

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

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

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

**TRIAL BRIEF  
OF THE TENNIS CHANNEL, INC.**

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April 15, 2011

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REDACTED VERSION

The Tennis Channel, Inc. (“Tennis Channel”) submits this Trial Brief in support of its claim that Comcast Cable Communications, LLC (“Comcast”) has discriminated against Tennis Channel, in violation of Section 616 of the Communications Act and the Commission’s program carriage rules, by illegally favoring competing networks in which it has a financial interest over Tennis Channel in the terms on which it carries Tennis Channel and those networks.

## INTRODUCTION

The fundamental facts in this case are straightforward. As we will prove, Tennis Channel is in all relevant respects comparable to Comcast’s affiliated sports services, Golf Channel and Versus. Comcast nonetheless distributes Tennis Channel to far fewer of its subscribers than receive *any* of its affiliated sports networks—almost exclusively on a limited sports tier, for which Comcast charges a premium fee, received by less than ██████████ of Comcast’s subscribers. As Comcast executives acknowledge, placement on narrowly-penetrated sports tiers like the one on which it carries Tennis Channel severely undermines any sports network’s ability to compete in the cable marketplace.

But the Comcast-affiliated networks that compete against Tennis Channel are not subject to these handicaps. Instead, Comcast provides those networks with far broader distribution; even in the case of sports networks that Comcast previously carried exclusively on the sports tier, or not at all, Comcast provided dramatically broader carriage once an equity acquisition was effected. Not one of Comcast’s affiliated sports networks is forced to accept the limited distribution that Comcast affords to Tennis Channel.

While Comcast’s *experts* have offered a litany of *post hoc* reasons for Comcast’s decision in 2009 to leave Tennis Channel on its sports tier—after the parties had negotiated regarding broader carriage, and in light of evidence overwhelmingly establishing that it was entitled to far greater distribution—the Comcast *executives* who actually made the decision to

deny improved carriage to Tennis Channel [REDACTED]. Nor have these decisionmakers ever applied to Comcast's competing affiliated sports networks any of the standards that they claim to have applied to Tennis Channel when they granted their affiliates far broader carriage. The evidence establishes that, in denying Tennis Channel fair carriage, Comcast executives focused on the facts [REDACTED]. Indeed, Comcast's own documents show that [REDACTED].

Comcast's discriminatory use of its leverage as a distributor has harmed Tennis Channel and unfairly advantaged Comcast-affiliated sports networks in the competition between them and Tennis Channel. That conduct is at the heart of Section 616's proscriptions.

## FACTS

### I. Comcast's Discrimination Against Tennis Channel

Since its launch in 2003, Tennis Channel has developed steadily into a robust competitor in the sports television arena. Indeed, "[e]arly in its history, Tennis Channel made the strategic decision to improve its . . . cable carriage profile. . . through a systematic plan to enhance the quality of its technical service, content production, and most importantly, the range of tennis events it made available"; in keeping with this strategy, Tennis Channel generated new and valuable original programming, launched a high definition channel, and acquired the rights to telecast virtually every top tennis tournament in the world.<sup>1</sup> By 2008, Tennis Channel was

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<sup>1</sup> Written Direct Testimony of Ken Solomon at ¶¶ 10-12 [hereinafter "Solomon Direct"].

telecasting more than [REDACTED] of worldwide event coverage—an average of more than [REDACTED] every week of the year; the vast majority of these events were Tennis Channel exclusives within the United States.<sup>2</sup> And by 2009, Tennis Channel had secured carriage rights to all four of tennis’s Grand Slam events—the French Open, the Australian Open, Wimbledon, and the U.S. Open.<sup>3</sup>

Notwithstanding the network’s growth since its debut, Comcast has stranded Tennis Channel on its sports tier, which is received by less than [REDACTED] of its subscribers and is available only for a per-subscriber premium charge of [REDACTED] per month.<sup>4</sup> In contrast, Tennis Channel has far greater average penetration among its other distributors. None of the companies that [REDACTED]—DIRECTV, Dish Network, Verizon FiOS, and AT&T U-Verse<sup>5</sup>—and none that have entered into carriage deals since Tennis Channel achieved its current programming profile— requires subscribers to buy an expensive sports tier to get Tennis Channel.<sup>6</sup> These [REDACTED] have committed to carry Tennis Channel on tiers reaching [REDACTED] of their subscribers— approximately [REDACTED] the penetration Comcast provides.<sup>7</sup>

Because this disparity severely hampered Tennis Channel’s competitive position

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<sup>2</sup> *Id.* at ¶ 12.

<sup>3</sup> *Id.* at ¶ 13.

<sup>4</sup> In all, Comcast distributes Tennis Channel to just [REDACTED] of its subscribers. Tennis Channel Exs. 130, 60, 113; Gaiski Dep. at 19:17-21, 31:25-32:2.

<sup>5</sup> Bond Dep. at 21:6-11.

<sup>6</sup> Written Direct Testimony of Hal Singer at ¶ 54 & table 6 [hereinafter “Singer Direct”].

<sup>7</sup> *Id.*; Solomon Direct at ¶ 8. [REDACTED]

and potential, in early 2009 Tennis Channel’s CEO, Ken Solomon, initiated negotiations with Comcast seeking broader distribution on Comcast’s systems.<sup>8</sup> During these discussions, Comcast’s then-Executive Vice President of Content Acquisition, Madison Bond, insisted that Tennis Channel provide Comcast with an “incentive” for broader carriage, beyond the substantially enhanced content that Tennis Channel was already providing without an increased rate.<sup>9</sup> In light of Comcast’s unique market power, and the correspondingly unique harm that Tennis Channel experiences by receiving only limited Comcast carriage, [REDACTED]

[REDACTED]

Unfortunately, Mr. Bond’s demand for an “incentive” was mere pretext; clearly, Comcast already had decided not to carry Tennis Channel more broadly. Rather than continue to negotiate or even to make a counter-offer on price, which would have reflected Comcast’s genuine interest in obtaining a rate “incentive,” Comcast cut off the discussions completely.<sup>13</sup>

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<sup>8</sup> *Id.* at ¶ 15.

<sup>9</sup> *Id.* at ¶¶ 20-21, 25. [REDACTED]

<sup>10</sup> Solomon Direct at ¶ 24.

<sup>11</sup> *Compare* Tennis Channel Ex. 144, *with* Exs.164 *and* 155.

<sup>12</sup> *See* Tennis Channel Ex. 70.

<sup>13</sup> Comcast claims that Mr. Bond did not close the door to negotiations, but rather gave Mr. Solomon the option to solicit local systems for broader carriage. *See* Tennis Channel Ex. 19. (continued...)

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And Mr. Bond's successor has now conceded that [REDACTED]

[REDACTED]

[REDACTED]<sup>14</sup>

## II. Comcast's Preferential Treatment of Its Affiliated Networks

Comcast's treatment of its affiliated sports networks—Golf Channel and Versus, which Comcast majority-owns; and the MLB Network, NHL Network, and NBA TV, in which Comcast has partial ownership interests—is far different.<sup>15</sup> Comcast carries each of these affiliates on broader tiers—the [REDACTED] Expanded Basic or Digital Starter tier in the case of its majority-owned and controlled affiliates, and the [REDACTED] Digital Preferred tier for the partially-owned services.<sup>16</sup> None of Comcast's affiliates is limited to the pay-extra sports tier where Comcast carries Tennis Channel.<sup>17</sup>

Comcast's affiliated networks clearly enjoy carriage benefits that are largely reserved to them. And the evidence is overwhelming that Comcast's equity interest in its affiliates trumps all other carriage considerations. Comcast's carriage executives press their

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But Mr. Solomon understood the response as a termination of the negotiation, [REDACTED]

<sup>14</sup> Rigdon Dep. at 143:13-19, 145:14-20.

<sup>15</sup> Bond Dep. at 232:8-11, 236:10-18, 247:5-16. Comcast wholly owned Golf Channel and Versus in 2009 and prior to its acquisition of NBC Universal; Comcast now owns a majority interest in both networks, but after several years, it may again own both in whole. *See* Tennis Channel Ex. 102 at 11-16.

<sup>16</sup> The Expanded Basic and Digital Starter tiers are Comcast's most broadly distributed tiers, except for a limited category of channels that, by federal law, must be distributed to all subscribers. Gaiski Dep. at 18:16-25, 19:15-16, 20:19-21:10; Tennis Channel Ex. 113.

<sup>17</sup> Singer Direct at ¶ 20, Table 1; Bond Dep. at 44:19-45:12.

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hedge yourself a bit is to get into it yourself.”<sup>23</sup> Mr. Burke also admitted that Comcast treats its affiliates like “siblings as opposed to like strangers” and affords them “a better audience” and a “different level of scrutiny” than unaffiliated channels.<sup>24</sup>

Against this backdrop, it is not surprising that in approving Comcast’s acquisition of NBC Universal, the Commission concluded “(1) that Comcast currently favors its affiliated programming in making [carriage and channel placement] decisions and that (2) this behavior stems from anticompetitive motives.”<sup>25</sup>

### LEGAL STANDARD

Congress passed the 1992 Cable Act to address its concerns that vertically-integrated cable operators have “undue market power . . . compared to . . . video programmers”<sup>26</sup> and that, in negotiations with unaffiliated networks, cable operators can “abuse [their] locally-derived market power to the detriment of programmers” and consumers.<sup>27</sup> To address these concerns, Congress directed the FCC to adopt regulations that prohibit vertically-integrated MVPDs from “engaging in conduct the effect of which is to unreasonably restrain the ability of

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<sup>23</sup> Tennis Channel Ex. 69; Singer Direct at ¶ 45.

<sup>24</sup> Tennis Channel Ex. 7. Mr. Burke has sought in this proceeding to minimize his “siblings” comment, saying that it related mostly to the sharing of “company facilities such as meeting rooms, cafeteria, and fitness center.” Tennis Channel Ex. 19, Comcast Answer, Ex. 2, ¶ 4. But that position mischaracterizes his original testimony, which acknowledged that Comcast’s affiliates “get a different level of scrutiny” than unaffiliated networks. Tennis Channel Ex. 7.

<sup>25</sup> Tennis Channel Ex. 13, *Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc. for Consent to Assign Licenses & Transfer Control of Licenses*, Mem. Op. & Order, MB Docket No. 10-56, FCC 11-4, Tech. App., at ¶ 65 (rel. Jan. 20, 2011) (“*NBC Universal Order*”).

<sup>26</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(2). *See also id.* § 2(a)(5).

<sup>27</sup> Tennis Channel Ex. 1, Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 24 (1991).

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an unaffiliated video programming vendor 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.”<sup>28</sup>

Section 616 is not limited to cases in which a cable operator affirmatively treats an unaffiliated network unfavorably because it is unaffiliated—although the evidence will show that this kind of discrimination occurred here. On its face, the proscription reaches conduct constituting discrimination “on the basis of affiliation *or* nonaffiliation”<sup>29</sup>—including situations in which a cable operator takes steps to advantage its affiliates over non-affiliates.

In order to determine whether a cable operator has violated Section 616, the FCC considers three issues:

1. Whether the unaffiliated network is similarly situated with an affiliated network.<sup>30</sup> The networks need not be “identical”; instead, it is sufficient that they compete with each other (for ratings, advertisers, and programming, for example) and have generally comparable popularity.<sup>31</sup>
2. Whether the similarly situated channels are being treated differently because of their affiliations.<sup>32</sup>

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<sup>28</sup> 47 U.S.C. § 536(a)(3), 47 C.F.R. § 76.1301(c) (Tennis Channel Exs. 5-6).

<sup>29</sup> 47 U.S.C. § 536(a)(3) (Tennis Channel Ex. 5) (emphasis added).

<sup>30</sup> *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Hearing Designation Order, MB Docket No. 10-204, File No. CSR-8258-P, DA 10-1918, at ¶¶ 17-18 (rel. Oct. 5, 2010) [hereinafter *HDO*] (Tennis Channel Ex. 11); *Herring Broad., Inc. v. Time Warner Cable Inc.*, et al., Mem. Op. & Hearing Designation Order, 23 FCC Rcd 14787, at ¶ 75 (MB 2008) [hereinafter *Omnibus HDO*] (Tennis Channel Ex. 3). See also *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd. 15783, at ¶¶ 27-28 (MB 2008) [hereinafter *TCR*] (Tennis Channel Ex. 4), *rev'd on other grounds*, 25 FCC Rcd. 18099, at ¶ 11 (FCC 2010) (Tennis Channel Ex. 12) (“our decision reverses the Bureau’s finding of liability on [a] narrow basis”; “we see no need to review . . . other aspects of the *Order* regarding the appropriate legal framework for assessing . . . carriage discrimination”).

<sup>31</sup> *Omnibus HDO* at ¶ 75; *TCR* at ¶¶ 27-28 (finding a regional sports network focused on baseball games similarly situated with a regional news channel operated by Time Warner).

<sup>32</sup> *HDO* at ¶ 19; *TCR* at ¶ 29; *Omnibus HDO* ¶ 76.

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3. Whether the differential treatment has harmed the unaffiliated network's ability to compete in the marketplace.<sup>33</sup> The complainant need not show that it "cannot compete at all, *i.e.*, would exit the industry, operate at a loss, or suffer some similar major disadvantage"; instead, it is sufficient to show that the differential treatment "restrained [the complainant's] ability to compete fairly for viewers, advertisers, and sports programming rights."<sup>34</sup>

As the Media Bureau concluded when it applied this test and designated this matter for hearing, Tennis Channel has presented *prima facie* evidence that Comcast violated Section 616.<sup>35</sup>

## COMCAST'S VIOLATION OF SECTION 616

### I. TENNIS CHANNEL, GOLF CHANNEL AND VERSUS ARE SIMILARLY SITUATED.

Tennis Channel, Golf Channel, and Versus clearly compete with each other on all relevant metrics: They are not only national sports networks,<sup>36</sup> but specifically ones with similar ratings and demographics, overlapping advertisers, and comparable (and competitive) programming [REDACTED].<sup>37</sup>

#### A. Viewers

Tennis Channel, Golf Channel, and Versus compete for the same groups of

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<sup>33</sup> HDO at ¶¶ 20-21; TCR at ¶ 30; Omnibus HDO at ¶¶ 77-78.

<sup>34</sup> TCR ¶¶ 30, ¶ 31.

<sup>35</sup> HDO at ¶¶ 24, 29. Comcast has failed to "provide[] evidence that is adequate to refute [Tennis Channel's] claim of . . . discrimination." *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 25 FCC Red. 18099, ¶ 11 (FCC 2010). The Commission did not establish what evidence would be "adequate to refute" a *prima facie* case. *Id.* If no contemporaneous evidence exists of the reasons for a distributor's decision, the FCC will weigh the testimony. *Id.* at ¶ 21 & n.118. Here, that is unnecessary; [REDACTED].

[REDACTED]. Tennis Channel Ex. 35.

<sup>36</sup> See Written Direct Testimony of Timothy Brooks at ¶ 53 [hereinafter "Brooks Direct"]; [REDACTED]. Golf Channel and Tennis Channel are also single-sport networks and competitors in [REDACTED].

<sup>37</sup> The economists agree that "two networks are 'similarly situated' if there is significant competition between [them] for viewers, advertisers, or programming carriage rights." Orszag Decl. at ¶ 54 n.66 (attached to Tennis Channel Ex. 19 as Ex. 8); Singer Direct at § II.A.

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viewers and are “similar in audience appeal.”<sup>38</sup> All three networks target predominantly affluent viewers. The median income for Tennis Channel viewing households is approximately [REDACTED]; the comparable figures for Golf Channel and Versus are [REDACTED], respectively—all significantly higher than the median household income for other networks.<sup>39</sup> The three networks also target and attract [REDACTED], as is typical for networks showing primarily sports content.<sup>40</sup> The comparability of golf and tennis among viewers and advertisers is widely understood in the cable industry; Comcast itself has highlighted it, describing professional tennis as “similar to . . . [professional golf] in its appeal.”<sup>41</sup>

The networks also attract similar levels of viewership. Their total-day coverage area ratings in the local markets in which all three networks are measured are [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>38</sup> Brooks Direct at ¶ 2.

<sup>39</sup> Brooks Direct at ¶¶ 31, 42; *see also* Shell Dep. at 51:18-52:11.

<sup>40</sup> *Id.*

<sup>41</sup> Tennis Channel Ex. 108.

<sup>42</sup> Brooks Direct at ¶ 36. Coverage ratings reflect the proportion of people receiving a channel that actually watch it. They are thus a more relevant measure of viewership than total market ratings, which count all people in a geographic area regardless of whether they actually receive a channel, and which artificially give greater weight to more broadly carried networks. Brooks Direct at ¶ 15 n.8; Donnelly Dep. at 262:25 - 263:18; Tennis Channel Ex. 46. Comcast makes no serious effort to challenge Tennis Channel’s showing that the networks have comparable ratings. [REDACTED]

<sup>43</sup> *Id.* at ¶¶ 27-28.

<sup>44</sup> *Id.* at ¶¶ 35-36.

[REDACTED]

[REDACTED]

**B. Advertisers**

Because Tennis Channel, Golf Channel, and Versus target and reach similar viewers, they also compete aggressively for the same advertisers. This competition extends beyond the fact that all three networks are sports networks, which are regarded by many advertisers as a distinct competitive set.<sup>46</sup>

Indeed, the three networks have a high degree of overlap among advertisers, a fact establishing that they are targeting the very same ad dollars. For example, between January and May 2009—the period immediately preceding Tennis Channel’s discussions with Comcast regarding carriage terms—[REDACTED] of Versus’s revenue from its top 30 advertisers came from companies that recently had purchased advertising on Tennis Channel, and [REDACTED] of Versus’s top-30 revenues came from such advertisers or from companies that had discussed making ad buys with Tennis Channel during the preceding two years. By 2010, the overlap was even greater, with [REDACTED] of Versus’s top-30 revenues coming from Tennis Channel customers, and [REDACTED] from Tennis Channel’s actual or prospective advertisers.<sup>47</sup>

The comparison with Golf Channel is even more striking: Not only did [REDACTED] of Golf Channel’s top-30 revenues during January – May 2009 come from companies that recently had purchased Tennis Channel advertising, but a full [REDACTED] came from

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<sup>45</sup> *Id.* at ¶ 38.

<sup>46</sup> *See generally* Goldstein Dep. at 50:10-50:20, 52:7-52:25, 58:2-58:8, 74:14-75:14, 113:13-114:11, 159:9-160:8, 217:12-218:6; Singer Direct at ¶¶ 27, 29; Tennis Channel Ex. 28. *See also* Tennis Channel Ex. 39.

<sup>47</sup> Herman Direct at ¶ 8; Singer Direct at ¶ 29.

Tennis Channel advertisers or recent prospects; this overlap increased in 2010, with [REDACTED] of Golf Channel's top-30 revenues coming from Tennis Channel advertisers, and [REDACTED] of its top-30 revenues coming from Tennis Channel advertisers or potential clients.<sup>48</sup> The limits on Tennis Channel's ability to compete for advertising with Versus and Golf Channel have nothing to do with content, attractiveness, demographics, or ratings comparability; if Tennis Channel were distributed more broadly, it would inevitably garner advertising revenues currently being obtained by Comcast-affiliated networks.<sup>49</sup>

### C. Programming

All three networks feature full-time sports content. And Tennis Channel and Golf Channel offer "a full-day schedule revolving around a single participatory sport," with offerings that include event coverage as well as lifestyle, instructional, and other general-interest programs relevant to their sport of choice.<sup>50</sup>

With respect to core event coverage, Tennis Channel outperforms Golf Channel and Versus in the amount of event programming offered—which for Tennis Channel includes coverage of all four Grand Slams, while Comcast "admits that Golf Channel does not offer live event coverage of" *any* of golf's four Majors.<sup>51</sup>

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<sup>48</sup> Herman Direct at ¶ 9; Singer Direct at ¶ 29.

<sup>49</sup> [REDACTED]

<sup>50</sup> Brooks Direct at ¶ 56; Tennis Channel Exs. 128, 127.

<sup>51</sup> Tennis Channel Ex. 19, Answer, Responses to Numbered Paragraphs, ¶ 39. Tennis Channel offers more event programming than Versus or Golf Channel both overall and in the category of so-called "anchor" events, which are telecast live or are first-run within the United States but broadcast on a recorded basis (typically to accommodate time zone or other scheduling issues). Singer Direct at ¶ 52 & Table 5; *see also* Egan Dep. at 90:17-90:23, 91:14-92:2, 175:7-176:4; Egan Report at ¶¶ 41, 55.

Tennis Channel also directly competes with Comcast for programming rights. In recent years, Tennis Channel and Versus shared telecast rights for the U.S. Davis Cup and WTA Tour Championships and [REDACTED].<sup>52</sup> As recently as this past year, Comcast's regional sports networks have telecast tennis events also carried on Tennis Channel, like the SAP Open and Sony Ericsson Open, and they have shared rights with the Tennis Channel for World TeamTennis events.<sup>53</sup> Additionally, competition between Comcast and Tennis Channel has intensified in light of Comcast's acquisition of NBCU, which holds rights to portions of Wimbledon and the French Open. [REDACTED]

[REDACTED].<sup>54</sup>

## II. COMCAST TREATS ITS AFFILIATED NETWORKS DRAMATICALLY MORE FAVORABLY THAN THE SIMILARLY SITUATED TENNIS CHANNEL.

The FCC recently confirmed that Comcast "currently favors its affiliated programming" and "does so for anticompetitive reasons."<sup>55</sup> Comcast's superior treatment of its affiliated sports networks over Tennis Channel constitutes a clear example of this misconduct.

The contrast is stark. As we have shown, only [REDACTED] of Comcast's subscribers receive Tennis Channel, generally on the extra-pay sports tier.<sup>56</sup> Comcast, however, distributes its affiliated networks on what it admits are [REDACTED]: Golf Channel and Versus are available [REDACTED]

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<sup>52</sup> Solomon Direct at ¶ 42; Tennis Channel Ex. 40. [REDACTED]

<sup>53</sup> Solomon Direct at ¶ 42; *see also* Tennis Channel Ex. 109.

<sup>54</sup> Singer Direct at ¶ 31; Solomon Direct at ¶ 42; Tennis Channel Ex. 119 at COMTTC\_00013262, COMTTC\_00013265; Tennis Channel Ex. 179.

<sup>55</sup> *NBC Universal Order*, Technical Appendix B, at ¶ 70; *see also id.* ("Comcast discriminates against unaffiliated programming in favor of its own.").

<sup>56</sup> Gaiski Dep. at 19:17-21, 19:25-20:3; Tennis Channel Ex. 110.

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[REDACTED] of all Comcast subscribers, and the NHL Network, MLB Network, and NBA TV are carried [REDACTED]

[REDACTED].<sup>57</sup> Uniformly, sports networks in which Comcast holds a financial interest are carried on widely-penetrated tiers, while networks in which Comcast holds no financial interest are relegated to the limited and expensive sports tier—to which *no* Comcast-affiliated network is exclusively relegated.<sup>58</sup>

Tennis Channel's channel positioning on Comcast systems also places it at a disadvantage relative to Golf Channel and Versus. In Comcast's Washington D.C. lineup, for example, viewers can watch Golf Channel on Channel 11 and Versus on Channel 7, while Tennis Channel is available to its relatively few premium subscribers on Channel 735; by comparison, Tennis Channel and Golf Channel are on adjacent channels in the lineups of Comcast's principal competitors, DIRECTV, Dish Network, and Verizon FiOS's HD service.<sup>59</sup>

Comcast's practice of providing its affiliated networks with special benefits is clear from the broad national carriage Comcast provides them. [REDACTED]

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<sup>57</sup> Gaiski Dep. at 18:21-25, 19:13-16, 20:7-21:10; Orszag Report at ¶ 17 (Table 1B). Similarly, Comcast announced in 2009 its plans to launch the U.S. Olympic Network, in which it would hold an equity stake, on a digital basic tier. Tennis Channel Exs. 76-77. The proposed network would not even have carried the Games themselves, which are covered on broadcast television, *see id.*, undermining Comcast's claim that live event coverage on sports networks and broadcast television helps motivate enhanced carriage, *see* Egan Report ¶¶ 38-40.

<sup>58</sup> Singer Direct at ¶ 20, Table 1. The only exceptions are the powerful ESPN family of channels and networks that have sued Comcast for expanded carriage under Section 616.

<sup>59</sup> Brooks Direct at ¶ 66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>60</sup> And as soon as Comcast more recently acquired equity in MLB Network and NHL Network, it launched those networks on Digital Preferred nationally; at the same time, it moved NBA TV from the sports tier (where it had previously been carried along with NHL Network) to Digital Preferred, a penetration increase of [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

### **III. COMCAST'S DISCRIMINATION HAS UNREASONABLY RESTRAINED TENNIS CHANNEL'S ABILITY TO COMPETE FAIRLY.**

Comcast's decision to restrict Tennis Channel to the sports tier in virtually all of its systems while carrying its affiliated networks on broader tiers has unreasonably restrained Tennis Channel's ability to compete fairly against those affiliates.

Comcast's restriction of Tennis Channel to its sports tier results in the network's total distribution being about [REDACTED] as it would be if Comcast carried Tennis Channel comparably to Golf Channel and Versus. "[D]istribution to less than 40 million households is widely regarded as a barrier to obtaining many national advertisers"; in addition, "limited distribution makes it unfeasible for a network to afford expensive Nielsen national ratings, and in some cases to obtain stable local ratings, which in turn negatively impacts revenues," since "[i]n addition to distribution, advertisers demand industry-

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<sup>60</sup> See Bond Dep. at 217:24-218:12; Rigdon Dep. at 142:12-143:2; Tennis Channel Ex. 55.

<sup>61</sup> See, e.g., Tennis Channel Ex. 74 at COMTTC\_00015609; Gaiski Dep. at 128:10-19; Bond Dep. at 123:6-17, 126:11-20, 128:8-17, 131:17-21.

standard Nielsen national ratings as proof of performance.”<sup>62</sup> If Tennis Channel were available in the same number of Comcast homes as Golf Channel and Versus, it would be feasible for it to purchase Nielsen national ratings, which would likely compare well to the ratings of Golf Channel and Versus: Tennis Channel’s “popularity within its limited area of availability is evidence of the wider success it would have but for the distribution limitations imposed upon it by Comcast.”<sup>63</sup> Expanded carriage on Comcast also would improve Tennis Channel’s ability to compete for programming rights, [REDACTED]

Tennis Channel’s restricted Comcast distribution also hinders its competition for advertising. “To be viewed in the industry as being a meaningful competitor for national advertising purposes, many advertisers use a rule of thumb that a network should have at least roughly 40 million subscribers”; although “advertisers will display flexibility . . . , the further a network is from [this] subscriber level, the less able it generally is to attract national advertisers.”<sup>64</sup> [REDACTED]

[REDACTED]

Because of Comcast’s discriminatory suppression of Tennis Channel’s subscriber

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<sup>62</sup> Brooks Direct ¶¶ 62, 68.

<sup>63</sup> Brooks Direct ¶ 3; *see also id.* at ¶ 59. Moreover, “sports programming is an ‘experience good’ that can best be learned about while surfing the channels.” Singer Direct at ¶ 87. But because Tennis Channel is on a tier not received by the vast majority of Comcast customers, most “will not be aware of the existence of Tennis Channel or the nature of the programming available on Tennis Channel.” *Id.*; *see also* Brooks Direct at ¶ 64. Furthermore, “limited distribution results in . . . fewer references in sports pages, fewer listings in guide sections, fewer mentions in the media at large,” further hindering Tennis Channel’s competition for viewers. Brooks Direct at ¶ 63.

<sup>64</sup> Herman Direct at ¶ 11; *see also* Singer Direct at ¶ 87. And Comcast’s ad expert is unaware of any network with fewer than 40 million subscribers that purchases Nielsen national ratings. Goldstein Dep. at 203:4-9; *see also id.* at 205:9-206:4.

<sup>65</sup> Egan Dep. at 257:8-11; Goldstein Dep. at 195:6-10.

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numbers, “many companies that otherwise would be interested in advertising on Tennis Channel are unwilling to do so.”<sup>66</sup> Such companies include [REDACTED].<sup>67</sup> Other companies, such as [REDACTED], advertise on Tennis Channel but would purchase more ad inventory at higher prices, and would have signed on with the network earlier, if the network’s distribution were greater.<sup>68</sup> Tennis Channel not only is unable to work with some companies because of its restricted distribution, but also receives lower revenues from the companies it does work with, in part because the price that advertisers pay per viewer increases with audience size.<sup>69</sup>

Comcast’s relegation of Tennis Channel to the sports tier also hinders the network’s ability to compete for programming rights. As Comcast recognized, [REDACTED]  
[REDACTED]  
[REDACTED] Indeed, “[REDACTED] was chosen over Tennis Channel to air the semi-final and final matches of the [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>71</sup>

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<sup>66</sup> Herman Direct at ¶ 14; *see also id.* at ¶ 15.

<sup>67</sup> *Id.* at ¶ 16, 20.

<sup>68</sup> *Id.* at ¶¶ 12, 15-18, 20.

<sup>69</sup> Singer Direct at ¶ 91.

<sup>70</sup> Shell Dep. at 53:12-54:4.

<sup>71</sup> Solomon Direct at ¶ 40; *see also id.* (“And “the rightsholders of the [REDACTED] would not grant Tennis Channel live coverage of each tournament’s last singles finals match . . . due to distribution concerns, and (continued...)”)

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This reduced ability to compete for tennis event rights is particularly significant because Comcast is competing for those very same rights.<sup>72</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As Comcast

executives acknowledged [REDACTED]

[REDACTED]

[REDACTED]<sup>76</sup> Comcast, of course, causes the very [REDACTED]

that limit Tennis Channel's ability to compete against Comcast for tennis programming.<sup>77</sup>

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instead awarded the rights to [REDACTED]."); Tennis Channel Ex. 178 at TTCCOM\_00020321. Tennis Channel's reduced licensing and advertising revenues also reduce the funds it has available to spend on content. *Id.* at ¶ 40; *see also* Singer Direct at ¶¶ 92-93 (Comcast's discrimination deprives Tennis Channel of economies of scale). Additionally, restricted subscribership hurts Tennis Channel competitively because network operating costs are relatively stable regardless of the number of viewers, meaning that advertising and license fee revenues from new subscribers could be used to invest in programming, marketing, and other improvements. *See* Singer Direct at ¶ 92.

<sup>72</sup> *See* p. 13, *supra* (describing tennis tournaments covered by both Tennis Channel and Comcast); Solomon Direct at ¶ 42 (same).

<sup>73</sup> *See* Tennis Channel Ex. 179; Solomon Direct at ¶ 42.

<sup>74</sup> *See generally* Shell Dep. at 41:4-5; Tennis Channel Exs. 32, 40-41, 43-44.

<sup>75</sup> *See, e.g.*, Donnelly Dep. at 151:5-153:25; Tennis Channel Exs. 32-35, 47, 118.

<sup>76</sup> Tennis Channel Ex. 40, at COMTTC\_00005847; Shell Dep. at 53:12-54:4.

<sup>77</sup> *See also* Singer Direct at ¶¶ 100-103 (explaining Comcast's motivation of extending its market power in the market for tennis programming); Tennis Channel Ex. 79 at COMTTC 00010856 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In sum, Comcast has admitted that “if you’re an ad-supported network” like Tennis Channel, “the sports tier that Comcast has . . . is not viable.”<sup>78</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**IV. COMCAST’S POST HOC LITIGATION JUSTIFICATIONS DO NOT EXPLAIN AWAY ITS DISCRIMINATION.**

Throughout this litigation, Comcast has introduced extraneous issues in order to distract from the fundamentally discriminatory behavior we have described above. For example, at the pleadings stage, Comcast essentially claimed that, because it has contractual discretion to determine the tier on which Tennis Channel would be carried, it is immunized from review under Section 616. That is, Comcast claimed it could discriminate as much as it wanted against Tennis Channel simply because the contract did not expressly identify a tier on which it was required to carry Tennis Channel or expressly require it to comply with Section 616 and the FCC’s rules.

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<sup>78</sup> Tennis Channel Ex. 9; *see also* Tennis Channel Ex. 51.

<sup>79</sup> Tennis Channel Ex. 33; *see also* [REDACTED].

The Media Bureau repeatedly has rejected this theory, including in this very case, in which it found a *prima facie* violation of Section 616:

The gravamen of The Tennis Channel's complaint is that Comcast has refused to exercise its discretion [to distribute the network outside of Comcast's sports tier], while at the same time carrying its allegedly similar affiliated networks on a more widely distributed tier, and has thus failed to meet its obligation under [Section 616] to avoid discrimination on the basis of affiliation. *It is this refusal, not the terms of the contract, which forms the basis for The Tennis Channel's complaint.*<sup>80</sup>

Comcast has also offered several claimed justifications for its preferential treatment of its affiliated networks vis-à-vis Tennis Channel.<sup>81</sup> Each justification is contradicted by evidence demonstrating either that Comcast did not consider the justification as a basis for its carriage decision, or did not utilize the same factors in making carriage decisions for its affiliated services, or both. The record permits only one conclusion: that Comcast's true basis for its treatment of these networks is affiliation or non-affiliation—an intention to protect and enhance its affiliated services and—because Tennis Channel's growth would damage the performance of and prospects for those services—to hinder Tennis Channel's expansion and ability to compete.

**A. Comcast's Experts' Theories Bear No Relationship to the Basis for Its Acts.**

Comcast's executives deny having considered most of the reasons its experts now offer to justify its treatment of Tennis Channel. [REDACTED]

[REDACTED]

[REDACTED]

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<sup>80</sup> HDO ¶ 12 (emphasis added); see also *Omnibus HDO*, at ¶ 72 (cited at HDO ¶ 13) (Tennis Channel Ex. 3); *NFL Enterprises LLC v. Comcast Cable Comms., LLC*, Mem. Op. & Order, FCC 09M-36, at ¶ 3 (Chief ALJ 2009) (cited in HDO ¶ 15 n.81) (Tennis Channel Ex. 10).

<sup>81</sup> See, e.g., Orszag Report at ¶ 12; Egan Report at ¶¶ 8, 45, 93.





[REDACTED]

- Potential subscriber loss. Mr. Bond justified his decision not to reposition Tennis Channel on the ground that he did not believe that subscribers would leave Comcast if he did not agree to the change. But Comcast does not apply that standard to its affiliated networks. As noted,

[REDACTED]

- Expense. To be sure, moving Tennis Channel to a broader tier would involve an increase in fees paid by Comcast,<sup>94</sup> but the total cost would be dramatically lower than—indeed, [REDACTED]—the roughly [REDACTED] Comcast paid each of Versus and Golf Channel for carriage in 2010.<sup>95</sup> In any case, if saving money on license fees were truly the concern that motivated Comcast, it would have made a counter-offer to Tennis Channel’s spring 2009 offer in an effort to persuade Tennis Channel to further reduce the fees it was charging, even though they were already among the lowest in the sports television industry. [REDACTED]<sup>96</sup>
- Bandwidth. Comcast has pointed to bandwidth constraints as a reason for denying Tennis Channel expanded carriage.<sup>97</sup> But Comcast concedes that Tennis Channel is technically “available” to virtually all of its subscribers and [REDACTED]

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<sup>91</sup> Rigdon Dep. at 143:13-19. This has been true since the network’s launch on Comcast, when Comcast’s corporate office refused to permit the San Francisco system to carry Tennis Channel on D2 (as well as the sports tier), despite the system’s desire to do so. *See* n. 13, *supra*.

<sup>92</sup> *See* Rigdon Dep. at 142:12-143:2; Bond Dep. at 123:6-17, 130:13-131:21.

<sup>93</sup> Shell Dep. at 39:13-16; Tennis Channel Ex. 26 at COMTTC\_00003991; Tennis Channel Ex. 80 at COMTTC\_00015420.

<sup>94</sup> Bond Decl. at ¶ 20; Gaiski Decl. at ¶ 12, Attachment B.

<sup>95</sup> Tennis Channel Exs. 155,164; *see also* Solomon Direct at ¶ 26.

<sup>96</sup> Gaiski Dep. at 186:5-8; Bond Dep. at 189:13-17.

<sup>97</sup> Bond Decl. at ¶ 3; Gaiski Decl. at ¶ 10.

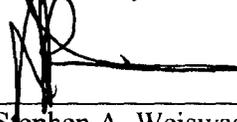


Judge can ensure that Tennis Channel obtains carriage on terms that comply with Section 616 and the Commission's program carriage rules is to order Comcast to make Tennis Channel available to its subscribers on terms that are no less favorable than the terms on which Comcast carries any of its affiliated sports networks.<sup>101</sup>

### CONCLUSION

For the reasons set forth above, judgment should be entered in favor of Tennis Channel and the requested relief granted.

Respectfully submitted,



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April 15, 2011

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<sup>101</sup> Comcast should be ordered to distribute Tennis Channel to a number of subscribers no less than the greatest number of Comcast subscribers who receive any of Versus, Golf Channel, MLB Network, NHL Network, NBA TV, and any other sports network with which Comcast is or becomes affiliated, for the duration of the parties' existing affiliation agreement, and to pay the rates set forth in the existing agreement for that carriage. Comcast should also be required to provide Tennis Channel nationally with channel placements that are competitively comparable to those it provides to Golf Channel and Versus. Prior to expiration of the current agreement, Comcast should further be ordered to negotiate in good faith with Tennis Channel for a renewal with carriage terms that are no less favorable than the terms on which any of the preceding networks are at that time carried by Comcast.

## APPENDIX A

### GLOSSARY OF ACRONYMS AND SPECIALIZED TERMS

For the convenience of the Presiding Judge, Tennis Channel submits the following glossary of acronyms and specialized terms that are used in this brief and that Tennis Channel expects will be relevant to this litigation.

<b>Term</b>	<b>Definition</b>
<b>Affiliated</b>	A network is “affiliated” with an MVPD if the MVPD holds a financial interest in the network that is attributable under Section 616 of the Communications Act of 1934, as amended. It is undisputed that Versus, Golf Channel, MLB Network, NHL Network, and various other networks (including Comcast’s regional sports networks) are affiliated with Comcast.
<b>Affiliation Agreement</b>	A contract used to license a programming network (such as Tennis Channel) to an MVPD (such as Comcast) for distribution to the MVPD’s retail subscribers.
<b>B1</b>	<i>See Tier.</i>
<b>B2</b>	<i>See Tier.</i>
<b>Bandwidth</b>	The amount of capacity available for delivery of content through a cable system. In general, once a particular network is carried on a cable system in a particular format ( <i>e.g.</i> , analog or digital) it occupies a fixed amount of bandwidth on that system even if the cable operator blocks certain system subscribers from receiving it.
<b>Carriage Agreement</b>	<i>See Affiliation Agreement.</i>
<b>CCR</b>	Channel Change Request; a form submitted by Comcast employees to Comcast management for approval to change the terms on which a channel is carried, generally after the change already has been directed or authorized informally by management.
<b>Comcast</b>	The Defendant in this proceeding; <i>see Comcast Cable Communications, LLC.</i>
<b>Comcast Cable Communications, LLC</b>	The subsidiary of Comcast Corp. that operates the company’s MVPD service. Comcast Cable Communications, LLC is the Defendant in this case.

<b>Term</b>	<b>Definition</b>
<b>Comcast Corp.</b>	The parent company that includes Comcast Cable Communications, LLC and other subsidiaries that operate Comcast's affiliated cable networks.
<b>Comcast Programming Group</b>	The organization within Comcast Corp. that operates Comcast's affiliated cable networks, including Versus and Golf Channel.
<b>Comcast SportsNet</b>	A collection of Comcast-affiliated sports networks that are distributed in particular geographic regions. The Comcast SportsNet networks cover a variety of sporting events, including tennis events.
<b>D0</b>	<i>See Tier.</i>
<b>D1</b>	<i>See Tier.</i>
<b>DS</b>	<i>See Tier.</i>
<b>DBS</b>	Direct Broadcast Satellite. Examples of DBS operators include DIRECTV and EchoStar (also known as DISH Network).
<b>DMA</b>	Designated Market Area; a geographical designation of a media market created by Nielsen Media Research.
<b>Expanded Basic</b>	<i>See Tier.</i>
<b>HH</b>	Household.
<b>License Fee</b>	<p>The fee that an entity pays for the right to distribute programming. In the context of a relationship between a network and an MVPD, the license fee is typically expressed as an amount of money per subscriber per month.</p> <p>A license fee also can refer to the fees that a network pays to a third-party rights-holder for the right to televise an event controlled by that rights-holder.</p>
<b>MSO</b>	Multiple System Operator; a cable operator that operates multiple cable systems. Comcast Cable Communications, LLC is an MSO.
<b>MVPD</b>	Multichannel Video Programming Distributor; a distributor that, unlike a broadcast station, delivers more than one channel to viewers. There are various types of MVPDs, including MSOs and other cable operators; DBS operators; and telephone company (telco) video providers, such as Verizon FiOS and AT&T U-Verse.

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<b>Term</b>	<b>Definition</b>
<b>OLN</b>	Outdoor Life Network (Versus's name before Comcast rebranded it).
<b>Penetration</b>	A percentage reflecting the proportion of a particular MVPD's subscribers that receive a particular network. For example, if Tennis Channel were received by 3 million of Comcast's 23 million subscribers, Tennis Channel's penetration would be 13%.
<b>PSPM</b>	Per subscriber per month. <i>See License Fee.</i>
<b>Sports Entertainment Package ("SEP")</b>	<i>See Tier.</i>
<b>Sports Tier</b>	<i>See Tier.</i>
<b>Subscriber (also known as a "Sub")</b>	A customer of an MVPD.
<b>Telco</b>	Telephone Company. Refers to telephone companies, such as Verizon and AT&T, that provide multichannel video service and that, therefore, are MVPDs.
<b>Tennis Channel</b>	A network focusing on tennis and other racquet-sport-related programming. Tennis Channel is unaffiliated with Comcast and is the complainant in this case.
<b>Tier</b>	<p>A package of channels on an MVPD's system that are sold as a unit. Cable operators frequently arrange tiers in a hierarchy so that a subscriber who purchases a "higher" (<i>i.e.</i>, more expensive) tier also receives programming contained in "lower" (<i>i.e.</i>, less expensive) tiers. Tennis Channel understands that most Comcast cable systems include these tiers, among others:</p> <ul style="list-style-type: none"> <li>▪ <b>Analog Basic (B1):</b> The most broadly penetrated tier of programming, available to ██████████ Comcast's video customers.<sup>102</sup></li> <li>▪ <b>Analog Expanded Basic (B2) or Digital Starter (DS):</b> A tier of programming available to about ██████████ of Comcast's subscribers, either as a part of their analog cable subscriptions or because they have a digital cable receiver but</li> </ul>

<sup>102</sup> Gaiski 18:7-19.

Term	Definition
	<p>have not purchased a more expensive digital programming tier.<sup>103</sup> Comcast carries its majority-owned sports networks, Versus, Golf Channel, and the Comcast SportsNet networks, on this tier.</p> <ul style="list-style-type: none"> <li data-bbox="581 451 1406 583">▪ <b>Digital Preferred (D1):</b> The collection of channels that is distributed to ██████████ of Comcast’s total subscribers.<sup>104</sup> Comcast carries the sports networks in which it holds part, but not all, of the equity on this tier.</li> <li data-bbox="581 604 1406 772">▪ <b>Sports Entertainment Package (SEP) or Sports Tier:</b> A pay-extra tier that requires customers to pay between \$5 and \$8 each month. Comcast carries Tennis Channel ██████████ ██████████ on the sports tier. No Comcast-owned network is carried exclusively on the sports tier.</li> </ul>
<b>TTC</b>	<i>See Tennis Channel.</i>
<b>Vertically Integrated MVPD</b>	A company that has a financial interest in both an MVPD and a video program service. Comcast is “vertically integrated” because it owns both cable systems and cable networks, such as Golf Channel and Versus.

<sup>103</sup> Gaiski 18:12-25.

<sup>104</sup> Gaiski 19:13-16; Tennis Channel Ex. 113.

## CERTIFICATE OF SERVICE

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