

**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)	

To: Marlene H. Dortch, Secretary
Attn: Hon. Richard L. Sippel, Chief Administrative Law Judge

**COMCAST’S OPPOSITION TO TENNIS CHANNEL’S
MOTION FOR LEAVE TO FILE “REBUTTAL” TESTIMONY**

Defendant Comcast Cable Communications, LLC (“Comcast”) respectfully submits this opposition to Tennis Channel’s motion dated May 9, 2001 for leave to file “rebuttal” testimony by Dr. Hal Singer or, in the alternative, to strike the April 26, 2011 rebuttal testimony of Mr. Jonathan Orszag.

Tennis Channel’s motion seeks to offer “rebuttal” testimony in two areas: (1) a new analysis allegedly based on prior work by the FCC Staff in connection with the NBCU Approval Order¹ (paras. 2-3 of Dr. Singer’s proffer); and (2) criticism of certain opinions which Comcast’s expert, Mr. Orszag, gave on direct relating to two aspects of Dr. Singer’s own direct (para. 4 of Dr. Singer’s proffer). Although it comes late, we do not object to (2), which at least arguably qualifies as “rebuttal” testimony. But we do object to (1) which is plainly not “rebuttal” at all,

¹ *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order FCC 11-4 (FCC rel. Jan. 20, 2011) (“NBCU Approval Order”) (“We do not reach any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past.”).

but more direct testimony in the same area on which Dr. Singer was cross-examined at trial.² Dr. Singer's testimony concerning inconsistencies between his own method and that used by the FCC Staff in connection with the NBCU Approval Order was the subject of extensive cross-examination at trial and it is improper for Dr. Singer now to attempt to rehabilitate himself by filing more testimony on the same issue.

Rebuttal testimony does not allow an expert witness to offer a new opinion on an issue as to which a previous expert witness expressed no opinion. If it did, then rebuttal testimony would never end as each side continued to proffer new evidence on issues not previously addressed. Rebuttal testimony is the opposite – it is testimony that disputes an opinion that another witness has already given. *See, e.g., Rodriguez v. Olin Corp.*, 780 F.2d 491, 494 (5th Cir. 1986).

With respect to (1), Tennis Channel – by its own admission – is not seeking to dispute any opinion that Mr. Orszag gave during his testimony, but instead to offer a new opinion on an issue, so-called “FCC Model 2,” which Tennis Channel claims Mr. Orszag failed to address.³ Dr. Singer's new analysis – in Tennis Channel's own words – focuses on “what Mr. Orszag didn't do,”⁴ and purports to replicate an analysis by the FCC Staff that Mr. Orszag “did not attempt to replicate.”⁵ Had Mr. Orszag done that analysis and opined on it, then it might be proper rebuttal for Dr. Singer to take issue with that work by filing his own analysis of it now. But Dr. Singer cannot now take issue with work Mr. Orszag did not do and try to supplement his

² For that reason, Tennis Channel's repeated invocation of our statement that we had no advance objection to a rebuttal report is unavailing. (Mot. at 2, 3, 5, 7 & 8). We stand by that statement, and have thus not objected to paragraph 4 of Dr. Singer's proffered testimony which arguably qualifies as rebuttal.

³ If Tennis Channel wants to criticize Mr. Orszag in its proposed findings for not conducting any particular analysis, it is free to do so, but that should not be an excuse for giving Dr. Singer a second bite at the apple.

⁴ Tr. 2779.

⁵ Tr. 2777.

own direct testimony in an area on which he was already cross-examined. Dr. Singer had ample opportunity to prepare and defend his opinions at trial, including his opinions regarding the analysis by the FCC Staff, and the serious shortcomings in his work that became apparent on cross-examination cannot be cured now, after the fact, under the guise of “rebuttal” testimony.

There is a second reason that we object to Tennis Channel’s effort to add new, post-trial opinions on the subject of the FCC Staff’s analysis in connection with the NBCU Approval Order. The Commission made clear in that order that the work of the FCC Staff in the technical appendix was not intended as a discrimination finding in any program carriage proceeding,⁶ and, as the Presiding Judge observed at the start of the evidentiary hearing, it is not binding in this case.⁷ Instead, Tennis Channel has the burden of proving that it has been discriminated against based on the evidentiary record in this case. At trial, however, Tennis Channel was unable to offer any proof of discrimination against it and was unable to dispute the evidence at the hearing, including contemporaneous documentation,⁸ that Comcast declined Tennis Channel’s carriage proposal because of what it would cost, and not because of any discriminatory motive.⁹ Now that that evidence is in, and unrebutted, we object to Tennis Channel’s efforts to misuse the work of the FCC Staff in connection with the NBCU Approval Order as a substitute for real evidence of discrimination in this case.

As to Tennis Channel’s request, in the alternative, to strike Mr. Orszag’s rebuttal testimony, there is no basis to do so and it would be unfair to deny Comcast the opportunity to respond to the new analysis in Dr. Singer’s written direct testimony. Tennis Channel has

⁶ NBCU Approval Order at 48 n.276 (“We do not reach any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past.”).

⁷ Tr. 148-49.

⁸ *See, e.g.*, Comcast Opening Binder Tab C (Comcast Exhs. 60, 66, 106, 638, 130 & 588).

⁹ *See, e.g.*, Tr. 2097-2101, 2124-2127 (Testimony of Madison Bond).

thoroughly cross-examined Mr. Orszag on his rebuttal, both at trial and in a May 1, 2011 deposition (which Comcast does not object to admitting into the record). Regardless, Comcast does not object to the admission of paragraph 4 of Dr. Singer's proffered rebuttal, and it would be inappropriate to strike Mr. Orszag's rebuttal now that Dr. Singer is responding to it.

Finally, in the event that Dr. Singer's brand new analysis in paragraphs 2 and 3 is admitted, then Comcast should have the opportunity to cross-examine Dr. Singer on it and to submit a rebuttal by Mr. Orszag. It would be fundamentally unfair to allow Tennis Channel to try to meet its burden of proof through the belated submission of a new analysis that (as is undisputed) Comcast's expert has never addressed.

Since Comcast has no objection to the admission of paragraph 4 of Dr. Singer's proffered testimony, Comcast is submitting along with this opposition a rebuttal by Mr. Orszag which directly replies to the new analysis in paragraph 4 of Dr. Singer's proffered testimony and identifies the flaws in Dr. Singer's analysis.

CONCLUSION

For the reasons set forth above, Comcast respectfully requests that the Chief Administrative Law Judge deny, in part, Tennis Channel’s motion for leave to file Dr. Singer’s “rebuttal” analysis or, in the alternative, to strike Mr. Orszag’s rebuttal. In particular, Comcast respectfully requests that the motion be denied to the extent that it seeks (1) to admit paragraphs 2 and 3 of Dr. Singer’s proffered rebuttal, and (2) to strike Mr. Orszag’s rebuttal. Comcast does not object to the admission of paragraph 4 of Dr. Singer’s proffered testimony, provided that Mr. Orszag’s rebuttal directly responding to paragraph 4 also is allowed.

Respectfully submitted,

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Dated: May 13, 2011

CERTIFICATE OF SERVICE

I, David B. Toscano, hereby certify that on May 13, 2011, I served a true and correct copy of Comcast's Opposition to Tennis Channel's Motion for Leave to File "Rebuttal" Testimony on the following individuals by electronic mail:

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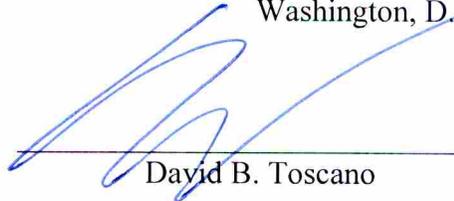
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*Courtesy copy