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Federal Communications Commission  
Office of the Secretary

June 7, 2011

Re: In re The Tennis Channel, Inc. v. Comcast Cable Communications, LLC,  
MB Docket No. 10-204, File No. CSR-8258-P  
**REDACTED – FOR PUBLIC INSPECTION**

By Hand Delivery

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
455 12th Street, S.W.  
Washington, D.C. 20554

Dear Ms. Dortch:

Enclosed please find redacted, public versions of the following materials for filing with the Commission: (1) Proposed Findings of Fact and Conclusions of Law of Defendant Comcast Cable Communications, LLC, and (2) Joint Glossary, which was jointly prepared by the parties and approved by Enforcement Bureau trial staff. One original and one stamp-and-return copy of each document are enclosed.

We are serving copies on counsel for Complainant The Tennis Channel, Inc.; and Enforcement Bureau trial staff by hand delivery and by electronic filing via ECFS. (Judge Sippel's chambers have informed us that the judge does not require redacted copies of these materials.)

Versions of these materials containing information designated as Highly Confidential Information and Confidential Information under the applicable protective orders are being submitted under separate cover.

Respectfully submitted,



Edith Beerdsen

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

JUN - 7 2011

Federal Communications Commission  
Office of the Secretary

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	)	

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
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SUMMARY

1. Under Section 616 of the 1992 Cable Act, the claimant has the burden of proving that because of affiliation-based discrimination<sup>1</sup> by the respondent, the claimant's ability to compete fairly has been unreasonably restrained.<sup>2</sup> In this case, that means that Tennis Channel has the burden of proving: (1) that Comcast rejected Tennis Channel's carriage proposal in 2009 because Tennis Channel is not an affiliate; and (2) that Comcast's action has unreasonably restrained Tennis Channel's ability to compete fairly.<sup>3</sup> Tennis Channel has failed to prove either of these elements.

2. First, there is no evidence that Comcast's decision to decline Tennis Channel's carriage proposal in 2009 had anything to do with affiliation or non-affiliation. Instead, the evidence showed that the decision was based on a cost-benefit analysis by Comcast which indicated that the proposal likely would have resulted in substantial losses to Comcast.<sup>4</sup> Tennis Channel was unable to offer any evidence to dispute this cost-benefit analysis and the hearing testimony established that it was Tennis Channel, not Comcast, that cut off negotiations rather than attempt to find a compromise where the costs and benefits were more evenly balanced.<sup>5</sup>

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<sup>1</sup> "Affiliation-based discrimination" and "discrimination" are used as shorthand for discrimination on the basis of affiliation or non-affiliation.

<sup>2</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. § 536(a)(3) ("1992 Cable Act"); *see also* 47 C.F.R. § 76.1301(c).

<sup>3</sup> 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

<sup>4</sup> *See infra* ¶¶ 27-28, 37-40.

<sup>5</sup> *See infra* ¶¶ 32, 38-42. It is noteworthy that within months following Tennis Channel's refusal to continue negotiations, at least two other independent networks were able to negotiate broader carriage agreements with Comcast notwithstanding the lack of any affiliation with Comcast. *See infra* ¶ 42.

3. As the Commission ruled in *MASN*, it is not discrimination under Section 616 when, as here, a multichannel video programming distributor (“MVPD”) declines a carriage proposal after determining that its economic costs substantially outweighed the benefits.<sup>6</sup> Section 616 does not require MVPDs to incur losses or increase subscriber fees for programming which, as here, is already available for purchase by subscribers who wish to receive it.<sup>7</sup>

4. Second, the evidence does not show that Tennis Channel has been unreasonably restrained from competing fairly. To the contrary, the evidence shows that Tennis Channel has been able to negotiate equity-for-carriage deals with Comcast’s major competitors, DIRECTV and Dish Network, and those agreements enable Tennis Channel to compete fairly for subscribers in every market in the United States.<sup>8</sup> (DIRECTV and Dish Network are satellite companies whose signals are offered to subscribers and potential subscribers throughout the United States.) Comcast subscribers who wish to receive Tennis Channel’s programming thus have at least three options: purchasing the sports tier package from Comcast, switching to DIRECTV or switching to Dish Network.<sup>9</sup> (The major telephone companies, Verizon and AT&T, who also carry Tennis Channel, provide additional options in many parts of the United States.<sup>10</sup>) Thus, Tennis Channel is able to compete fairly for subscribers in the same way that DIRECTV

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<sup>6</sup> *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, 18106, 18112-13 ¶¶ 12, 19 (2010), *appeal docketed*, No. 11-1151 (4th Cir. Feb. 22, 2011) (hereinafter “*MASN*”).

<sup>7</sup> *See id.*

<sup>8</sup> *See infra* ¶¶ 21-23, 135.

<sup>9</sup> *See infra* ¶¶ 135-37.

<sup>10</sup> *See infra* ¶ 136-37.

REDACTED VERSION

and Dish Network are, and potential subscribers who want Tennis Channel's programming are free to choose it.

5. Tennis Channel would not have to compete for subscribers at all if Comcast, and all other cable MVPDs, were required to distribute Tennis Channel to all subscribers at no additional charge. But the goal of Section 616 is to enable unaffiliated programmers to compete fairly, not to insulate them from competition by subsidizing them at the expense of MVPDs and their customers.<sup>11</sup>

6. Section 616 also was not intended to eliminate all carriage differences among networks, including those that are the result of natural competitive forces such as the timing of market launches and the size and strength of consumer demand. Here, Golf Channel and Versus were launched years before Tennis Channel, when sports tiers did not exist, and the size and strength of their fan base is – as Tennis Channel's own documents acknowledge – much larger.<sup>12</sup> These specific differences are reflected in different carriage arrangements which do not evidence affiliation-based discrimination. Section 616 does not require that all carriage differences be eliminated; it only prohibits differences that are the result of affiliation-based discrimination, rather than market forces.<sup>13</sup>

7. Having failed to prove the required elements for a Section 616 claim, Tennis Channel is not entitled to any relief in this matter. Moreover, the relief that Tennis Channel has requested is not proper under Section 616. Tennis Channel has, for

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<sup>11</sup> See *infra* ¶ 181. Congress has specified that no cable system shall “be subject to regulation as a common carrier . . . by reason of providing any cable service.” 47 U.S.C. § 541(c).

<sup>12</sup> See *infra* ¶¶ 20 n.38, 74-77.

<sup>13</sup> See 47 U.S.C. § 536(a)(3); see also *infra* ¶¶ 185-91.

example, requested a level of distribution that is far broader than any other MVPD in the market is currently providing it, and it is also requesting that, in addition to providing broader distribution, Comcast increase its total license payments to Tennis Channel by more than [REDACTED] }<sup>14</sup>

8. Even if Tennis Channel were entitled to broader distribution under Section 616, it would not be entitled to receive additional fees for that broader distribution. An increase in distribution might better enable Tennis Channel to compete for larger advertising revenues, but there is no evidence that Tennis Channel now is unable to compete fairly for those advertising revenues, or for anything else, without the dramatic increase in license fees which it is also asking that Comcast be ordered to pay. Remedial relief under Section 616 is limited to what is necessary for an unaffiliated programmer to “compete fairly,” and does not allow the recovery of an economic windfall.<sup>15</sup>

### **PROPOSED FINDINGS OF FACT**

#### **I. The Parties**

9. Complainant Tennis Channel is a single-sport niche network launched in 2003 that offers programming relating to tennis.<sup>16</sup> Tennis Channel’s owners include satellite operators DIRECTV and Dish Network, which collectively own approximately [REDACTED] of the network.<sup>17</sup>

10. Defendant Comcast Cable Communications, LLC is a subsidiary of Comcast Corporation, which is one of the nation’s leading providers of entertainment,

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<sup>14</sup> See *infra* ¶ 146.

<sup>15</sup> See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

<sup>16</sup> Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 5.

<sup>17</sup> Solomon Cross, Apr. 25, 2011 Tr. 509:12-510:1; Comcast Exhs. 100, 241, 242, 247, 398, 439; see *infra* ¶ 23.

information and communications products and services. Comcast Cable operates the company's multichannel video programming distribution service.<sup>18</sup>

## **II. The Early Years Before Tennis Channel Existed**

11. Tennis Channel launched in 2003, during [REDACTED] [REDACTED] }<sup>19</sup> By that time, distributors already had comprehensive program offerings as a result of network launches in the 1980s and 1990s.<sup>20</sup>

12. Two of the channels which had been launched in the mid-1990s were Golf Channel and The Outdoor Life Network (later renamed Versus).<sup>21</sup> When Golf Channel and Versus were first launched, Comcast owned a minority interest in them, but through a series of acquisitions over the years, Comcast came to be the sole owner.<sup>22</sup>

13. By the early 2000s, Golf Channel and Versus had achieved wide distribution not only on Comcast systems but throughout the industry.<sup>23</sup> The distribution reflected the fact that in the early years it was easier to launch a new network because of greater demand and because total license fees paid by distributors were lower.<sup>24</sup>

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<sup>18</sup> Tennis Channel Exh. 308 (Comcast Corp. 2010 Form 10-K) at 1, 88; Comcast Exh. 75 (Bond Written Direct) ¶¶ 2, 32.

<sup>19</sup> Comcast Exh. 573 at TTCCOM\_00037385.

<sup>20</sup> Comcast Exh. 583; Bond Direct, Apr. 29, 2011 Tr. 1952:2-1954:2.

<sup>21</sup> Bond Direct, Apr. 29, 2011 Tr. 1953:7-12; Comcast Exh. 203 at 312, 600.

<sup>22</sup> Tennis Channel Exh. 126 at COMTTC\_00052118-19. As a result of the recent NBCUniversal ("NBCU") transaction which closed in early 2011, Comcast's ownership of Golf Channel and Versus was reduced to just over 50%. (Tennis Channel Exh. 13 ¶¶ 16-17).

<sup>23</sup> Bond Direct, Apr. 29, 2011 Tr. 1964:3-9; Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-13.

<sup>24</sup> Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-15; Orszag Direct, Apr. 27, 2011 Tr. 1223:9-1224:16.

14. In addition, through incentives such as launch support payments, networks such as Golf Channel and Versus were able to greatly reduce the costs to distributors of carrying them. In the early years of their existence, before Tennis Channel existed, Golf Channel and Versus paid hundreds of millions in such launch support payments to Comcast and other distributors (including distributors subsequently acquired by Comcast).<sup>25</sup>

15. By 2003, when Tennis Channel launched, however, much of the initial demand for new programming already had been filled, and the increasing costs to distributors of carrying all of this programming had become a significant issue.<sup>26</sup> Competition from satellite providers such as DIRECTV and Dish Network, as well as from telephone companies such as AT&T and Verizon, also had made it increasingly difficult for cable companies to absorb higher programming costs.<sup>27</sup>

### **III. Tennis Channel Launches and Pursues a Sports Tier Strategy**

16. Tennis Channel's earliest distributor agreements in 2002 and 2003 were with other cable companies and the National Cable Television Cooperative ("NCTC"), not Comcast.<sup>28</sup> Those early agreements were generally for carriage on a sports tier – the industry term for an arrangement whereby programming, in this case sports

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<sup>25</sup> Comcast Exh. 76 (Donnelly Written Direct) ¶ 18; Donnelly Direct, May 2, 2011 Tr. 2494:21-2495:17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 28-29; Bond Direct, Apr. 29, 2011 Tr. 1962:5-10; Comcast Exh. 77 (Egan Written Direct) ¶ 13.

<sup>26</sup> Comcast Exh. 77 (Egan Written Direct) ¶¶ 14-15; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15; Bond Direct, Apr. 29, 2011 Tr. 1969:15-1970:4; *see supra* ¶¶ 13-15.

<sup>27</sup> Comcast Exh. 77 (Egan Written Direct) ¶ 14; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15.

<sup>28</sup> Comcast Exh. 165 (6/7/02 Time Warner Cable Affiliation Agreement); Comcast Exh. 231 (6/17/02 NCTC Affiliation Agreement); Comcast Exh. 235 (3/7/03 Cox Letter Agreement).

programming, is offered not to everyone who signs up for more broadly distributed tiers of cable service but, instead, only to those subscribers who request the programming and are willing to pay an additional monthly fee to receive it.<sup>29</sup> One of the advantages of this type of distribution is that it allows the distributor to control costs by paying only for programming that subscribers are interested in and willing to pay for.<sup>30</sup> From the perspective of a programmer attempting to launch a new network, sports tiers are an attractive option to offer distributors because by lowering distributors' costs, they make it less risky for distributors to launch new networks.<sup>31</sup>

17. By definition, sports tiers do not have the same broad distribution as the basic, more popular programming packages that MVPDs offer.<sup>32</sup> In its 2005 strategic plan, Tennis Channel noted this as [REDACTED]

[REDACTED]<sup>33</sup>

18. In 2005, Tennis Channel persuaded Comcast to carry it by agreeing to contract terms that permitted Comcast to carry Tennis Channel on a sports tier, as other MVPDs, such as Time Warner and Cox, already were doing.<sup>34</sup> The Affiliation Agreement between Comcast and Tennis Channel contained an MFN (most favored

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<sup>29</sup> Comcast Exh. 75 (Bond Written Direct) ¶ 4; Comcast Exhs. 52, 165, 231, 235.

<sup>30</sup> Comcast Exh. 52; Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9; Egan Direct, Apr. 28, 2011 Tr. 1595:1-15.

<sup>31</sup> Tennis Channel expressly stated to Comcast that sports tier carriage would provide Comcast with [REDACTED] (Comcast Exh. 52).

<sup>32</sup> Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9.

<sup>33</sup> Comcast Exh. 508 at TTCCOM\_00065361.

<sup>34</sup> Comcast Exh. 84 (Affiliation Agreement between Comcast and Tennis Channel); Comcast Exh. 52; Comcast Exh. 75 (Bond Written Direct) ¶ 5; Bond Direct, Apr. 29, 2011 Tr. 1985:20-1988:13.

nation) provision entitling Comcast to benefit from other agreements that Tennis Channel might already have or might negotiate with other MVPDs in the future, and also

[REDACTED]

[REDACTED]<sup>35</sup> The Affiliation Agreement gives Comcast complete discretion to place Tennis Channel on whatever channel it wants.<sup>36</sup>

19. Tennis Channel's Affiliation Agreement with Comcast remains in full force and effect, and Tennis Channel concedes that Comcast has fully complied with its terms.<sup>37</sup>

20. Shortly after the Affiliation Agreement with Comcast was signed, Tennis Channel hired a new CEO who soon pursued a very different distribution strategy.<sup>38</sup>

#### **IV. Tennis Channel's New Equity-for-Carriage Strategy**

21. Ken Solomon took over as Tennis Channel's new CEO in April 2005.<sup>39</sup> Mr. Solomon had extensive prior experience in the video programming industry, though

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<sup>35</sup> Comcast Exh. 84 at TTCCOM\_00020421-23.

<sup>36</sup> Comcast Exh. 84 at TTCCOM\_00020405-06.

<sup>37</sup> Comcast Exh. 84 at TTCCOM\_00020400; Comcast Exhs. 85, 204; Tennis Channel Opening, Apr. 25, 2011 Tr. 121:16-19.

<sup>38</sup> Shortly before Mr. Solomon's arrival, Frank Garland, Tennis Channel's then-senior advertising executive, informed Tennis Channel's top management that its ratings and advertising projections [REDACTED]

[REDACTED] (Comcast Exh. 104; Comcast Exh. 572; Solomon Cross, Apr. 25, 2011 Tr. 357:22-358:8). The inflation resulted from Tennis Channel's mistaken belief that tennis had audience appeal similar to golf and other popular televised sports. Mr. Garland informed Tennis Channel management in December 2004 that [REDACTED] (Comcast Exh. 572).

<sup>39</sup> Solomon Cross, Apr. 25, 2011 Tr. 353:6-10.

none of that experience was with a single-sports network.<sup>40</sup> Shortly thereafter, Mr. Solomon decided to abandon sports tiers as a strategy, telling the Tennis Channel board that [REDACTED]<sup>41</sup>

22. Mr. Solomon decided to pursue broader distribution through equity-for-carriage deals with MVPDs.<sup>42</sup> An equity-for-carriage deal is one in which a programmer induces an MVPD to give its programming broader distribution by offering the MVPD an equity stake in the programmer.<sup>43</sup> Internal Tennis Channel documents, including e-mail and Mr. Solomon's own notes, refer to equity-for-carriage offers that Tennis Channel made to DIRECTV and Dish Network not long after Mr. Solomon took over as CEO and chairman.<sup>44</sup> Though Mr. Solomon at first denied during his testimony that the transactions with DIRECTV and Dish Network were negotiated as equity-for-carriage deals,<sup>45</sup> his testimony on that point was not credible, and eventually Mr. Solomon had to concede that Tennis Channel made equity-for-carriage proposals to Dish Network and DIRECTV to incentivize them to provide distribution.<sup>46</sup>

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<sup>40</sup> Solomon Cross, Apr. 25, 2011 Tr. 353:11-354:2.

<sup>41</sup> Comcast Exhs. 268, 701 at TTCCOM\_00067839; Solomon Cross, Apr. 25, 2011 Tr. 395:11-17.

<sup>42</sup> Comcast Exh. 701 at TTCCOM\_00067839; Solomon Cross, Apr. 25, 2011 Tr. 407:22-410:5, 413:11-16, 419:3-420:10.

<sup>43</sup> Solomon Cross, Apr. 25, 2011 Tr. 397:6-399:11.

<sup>44</sup> Comcast Exhs. 111 at TTCCOM\_00003632, 508 at TTCCOM\_00065359, 517, 703, 704.

<sup>45</sup> Solomon Cross, Apr. 25, 2011 Tr. 383:10-384:5; *see also* Tennis Channel Exh. 14 (Solomon Written Direct) at ¶ 8 n.3.

<sup>46</sup> Solomon Cross, Apr. 25, 2011 Tr. 408:13-410:5 (“Q: So this, you agree, is an equity for carriage offer that you made to DirecTV? A: It’s a proposal for them to make an offer back to us. Q: An equity for carriage proposal? A: Yes.”), 413:11-16, 419:3-420:10 (“Q: This letter is describing an equity for carriage proposal in which you are offering [Dish Network] equity in exchange for getting greater distribution, correct? . . .

23. In 2006 and 2007, Tennis Channel signed equity-for-carriage deals first with Dish Network and then with DIRECTV.<sup>47</sup> In exchange for distribution to a guaranteed minimum percentage of subscribers, Dish Network received a [REDACTED] equity interest in Tennis Channel and DIRECTV received a [REDACTED] stake.<sup>48</sup> In addition, each MVPD received a seat on Tennis Channel's board of directors.<sup>49</sup> None of the MVPDs that had previously done sports tier deals with Tennis Channel had received any equity in Tennis Channel or board seats, and none were required to distribute Tennis Channel as broadly as Dish Network and DIRECTV were required to distribute it.<sup>50</sup>

**V. The 2006 and 2007 MFN Offers**

24. Shortly after signing its equity-for-carriage deal with Dish Network in February 2006, Tennis Channel made an offer to Comcast under the MFN provision in its

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THE WITNESS: . . . It appears, yes, that that's what we're proffering in this note. BY MR. CARROLL: Q: And that is what you proffered in the note to Dish, correct? A: Yes."); Comcast Exhs. 503, 703.

<sup>47</sup> Comcast Exhs. 100, 241, 242, 247.

<sup>48</sup> Comcast Exhs. 100, 241, 398, 439.

<sup>49</sup> Solomon Direct, Apr. 25, 2011 Tr. 316:10-14. Mr. Solomon – whose positions include chairman of Tennis Channel's board of directors – testified on direct that the representatives of Dish Network and DIRECTV on the Tennis Channel board “recused themselves from anything having to do with distribution issues.” (Solomon Direct, Apr. 25, 2011 Tr. 316:3-18). This testimony is contradicted by Tennis Channel's [REDACTED]

[REDACTED] (Comcast Exh. 730). This testimony also is contradicted by the representation of Tennis Channel's counsel that the Dish Network and DIRECTV representatives would only “recuse themselves on decisions that come up that affect their own companies.” (Colloquy, Apr. 26, 2011 Tr. 540:12-19).

<sup>50</sup> Comcast Exhs. 84, 165, 231, 235.

agreement.<sup>51</sup> The MFN offer was an equity-for-carriage proposal comparable to the one that Tennis Channel had signed with Dish Network.<sup>52</sup> After receiving the offer, Comcast performed a cost-benefit analysis in which it compared the increased cost in subscriber fees it would be required to pay with the value of the equity that Comcast would receive in Tennis Channel. The cost-benefit analysis revealed that the costs would substantially exceed the benefits, and Mr. Madison Bond, then Comcast's head of programming acquisition, determined that there was no basis to believe that any additional benefits such as enhanced ability to attract or retain subscribers would accrue to Comcast from distributing Tennis Channel more broadly.<sup>53</sup> Accordingly, Comcast declined the offer.<sup>54</sup>

25. The following year, Tennis Channel made another MFN offer to Comcast after it signed its equity-for-carriage deal with DIRECTV.<sup>55</sup> Once again, Comcast performed a cost-benefit analysis comparing the cost of distribution to additional subscribers with the value of the equity in Tennis Channel which Comcast would receive. Once again, the analysis revealed that the costs would substantially exceed the value of the equity, and Mr. Bond determined that no other benefits would offset those costs. On that basis, Comcast declined the offer.<sup>56</sup>

26. It is undisputed that after each of its decisions in 2006 and 2007, Comcast explained to Tennis Channel the cost-benefit analysis that it had performed, and there is

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<sup>51</sup> Comcast Exh. 58; *see also* Comcast Exh. 84 at TTCCOM\_00020421-23.

<sup>52</sup> Comcast Exhs. 58, 87.

<sup>53</sup> Comcast Exh. 60; Comcast Exh. 76 (Donnelly Written Direct) ¶¶ 7-11; Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-26.

<sup>54</sup> Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-26.

<sup>55</sup> Comcast Exh. 86.

<sup>56</sup> Comcast Exhs. 66, 86; Comcast Exh. 76 (Donnelly Written Direct) ¶¶ 13-17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-26.

no evidence that anyone at Tennis Channel complained that Comcast's analysis of each offer was in any way wrong or discriminatory.<sup>57</sup> In fact, during hearing testimony, Mr. Solomon admitted that he did not believe Comcast's decision in 2007 was discriminatory.<sup>58</sup>

## **VI. The 2009 Proposal**

27. The central factual dispute in this case concerns another proposal which Tennis Channel made to Comcast in 2009 and communications between the two sides relating to that proposal. The two key witnesses on this central issue were Tennis Channel's CEO, Mr. Solomon, and the former head of content acquisition at Comcast, Mr. Bond.<sup>59</sup> Mr. Bond's testimony was consistent, competent, and credible.<sup>60</sup> The testimony of Mr. Solomon, by contrast, was often inconsistent and not credible. Based on these credibility findings, the testimony of Mr. Bond is accepted and that of Mr. Solomon rejected, on factual issues where the two gave differing accounts.

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<sup>57</sup> In particular, Tennis Channel did not complain about Comcast's changes to the projections in Tennis Channel's business plan. (Comcast Exh. 106; Donnelly Direct, May 2, 2011 Tr. 2519:22-2520:17). Tennis Channel was aware that the projections set forth in its business plan were significantly overstated. Upon his arrival at Tennis Channel, Mr. Solomon had described Tennis Channel's business plan as a [REDACTED] (Comcast Exh. 709; *see also* Comcast Exhs. 104, 572 (stating that Tennis Channel employees had previously inflated ratings and advertising projections)).

<sup>58</sup> Solomon Cross, Apr. 25, 2011 Tr. 457:11-16. [REDACTED]  
[REDACTED] (Comcast Exhs. 112, 320).

<sup>59</sup> After the NBCU transaction closed in 2011, Mr. Bond changed jobs and became the Executive Vice President of Content Distribution for NBCU, where he is responsible for distributing all of the NBC cable channels, broadcast stations and other content. (Bond Direct, Apr. 29, 2011 Tr. 1945:4-22; Comcast Exh. 75 (Bond Written Direct) ¶ 2).

<sup>60</sup> In *WealthTV*, Mr. Bond testified before the Presiding Judge who found Mr. Bond's testimony to be "consistent, competent and credible." *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, 24 FCC Rcd 12967, 12988-89 ¶ 44 (ALJ 2009) (hereinafter "*WealthTV*").

28. Mr. Solomon testified that he approached Comcast in May 2009 and made a proposal for Comcast to move Tennis Channel off the sports tier where it had been distributed since 2005.<sup>61</sup> Under the 2009 proposal, Comcast would have been required to increase the number of subscribers receiving Tennis Channel by { [REDACTED] } times by including Tennis Channel in one of the two most popular packages that Comcast offered its subscribers (known as digital starter (or D0, and digital expanded basic) or D1).<sup>62</sup> Because the fees Tennis Channel charges are calculated per subscriber, the 2009 proposal would have increased the total fees Comcast would have to pay Tennis Channel over the remaining life of their contract by [REDACTED].<sup>63</sup> Tennis Channel presented no evidence showing that Comcast would be able to earn additional revenues to offset this substantial increase in costs it would have incurred under the 2009 proposal.

29. Mr. Solomon testified, however, that he believed that Comcast would find the 2009 proposal “irresistible” because of the increased Grand Slam and high definition coverage which Tennis Channel was able to provide.<sup>64</sup> Comcast had, however, already declined two equity-for-carriage proposals in 2006 and 2007, the terms of which were more favorable financially to Comcast than the “irresistible” proposal in 2009.<sup>65</sup> And

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<sup>61</sup> Solomon Direct, Apr. 25, 2011 Tr. 304:4-305:9.

<sup>62</sup> Comcast Exhs. 588, 638; Comcast Exh. 75 (Bond Written Direct) ¶ 14; Comcast Exh. 78 (Gaiski Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2093:4-2097:18.

<sup>63</sup> Comcast Exh. 588; Comcast Exh. 638; Comcast Exh. 78 (Gaiski Written Direct) ¶ 14; Gaiski Direct, May 2, 2011 Tr. 2344:1-2347:14. Tennis Channel’s own contemporaneous analysis confirmed that accepting Tennis Channel’s 2009 proposal would have increased Comcast’s costs considerably. (Comcast Exh. 467).

<sup>64</sup> Solomon Direct, Apr. 25, 2011 Tr. 261:7-12, 262:10-12, 263:10-20, 266:9-22, 268:13-19, 285:8-9.

<sup>65</sup> Comcast Exhs. 86, 87.

prior to 2009, Tennis Channel had had no success in persuading other cable companies that, like Comcast, had contracts entitling them to sports tier carriage to surrender those contract rights in favor of broader distribution agreements.<sup>66</sup> In early 2009, every other major cable company that carried Tennis Channel did so on some form of a sports tier, and two other distributors (AT&T and Cablevision) still did not carry Tennis Channel at all.<sup>67</sup>

30. In addition, the evidence showed that since at least January 2007, Tennis Channel had been considering [REDACTED]  
[REDACTED]  
[REDACTED] }<sup>68</sup> and that by early 2009, months before it made its “irresistible” offer to Comcast, Tennis Channel already was [REDACTED]  
[REDACTED]  
[REDACTED] }<sup>69</sup>

31. Mr. Solomon’s testimony that the 2009 proposal was “irresistible” is therefore not credible, and it seems more likely that the 2009 offer was part of a legal strategy to set up a claim against Comcast than a sincere effort to start a negotiation. Mr. Bond testified that in April 2009, Mr. Solomon sent a letter that for the first time was

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<sup>66</sup> Comcast Exhs. 112, 320.

<sup>67</sup> Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23; Comcast Exh. 659; Comcast Exh. 517 (Solomon Dep.) 196:9-197:19.

<sup>68</sup> Comcast Exhs. 22, 24, 125, 136, 137, 271, 516, 522, 626. For example, in early 2007, [REDACTED]  
[REDACTED] (Comcast Exh. 24).

<sup>69</sup> Herman Cross, Apr. 26, 2011 Tr. 662:20-663:19; Comcast Exh. 368 (Herman Dep.) 162:17-178:19; 206:10-208:19; Comcast Exh. 517 (Solomon Dep.) 278:9-280:6.

threatening in tone, and that the offer itself in May 2009 was presented more as a take-it-or-leave-it proposition than as the start of a negotiation.<sup>70</sup>

32. Mr. Solomon testified on direct that after receiving Tennis Channel's offer in May 2009, Mr. Bond never made a counterproposal and that it was Mr. Bond who abruptly cut off any further discussions between the two sides.<sup>71</sup> Mr. Solomon recanted that testimony on cross-examination, however, and admitted that, in fact, Mr. Bond had made a counterproposal and that it was Mr. Solomon, and not Mr. Bond, who had cut off any further discussion by declaring that he, Mr. Solomon, was not interested in "half measures" and that further discussion between the two sides would be "a waste of time."<sup>72</sup> During his testimony, Mr. Bond explained that Mr. Solomon had presented the 2009 proposal as almost a take-it-or-leave-it offer but that notwithstanding that approach, he, Mr. Bond, was prepared to engage in further discussions and had even offered to explore ways in which he might identify some regions where Comcast might be able to offer Tennis Channel increased distribution.<sup>73</sup> Mr. Bond confirmed, though, that Mr. Solomon had cut off further discussions by making the pronouncements about half measures and further discussions being a waste of time.<sup>74</sup>

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<sup>70</sup> Comcast Exh. 592; Comcast Exh. 75 (Bond Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2107:16-2109:17.

<sup>71</sup> Solomon Direct, Apr. 25, 2011 Tr. 283:5-21; *see also* Tennis Channel Exh. 14 (Solomon Written Direct) ¶¶ 28-29.

<sup>72</sup> Solomon Cross, Apr. 25, 2011 Tr. 348:13-350:1; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2130:7.

<sup>73</sup> Comcast Exh. 75 (Bond Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2129:21.

<sup>74</sup> Comcast Exh. 75 (Bond Written Direct) ¶ 19; Bond Direct Apr. 29, 2011 Tr. 2128:9-2129:21; *see also* Comcast Exh. 646 (Simon Dep.) 50:9-17.