commission issued an order approving with conditions Comcast’s acquisition of control of NBC Universal.⁷ The unredacted copy of the order includes “evidence set forth in the Technical Appendix [showing] that Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons.”⁸ The Commission made available copies of the unredacted order only to Comcast and other parties that had signed protective orders in the *Comcast/NBC Universal* proceeding.⁹ The Commission excised the confidential evidence (including evidence in the Technical Appendix) from the publicly-available version of the *Comcast/NBC Universal Order*.

4. Shortly after the *Comcast/NBC Universal Order* was released, the Tennis Channel supplemented its document request to include “copies of the unredacted materials that Comcast has received from the FCC in connection with [the *Comcast/NBC Universal* proceeding].”¹⁰ That request included production of a copy of the unredacted *Comcast/NBC Universal Order*.

5. Comcast raised a number of objections to Document Request No. 12.¹¹ With a few exceptions, Comcast refused to provide those documents to the Tennis Channel and supplied redacted copies of the documents that it did produce. Comcast also declined to produce any documents covered by the Tennis Channel in its supplemental request, including an unredacted copy of the *Comcast/NBC Universal Order*.

⁶ *Id.*, Schedule A.

⁷ *Application of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, FCC 11-4 (released Jan. 20, 2011) (“*Comcast/NBC Universal Order*”).

⁸ *Id.* at ¶ 117. The Commission, in the Technical Appendix states that its “analysis of Comcast’s data on carriage and channel placement shows (1) that Comcast currently favors its affiliated programming in making such decisions and that (2) this behavior stems from anticompetitive motives rather than due to reasons that arise from vertical efficiencies.” *Id.*, *Technical App.* at ¶ 65.

⁹ The Tennis Channel was a participant to the *Comcast/NBC Universal* proceeding but it was not a signatory to the protective order in that proceeding.

¹⁰ See Comcast Opposition, Exh. 4 at 4 (e-mail from Robert Sherman to Edward N. Moss).

¹¹ See “Defendant’s Responses and Objections to Complainant’s Document Requests” (Dec. 29, 2010).

PARTIES' PLEADINGS

Motion to Compel

6. The Tennis Channel states that Document Request No. 12, as supplemented, involves “evidence that Comcast submitted to the Commission concerning its treatment of affiliated sports networks compared to its treatment of unaffiliated sports networks, as well as the Commission’s unredacted analysis regarding that evidence.”¹² The Tennis Channel maintains that this evidence is directly relevant to the core issues in this proceeding and thus should be produced. The Tennis Channel complains that Comcast, in the material it did produce, inappropriately redacted information not relating to Golf Channel and Versus and thus excluded evidence relating to other sports networks at issue in this case. The Tennis Channel asks the Presiding Judge to issue an order requiring Comcast to produce in full the documents requested in Document Request No. 12, as supplemented.¹³

Opposition

7. Comcast argues that the Tennis Channel’s request that Comcast produce documents submitted in the *Comcast/NBC Universal* docket is inconsistent with its earlier position, advanced in the *Comcast/NBC Universal* proceeding, that this proceeding and the *Comcast/NBC Universal* proceeding are unrelated. Comcast claims that the Tennis Channel’s request is contrary to the parties’ agreement to resolve their principal outstanding disputes over documents without motion practice.¹⁴ Comcast also argues that the Tennis Channel’s supplemental request is inconsistent with the parties’ agreement to permit a maximum of 12 document requests. Finally, Comcast claims that it cannot produce the *Comcast/NBC Universal Order* without violating the protective orders issued in the *Comcast/NBC Universal* proceeding.

DISCUSSION

8. The Hearing Designation Order directs “the Presiding Judge to develop a full and complete record in the instant hearing proceeding.”¹⁵ Consistent with that directive,

¹² Tennis Channel Reply at 1.

¹³ If the Presiding Judge grants its motion, the Tennis Channel “reserves the right (a) to re-depose any Comcast witness that may be deposed by the time Comcast produces these documents and Tennis Channel has had an opportunity to review them, and (2) to include in its experts’ written direct testimony any analysis of the documents once Comcast produces them.” Tennis Channel Motion at 17.

¹⁴ At the same time Comcast states that it is “not arguing that Tennis Channel has violated that agreement by moving to compel production of documents responsive to Request No. 12.” Comcast Opposition at 8.

¹⁵ *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC, Complaint Alleging Program Carriage Discrimination*, Hearing Designation Order, 25 FCC Rcd 14149,

the expedited time schedule established for the adjudication of this case provides for the opportunity for document requests.¹⁶ Under the Commission's discovery rules, a party to a hearing generally may request from another party documents under its "possession, custody or control" relating to "any matter, not privileged, which is relevant to the hearing issues."¹⁷ The documents Comcast submitted to the FCC in the *Comcast/NBC Universal* proceeding are within Comcast's possession, and Comcast does not rebut the Tennis Channel's showing that these materials are relevant to the issues in this case.¹⁸ As Comcast already has collected and produced these documents in the *Comcast/NBC Universal* proceeding, producing those documents to the Tennis Channel in this proceeding would not be burdensome to Comcast. Moreover, the protective orders in the *Comcast/NBC Universal* do not preclude Comcast from separately producing in this case the documents it earlier had submitted to the FCC in the *Comcast/NBC Universal* proceeding.¹⁹ For these reasons, Comcast must fully comply with Document Request No. 12 as it relates to the documents Comcast submitted to the Commission in the *Comcast/NBC Universal* proceeding.

9. Different considerations, however, apply to the production of the unredacted *Comcast/NBC Universal Order* and other material Comcast received from the Commission pursuant to the protective orders in that proceeding. Those protective orders bar any person obtaining access to Confidential and Highly Confidential Information submitted by third parties in the *Comcast/NBC Universal* proceeding from disclosing that

14162 (¶ 23) ("HDO"). *See generally In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV, v. Time Warner Cable Inc.*, Order, 24 FCC Rcd 1581, 1582 (¶ 2) (2009) (directing the Presiding Judge to adjudicate the case "as expeditiously as possible, consistent with the mandates of fairness and due process").

¹⁶ Order, FCC 10M-22 (released Dec. 9, 2010) at 1.

¹⁷ 47 C.F.R. § 1.311(b), 1.325(a). *In re Applications of RKO GENERAL, INC. (KHJ-TV) Los Angeles for Renewal of Broadcasting License*, 97 FCC 2d 423, 426 (¶ 7) (1984) (Citing "general rule" that "all documents that are relevant to the hearing issues and reasonably calculated to lead to the discovery of admissible evidence are to be produced."). *See also* 47 C.F.R. § 1.311(b) ("It is not ground for objection . . . that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.').

¹⁸ The Tennis Channel has alleged that Comcast, in supplying documents to the Tennis Channel, has redacted information relating to sports channels other than the Golf Channel and Versus. *See Tennis Channel Reply* at 3. There is no justifiable basis for such redactions and Comcast will produce those documents to the Tennis Channel without redactions.

¹⁹ As noted above, Comcast does not claim that Tennis Channel has violated its agreement with Comcast by moving to compel production of documents responsive to Request No. 12. *See Comcast Opposition* at 8.

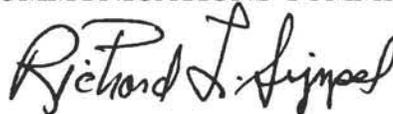
information to any persons that are not authorized to receive it.²⁰ Those protective orders specify that documents containing Confidential and Highly Confidential Information can be used “solely for the preparation and conduct of the [*Comcast/NBC Universal* proceeding . . . and any subsequent judicial proceeding . . . and . . . [not] for any other purposes, including without limitation business, governmental, or commercial purposes, or in other administrative regulatory or judicial proceedings.”²¹ The Presiding Judge cannot lawfully compel Comcast to produce documents in violation of the protective orders issued in the *Comcast/NBC Universal* proceeding. Thus, to the extent the Tennis Channel requests documents that Comcast obtained pursuant to those protective orders, the motion must be denied.

ORDER

10. According, IT IS ORDERED that “Tennis Channel’s Motion to Compel Production of Documents by Comcast” filed on February 15, 2011, IS GRANTED IN PART AND DENIED IN PART.

11. IT IS FURTHER ORDERED that documents required to be produced by Comcast pursuant to this ruling in this expedited proceeding must be hand-delivered to Tennis Channel’s counsel as soon as practicable.²²

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Chief Administrative Law Judge

²⁰ *In the Matter of Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Protective Order, 25 FCC Rcd 2133, 2135-36 (Med. Bur. 2010).

²¹ *Id.* at 2135 (¶ 9).

²² Courtesy copies of this Order are sent to each counsel by e-mail on date of issuance.