

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)	
)	
Complaint Alleging Program Carriage Discrimination)	
)	

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

Issued: _____ Released: _____

**[PROPOSED] RECOMMENDED DECISION OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

Appearances

Stephen A. Weiswasser, Esquire, C. William Phillips, Esquire, Paul W. Schmidt, Esquire, Robert M. Sherman, Esquire, Leah E. Pogoriler, Esquire, Neema D. Trivedi, Esquire, on behalf of The Tennis Channel, Inc. Michael P. Carroll, Esquire, David B. Toscano, Esquire, Edward N. Moss, Esquire, James L. Casserly, Esquire, David P. Murray, Esquire, Michael D. Hurwitz, Esquire, David H. Solomon, Esquire, J. Wade Lindsay, Esquire, on behalf of Comcast Cable Communications, LLC. Gary Oshinsky, Esquire and William Knowles-Kellett, Esquire, on behalf of the Enforcement Bureau of the Federal Communications Commission.

PRELIMINARY STATEMENT

1. On January 5, 2010, The Tennis Channel, Inc. (“Tennis Channel”), a video programming vendor,¹ filed a carriage complaint against Comcast Cable Communications, LLC

¹ A “video programming vendor” is a “person engaged in the production, creation, or wholesale distribution of video programming for sale.” 47 U.S.C. § 536(6)(b).

("Comcast"), a multichannel video programming distributor (MVPD),² alleging that Comcast had violated Section 616 of the Communications Act of 1934, as amended, and Section 76.1301(c) of the Commission's rules³ by discriminating in favor of Comcast's affiliated sports networks and against Tennis Channel in the terms and conditions of video programming distribution. Specifically, Tennis Channel alleges that Comcast carries its affiliated sports networks, including Golf Channel and Versus, on broadly distributed tiers throughout all of its systems, while largely restricting Tennis Channel to a narrowly penetrated, premium-pay sports tier throughout its systems.⁴ Tennis Channel asserts that the basis for this differential treatment is each network's affiliation or non-affiliation; that it is similarly situated to Comcast's affiliated sports networks; and that Comcast's discrimination unreasonably restrains its ability to compete fairly.⁵ Tennis Channel requests that Comcast be ordered to carry it on each local system on a tier no less distributed than the most highly penetrated tier on which Comcast carried any of its affiliated sports networks.⁶

2. On October 4, 2010, the Media Bureau, by delegated authority, designated the case for hearing before an Administrative Law Judge ("Presiding Judge").⁷ The Media Bureau found that Tennis Channel had presented *prima facie* evidence that Comcast violated Section 616.⁸ The Bureau stated that "the existing record, including Comcast's Answer, makes clear that there are substantial and material questions of fact as to whether Comcast has engaged in conduct that violates the program carriage provisions of the Act and the Commission's rules"; it therefore "direct[ed] the Presiding Judge to develop a full and complete record and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision."⁹ The Bureau designated the case for a hearing at which the Presiding Judge was to address the following issues:

² A "multichannel video programming distributor," or MVPD, is "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.1000(e). Examples include cable companies, such as Comcast; direct broadcast satellite (DBS) operators, such as DIRECTV and EchoStar (which operates the Dish Network); and telephone company ("telco") distributors, such as Verizon FiOS and AT&T U-Verse.

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

⁴ See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Program Carriage Complaint (Jan. 5, 2010), Tennis Channel Ex. 18 [hereinafter "Complaint"].

⁵ *Id.* at 22-45.

⁶ *Id.* at 45.

⁷ See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, DA 10-1918, *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* (Oct. 5, 2010), Tennis Channel Ex. 11 [hereinafter "HDO"].

⁸ *Id.* ¶¶ 2, 17, 19, 20.

⁹ *Id.* ¶ 2.

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(a) To determine whether Comcast has engaged in conduct the effect of which is to unreasonably restrain the ability of The Tennis Channel to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by The Tennis Channel, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and

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

(c) In light of the evidence adduced pursuant to the foregoing issues, to determine whether a forfeiture should be imposed on Comcast.¹⁰

3. Following the completion of discovery and the submission of written direct testimony, proposed exhibits, and trial briefs, formal hearings were held in the Office of Administrative Law Judges ("OALJ") courtroom at Commission headquarters from April 25, 2011 through May 2, 2011. Four witnesses appeared on behalf of Tennis Channel,¹¹ and seven witnesses appeared on behalf of Comcast.¹²

¹⁰ *Id.* ¶ 24. The Media Bureau stated that "the following matters are not designated for the ALJ to resolve: . . . whether The Tennis Channel's complaint was filed in accordance with the program carriage statute of limitations." *Id.* ¶ 2 n.4. Accordingly, this issue was not addressed at the hearing and is not the subject of this Recommended Decision.

¹¹ Mr. Ken Solomon, Chairman and Chief Executive Officer of Tennis Channel, and Mr. Gary Herman, Tennis Channel's Senior Vice President of Advertising Sales, testified as fact witnesses on behalf of Tennis Channel. In addition, Tennis Channel presented two expert witnesses: Dr. Hal Singer, Managing Director at Navigant Economics; and Mr. Timothy Brooks, an independent media consultant and media researcher. I found Tennis Channel's witnesses credible and reliable.

¹² Comcast's fact witnesses were Mr. Madison Bond, who was Executive Vice President of Content Acquisition at Comcast until his recent transfer to NBC Universal; Ms. Jennifer Gaiski, Senior Vice President of Content Acquisition for Comcast, who reported to Mr. Bond until recently; Mr. Gregory Rigdon, Executive Vice President of Content Acquisition, who replaced Mr. Bond; and Mr. Joseph Donnelly, until recently the Senior Vice President and Chief Financial Officer of Comcast Programming Group. Comcast presented testimony from three expert witnesses: Mr. Jonathan Orszag, Senior Managing Director and member of the Executive committee of Compass Lexecon; Mr. Michael Egan, founder of Renaissance Media Partners, LLC; and Mr. Marc Goldstein, a media consultant. An eighth witness, Jeffrey Shell, the former

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4. Subsequently, Tennis Channel and Comcast each filed (1) Proposed Findings of Fact and Conclusions of Law; (2) Reply Findings of Fact and Conclusions of Law; (3) Post-Trial Briefs; and (4) Proposed Recommended Decisions. The parties also filed a Joint Glossary of Terms. The Enforcement Bureau, participating as a party and representing the public interest, cross-examined each witness during the hearing and filed Comments addressing the complaint.

* * *

5. For the reasons explained below, I find that Comcast has discriminated in its network distribution decisions on the basis of affiliation or non-affiliation. Comcast carries its affiliated national sports networks, including Golf Channel and Versus, as well as the NHL Network and the MLB Network, broadly and pursuant to a company-wide mandate. This mandate is based on affiliation. Comcast does not provide this or other benefits to Tennis Channel, because it is an unaffiliated network. Comcast applies different standards to Tennis Channel based on its non-affiliation, unreasonably harming Tennis Channel's ability to compete fairly for viewers, advertisers, and programming rights (including rights sought by Comcast for Versus).

FINDINGS OF FACT

Description of Parties

Tennis Channel

6. Tennis Channel is a national cable sports network that launched in 2003.¹³ Tennis Channel airs coverage of tennis and tennis-related programming.¹⁴ Tennis Channel has rights to telecast virtually every top tennis tournament in the world. By 2009, it had secured rights to cover portions of all four of the world's leading tennis events, known as the "Grand Slams": the Australian Open, the French Open, Wimbledon, and the U.S. Open.¹⁵ In addition, Tennis Channel carries approximately a hundred major tennis tournaments, including the Fed Cup, the Davis Cup, Association of Tennis Professionals World Tour Masters 1000 events,

head of the Comcast Programming group, testified by deposition, and designations from his testimony were, by stipulation of the parties, admitted into the record as Tennis Channel Exhibits 142 and 143.

¹³ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 2 (¶ 5). Tennis Channel is a video programming vendor as defined by Section 616 of the Act and Section 76.1301(c) of the Commission's regulations. See 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

¹⁴ *Id.* ¶ 5.

¹⁵ *Id.* ¶¶ 5, 13. Tennis Channel has rights to show live or delayed tournament play for all of the four Grand Slams (the Australian Open, the French Open, Wimbledon, and the U.S. Open). In 2010 it earned an Emmy nomination for its exclusive Wimbledon Primetime coverage of the fourth Grand Slam. *Id.* ¶ 7; see also e.g., Tennis Channel Ex. 127, at 262, 348; Tr. at 452:1-3, 495:16-18 (Solomon).

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Women's Tennis Association Premier Tournaments, and many other top events.¹⁶ In addition to live events, Tennis Channel also creates original programming, including lifestyle, instructional, and fitness series, specials, and short-form programs featuring popular athletes and experts in tennis.¹⁷ The network launched a high-definition (HD) television version of its service in 2008.¹⁸

7. Comcast does not have an ownership interest in Tennis Channel.¹⁹

8. Nationwide, Tennis Channel is distributed by approximately 130 cable, satellite, and telco operators to approximately [REDACTED] million subscribers.²⁰ About two-thirds of Tennis Channel's distribution is on "general interest" tiers, which include a range of both sports-based programming and other types of networks and are generally distributed to a significant proportion of a distributor's subscribers.²¹ The distributors that carry Tennis Channel on broadly penetrated general interest tiers include Comcast's self-identified "chief competitors": the satellite companies DIRECTV and Dish Network, and the telcos Verizon FiOS and AT&T U-Verse.²² DIRECTV carries Tennis Channel to [REDACTED] of its subscribers; Dish Network to [REDACTED]; Verizon to [REDACTED]; and AT&T to [REDACTED].²³ Other major cable companies, such as Cox, also provide Tennis Channel to their customers on broadly penetrated tiers without requiring their customers to pay extra for a sports tier. For example, Cox carries Tennis Channel to about [REDACTED] of its subscribers on a general interest "Digital Sports and Information Tier," where it also carries Versus, the NHL Network, the NFL Network, Golf Channel, Bloomberg, and other national sports and news cable networks.²⁴

¹⁶ *Id.* ¶¶ 5, 6, 13, 14.

¹⁷ *Id.* ¶ 6.

¹⁸ *Id.* ¶ 11.

¹⁹ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 20 (¶ 42 n.11). DIRECTV and Dish Network have, at separate times, purchased minority shares in the network; I address this point in more detail below.

²⁰ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 3 (¶ 8).

²¹ Tr. at 248:14-22 (Solomon).

²² Tennis Channel Ex. 139 (Madison Bond Deposition Transcript) at 21:6-11; Tr. at 2309:14-2310:4 (Bond); Tr. at 1809:4-9 (Rigdon).

²³ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 5 (¶ 8 & n.4); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 44 (¶ 62).

²⁴ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 3 (¶ 8).

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Comcast and Its Affiliated Sports Networks

9. Comcast is the largest MVPD in the United States, serving approximately 23 million television subscribers.²⁵ Comcast serves one in every four homes in the United States, and it is the dominant MVPD in seven of the top ten media markets, with a substantial presence in the eighth largest market.²⁶

10. Comcast offers programming to its customers in tiers, that is, packages of channels that are sold as a bundle. Approximately [REDACTED] of Comcast subscribers — [REDACTED] — receive the next broadest tier after broadcast basic, which is either Digital Starter (DS or D0), or its analog equivalent, Expanded Basic.²⁷ Versus and Golf Channel, which are affiliated with Comcast, are carried at this level.

11. Nearly [REDACTED] of Comcast subscribers — [REDACTED] — receive the Digital Preferred (D1) tier, which offers additional general interest channels.²⁸ The NHL Network and the MLB Network, which are affiliated with Comcast, are carried on this tier.

12. Fewer than [REDACTED] of Comcast subscribers — [REDACTED] — receive Comcast's Sports and Entertainment Package (the "Sports Tier").²⁹ Tennis Channel is carried on this tier. In order to receive the Sports Tier, Comcast subscribers must pay an additional premium of approximately \$5 to \$8 per month.³⁰

13. Comcast is vertically integrated: as a cable company, it is involved in video programming distribution; at the same time, it is affiliated with programming networks, which are owned in whole or in part by its parent company, Comcast Corporation.³¹

²⁵ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 69 (¶ 101); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 15:9-12; Tr. at 1989:1-2, 1991:11-12 (Bond).

²⁶ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 69 (¶ 101); Tennis Channel Ex. 15 (Testimony of Gary Herman) at 5 (¶¶ 13-14).

²⁷ Tr. at 1951:1-17, 2096:8-17; 2115:21-2116:12 (Bond); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 15:13-21.

²⁸ Tr. at 2190:21-2191:3 (Bond).

²⁹ Tr. at 2012:14-2013:1 (Bond).

³⁰ Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

³¹ See generally Joint Glossary of Terms at 9. The Comcast Programming Group is the division within Comcast Corporation responsible for operating networks, such as Golf Channel and Versus. See *id.* at 3.

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14. *Golf Channel and Versus*. Until its merger with the content company NBC Universal in 2011, Comcast Corporation wholly owned Golf Channel and Versus. Comcast continues to have a controlling interest in these networks following the merger.³²

15. Golf Channel is a single-sport network that launched in 1995 and that focuses on events, news, and analysis relating to golf.³³ Although it offers play-by-play event coverage of portions of a number of golf tournaments, Golf Channel has no rights to telecast any actual tournament play for any of the four golf Majors: the Masters Tournament, the U.S. Open, the British Open, and the PGA Championship.³⁴

16. Versus, which launched in 1995, televises various sports, including hockey, the Tour de France bicycle event, and tennis.³⁵ In recent years, Versus has shared with Tennis Channel the rights to cover tennis events, such as the U.S. Davis Cup (in 2006) and the WTA Tour Championships (in 2007).³⁶ In 2007, [REDACTED],³⁷ and it considered acquiring rights to a second top tennis tournament, the French Open.³⁸ Today, Comcast has stipulated that it is currently competing to acquire rights to a third top tennis tournament, Wimbledon, including the rights that Tennis Channel currently holds.³⁹

17. Comcast requires all of its local cable systems around the nation to carry Golf Channel and Versus on the Expanded Basic or Digital Starter tiers (depending on the system) to approximately [REDACTED] subscribers.⁴⁰ Comcast's systems do not have the

³² As a part of the merger, Comcast established a structure by which these networks were transferred to a corporate entity in which Comcast holds a majority interest and which Comcast can acquire in full over the next several years. *See* Tennis Channel Ex. 102, at 20-25.

³³ Tennis Channel Ex. 21, 61, 128; Tennis Channel Ex. 164 at COMTTC_00054265.

³⁴ Tr. at 1513:18-19, 1728:1-9 (Egan); *see also* Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 7 (¶ 14).

³⁵ *See* Tennis Channel Ex. 129; Tennis Channel Ex. 21 (then called Outdoor Life Network).

³⁶ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 19 (¶ 42).

³⁷ [REDACTED]

³⁸ *See* Tr. at 2592:5-8 (Donnelly); *see also* Tennis Channel Ex. 119 [REDACTED]

³⁹ Tennis Channel Ex. 179; Tr. at 1407:3-9 (Orszag).

⁴⁰ Tr. at 2160:19-2161:21, 2218:14-19, 2219:22-2220:15 (Bond); Comcast Ex. 75 (Testimony of Madison Bond) at 11 (¶ 31); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20 tbl. 1); Tennis Channel Exs. 131, 132; Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 20:19-21:1.

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option to carry Golf Channel or Versus more narrowly, even if they wish to do so.⁴¹ Comcast's cable distribution group pays its programming group ██████████ per subscriber per month for Golf Channel, for a total of ██████████ per year,⁴² and about ██████████ per subscriber per month for Versus, for a total of approximately ██████████ per year.⁴³

18. *NHL Network and MLB Network.* Comcast has attributable ownership interests in the NHL Network and the MLB Network,⁴⁴ which cover hockey and baseball, respectively.⁴⁵ Comcast carries the NHL Network and the MLB Network on its Digital Preferred (D1) tier to approximately ██████████ subscribers.⁴⁶ Comcast pays about ██████████ per subscriber per month for the NHL Network, for a total of ██████████ per year,⁴⁷ and about ██████████ per subscriber per month for the MLB Network, for a total of approximately ██████████ per year.⁴⁸

19. *Other sports networks.* Comcast owns Comcast SportsNet, a collection of regional sports networks (RSNs), and it has an ownership interest in NBA TV through its ownership of the Philadelphia 76ers.⁴⁹

⁴¹ Tr. at 2160:19-2161:21 (Bond).

⁴² Tr. at 2218:14-2219:4 (Bond); Tr. at 1874:3-6 (Rigdon).

⁴³ Tr. at 2377:1-8 (Gaiski); Tr. at 1874:7-11 (Rigdon); *see also* Tr. at 2249:18-2250:2 (Bond).

⁴⁴ Tennis Channel Ex. 87 § 1.01, p. 6; Comcast Ex. 54; Comcast Ex. 75 (Testimony of Madison Bond) at 8 (¶¶ 22-24); Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 9 (¶ 22 n.3); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 263:4-9; Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20).

⁴⁵ Tr. at 2180:5-17, 2181:1-4, 2182:7-12 (Bond); Tennis Channel Ex. 175 at COMTTC_00052977-78; Tennis Channel Ex. 165 at COMTTC_00052706-07.

⁴⁶ Comcast Ex. 75 (Testimony of Madison Bond) at 8 (¶¶ 22-24); Tr. at 2190:21-2191:3 (Bond); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20 & tbl. 1); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 19:13-16, 21:3-10. Comcast "dual-illuminates" these networks, meaning that they are carried on both D1 and the Sports Tier; although they are nominally carried on the Sports Tier, Comcast subscribers do not need to purchase the Sports Tier to receive them. Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20 tbl. 1); Tr. at 2424:7-13, 2426:8-12 (Gaiski).

⁴⁷ Tennis Channel Ex. 177, at COMTTC_00052960.

⁴⁸ Tr. at 2221:12-2222:7 (Bond).

⁴⁹ Comcast Ex. 75 (Testimony of Madison Bond) at 9 (¶ 23); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 46 (¶ 64).

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20. *Date of launch.* Tennis Channel launched after Golf Channel and Versus. Thus, as in the *WealthTV* case, where the complaining network launched after the networks affiliated with the defendant MVPDs,⁵⁰ given the differences in launch dates, “WealthTV was not — and could not have been — a factor in any of the defendants’ decisions to provide carriage to their affiliated networks.”⁵¹ The same is true as to Versus and Golf Channel here; Tennis Channel was not a factor in Comcast’s early carriage decisions for Golf Channel and Versus. However, Comcast could have rethought the level of carriage it provided these services when their contracts expired — but it did not do so. And its decisions to carry the NHL Network and the MLB Network, which were launched well after Tennis Channel, on the D1 tier cannot be similarly justified.

Background of Dispute

Comcast’s Restriction of Tennis Channel’s Distribution to Its Sports Tier

21. On [REDACTED], Tennis Channel and Comcast entered into an affiliation agreement allowing Comcast to carry Tennis Channel in return for a per-subscriber fee.⁵² The affiliation agreement requires Comcast to exercise discretion with respect to the tiers on which to carry Tennis Channel, [REDACTED].⁵³

22. Today, Tennis Channel is received by approximately [REDACTED] Comcast subscribers.⁵⁴ Approximately [REDACTED] of Comcast’s cable systems

⁵⁰ *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, File Nos. CSR-7709-P, 7822-P, 7829-P, 7907-P, FCC 09 D-01, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, ¶ 12 (rel. Oct. 14, 2009) [hereinafter “*WealthTV P*”]. The Recommended Decision was recently adopted by the full Commission. See *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, File Nos. CSR-7709-P, 7822-P, 7829-P, 7907-P, FCC 09 D-01, Memorandum Opinion and Order, ¶ 3 (rel. June 13, 2011) [hereinafter “*WealthTV IP*”].

⁵¹ *WealthTV I* ¶ 12.

⁵² Tennis Channel Ex. 144.

⁵³ *Id.* ¶ 6.2.1; Tr. at 1985:20-1986:12, 2158:18-2159:18 (Bond); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 44:6-45:14.

⁵⁴ Tennis Channel Ex. 130.

carry Tennis Channel, but the vast majority do so exclusively on the Sports Tier.⁵⁵ None of the sports networks that Comcast carries exclusively on the Sports Tier is affiliated with Comcast.⁵⁶

23. Comcast has determined that systems generally may not carry Tennis Channel on tiers other than the Sports Tier. A Comcast distribution executive has in the past instructed Comcast's cable systems around the nation that Tennis Channel should be distributed solely on the Sports Tier and not any broader digital basic tier.⁵⁷ Comcast's new head of content acquisition, Mr. Gregory Rigdon, has confirmed that this policy remains in force: Comcast's corporate office will not permit broad carriage of Tennis Channel even if its local personnel and customers request it.⁵⁸

Comcast's Rejection of Tennis Channel's May 2009 Proposal.

24. In early 2009 Tennis Channel's CEO, Mr. Ken Solomon, initiated negotiations with Comcast seeking broader distribution on Comcast's systems.⁵⁹ During these negotiations, Comcast's then-Executive Vice President of Content Acquisition, Mr. Madison Bond, told Mr. Solomon that Comcast would refuse to expand carriage of Tennis Channel unless Tennis Channel provided Comcast with an "incentive" to do so.⁶⁰ Mr. Bond also told Mr. Solomon that he thought that this demand would preclude further discussions because he believed that it would be "too expensive" for Tennis Channel to provide any further incentive to Comcast, given [REDACTED].⁶¹

25. Executives from both parties, including Mr. Solomon and Mr. Bond, met at Comcast's headquarters in Philadelphia on May 12, 2009. Tennis Channel responded to Mr. Bond's demand for an incentive by offering [REDACTED] that it was charging to Comcast. Specifically, Tennis Channel proposed [REDACTED].

⁵⁵ Tr. at 1988:17-1990:22 (Bond); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 19:17-21, 19:25-20:3; Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20 & tbl. 1). Some Comcast systems carry Tennis Channel on tiers that are more broadly distributed than the Sports Tier, but Comcast has described such systems as the "exceptions" to its otherwise consistent practice of carrying the network on the limited Sports Tier. Tr. at 1989:10-14 (Bond).

⁵⁶ Tr. at 2198:15-21 (Bond).

⁵⁷ Tr. at 2407:18-2408:15, 2482:13-2485:1 (Gaiski).

⁵⁸ Tr. at 1877:7-17, 1879:20-1881:11:1 (Rigdon).

⁵⁹ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 8 (¶ 15).

⁶⁰ *Id.* ¶¶ 20-21, 26; Tennis Channel Ex. 144 ¶¶ 5.1.2, 5.5; *see also* Tennis Channel Ex. 19, Answer of Comcast Cable Communications, LLC, ¶ 46 [hereinafter "Comcast Answer"].

⁶¹ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 10 (¶ 21).

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26. After nearly a month, on June 9, 2009, Mr. Bond called Mr. Solomon to say that Comcast had decided to decline Tennis Channel's proposal.⁶³ Comcast did not offer a counter-proposal.⁶⁴ Mr. Bond told Tennis Channel that the network could try to negotiate broader carriage with local Comcast systems on an individual market-by-market basis. This offer was no different from the arrangement that Tennis Channel already had in its existing contract with Comcast, an arrangement that had proven illusory in view of Comcast's past refusal to allow broader positioning of Tennis Channel even when system personnel were interested in doing so.⁶⁵

27. Comcast ended the negotiations on June 9, when it called to reject Tennis Channel's proposal without making a counter-offer on price.⁶⁶ Comcast's suggestion that Tennis Channel should continue to seek broader carriage on a local system-by-system basis merely restated a right that Tennis Channel already had under its contract.⁶⁷

28. On June 8, 2009, the day before Comcast rejected Tennis Channel's proposal, Ms. Gaiski, who reported to Mr. Bond in the content acquisition area, held a conference call with four Comcast cable division representatives and in-house counsel to discuss

⁶² Tennis Channel Ex. 70; Comcast Ex. 588; Tr. at 2099:17-2100:11 (Bond). At Tennis Channel's proposed discounted rates, Comcast would have paid Tennis Channel approximately [REDACTED] more for carrying it on D1 and [REDACTED] more for carrying it on Digital Starter for 2009. Tr. at 1874:20-1875:14 (Rigdon); Comcast Ex. 588. In carrying Versus and Golf Channel on Expanded Basic/Digital Starter, Comcast currently pays Versus [REDACTED] more and Golf Channel [REDACTED] more than what it would pay if the channels were distributed at the same level as Tennis Channel. See Tennis Channel Ex. 155, at COMTTC_0000027; Tennis Channel Ex. 164, at COMTTC_00054262.

⁶³ Tr. at 2128:1-14 (Bond); Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 7 (¶ 17).

⁶⁴ Tr. at 2215:9-11 (Bond); Tr. at 2413:1-16 (Gaiski); Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 13 (¶ 28).

⁶⁵ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 13 (¶ 29); Tr. at 2214:3-12 (Bond); *see also* Tr. at 1877:7-17, 1879:20-1881:1 (Rigdon).

⁶⁶ [REDACTED]

⁶⁷ On December 10, 2009, Tennis Channel sent a letter to Comcast President Steve Burke, inviting an amicable resolution of the dispute. In that letter, Mr. Solomon also informed Mr. Burke that if the matter could not be resolved informally, Tennis Channel would file a program carriage complaint against Comcast. Tennis Channel Ex. 88. After Comcast once again refused to engage in meaningful negotiations, Tennis Channel filed its program carriage complaint on January 5, 2010. *See* Tennis Channel Ex. 18.

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Comcast's response to Tennis Channel's proposal.⁶⁸ Ms. Gaiski conducted the field call in anticipation of litigation — specifically, in anticipation of denying Tennis Channel's request for broader carriage — as indicated by the participation of counsel and counsel's advice that she label her notes from the call as “work product.”⁶⁹ During the call, Ms. Gaiski asked the four division representatives about local interest in Tennis Channel. According to Ms. Gaiski's “work product” notes from the call, one division representative stated that Tennis Channel was a “strong product to keep on [the sports tier] while going thru [*sic*] [changes] w/league channels right now,” and another noted that “they [were] being told” — by Comcast corporate headquarters — “to keep all costs flat.”⁷⁰ Ms. Gaiski asked the division representatives to “get back to us in a day or two if any interest stirred up b/c of [the] proposal.”⁷¹ However, before any representative could respond, Comcast rejected the Tennis Channel proposal the very next day, June 9.⁷² Given the circumstances of the call, which reflect that the call was conducted and the notes were taken specifically for the purpose of defending potential litigation, the notes do not reflect credible, contemporaneous documentation of a *bona fide* assessment by Comcast of internal interest among its systems in expanding Tennis Channel's carriage.⁷³

29. Comcast's evaluation of Tennis Channel's proposal was limited to an analysis of the costs of the proposal and the “work product” field call described above. In rejecting Tennis Channel's request for broader carriage, Comcast did not make any effort to assess the extent of other costs or benefits that would follow from a decision to change Tennis Channel's carriage status.⁷⁴ Nor did Ms. Gaiski conduct any analysis or comparison of the cost of Comcast's carriage of its own affiliated channels, particularly Golf Channel and Versus.⁷⁵

⁶⁸ See Tr. at 2350:19-2351:14, 2355:1-2356:8, 2433:19-2434:22, 2442:14-2443:11 (Gaiski).

⁶⁹ Tr. at 2356:1-8, 2433:19-2434:22 (Gaiski).

⁷⁰ Comcast Ex. 130, at COMTTC_00049903; Tr. at 2359:8-14, 2360:6-11 (Gaiski).

⁷¹ Comcast Ex. 130, at COMTTC_00049904; Tr. at 2367:3-7 (Gaiski).

⁷² See Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 7 (¶ 17).

⁷³ Cf. *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atl. Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, ¶ 21 (2010) [hereinafter “*MASN II*”].

⁷⁴ Tr. at 2437:18-2439:11 (Gaiski). Ms. Gaiski did not receive any such analyses from her division representatives. Nor did she ask them to conduct any such analysis. *Id.* at 2439:12-2440:1, 2441:21-2442:6 (Gaiski). She did not create or see “any written analysis of additional subscribers or upgrades that might result from” expanding Tennis Channel's carriage, and she “never gave any consideration” to the additional revenues that could be generated through the sale of ad avails on Tennis Channel. *Id.* at 2414:3-21 (Gaiski). As such, the numbers Comcast actually quantified and documented in relation to Tennis Channel's 2009 proposal represent only the costs of increased carriage, with no quantification of any offsetting benefits. See Comcast Ex. 588.

⁷⁵ Tr. at 2433:3-8 (Gaiski). These two channels cost Comcast more than [REDACTED] the amount that Tennis Channel would have cost under its May 2009 proposal, at the same levels of distribution.

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30. At the time Mr. Bond and Ms. Gaiski decided to reject Tennis Channel's proposal, they anticipated Section 616 litigation arising from this rejection (as shown in the "work product" notes), and they knew that such litigation likely would involve their affiliated sports networks, including Golf Channel and Versus (as was the case in the NFL Network carriage proceeding during which they had both recently been involved as fact witnesses⁷⁶). For this reason, Comcast's claims that it did not consider its affiliated networks in rejecting Tennis Channel's proposal, and that it did not consider Tennis Channel's non-affiliation, are not credible.⁷⁷

TENNIS CHANNEL AND COMCAST'S AFFILIATED SPORTS NETWORKS ARE SIMILARLY SITUATED.

31. Tennis Channel, Golf Channel, and Versus are similarly situated networks. The networks offer similar sports programming that is viewed by similarly upscale, adult, male-skewed audiences. The networks are similarly popular among the viewers that have access to them, as demonstrated by Mr. Brooks's helpful and credible ratings analysis.⁷⁸ Given their similar programming and demographics, the networks not surprisingly compete for a similar, highly overlapping set of advertisers.

⁷⁶ Indeed, Mr. Bond testified before the undersigned as a trial witness in the NFL Network case, which involved alleged discrimination by Comcast in favor of Golf Channel and Versus. Ms. Gaiski was a declarant in the same proceeding. *See NFL Enters. LLC v. Comcast Cable Comms., LLC*, MB Docket No. 08-214, File No. CSR-7876-P, Program Carriage Complaint (filed May 6, 2008) & Answer (filed June 20, 2008).

⁷⁷ *See, e.g.*, Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 3 (¶¶ 7, 19).

⁷⁸ Mr. Brooks has significant ratings experience that was unmatched by any of Comcast's experts. *See* Tr. at 2691:8-11 (Goldstein); Tr. at 1662:10-15 (Egan). Mr. Brooks has spent over four decades working in the field of audience research and working with ratings. He has worked in, or led, the research departments of several established cable and broadcast networks, *see* Tr. at 696:4-17 (Brooks); Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 36-37, and he has been actively engaged with industry organizations, ratings, and research standards throughout his career. *See* Tr. at 697:3-699:16 (Brooks); Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 37-38. In conducting his research for this litigation, Mr. Brooks used the same type of methodology he customarily uses in his work on audience research. Tr. at 701:20-702:3 (Brooks). He had Tennis Channel access raw ratings data from [REDACTED] and recalculate that data under his "strict supervision." *Id.* at 725:13-726:13 (Brooks). He [REDACTED]

Mr. Brooks then conducted his own independent analysis of the ratings Tennis Channel calculated, as would be his customary approach for this sort of research project. Tr. at 726:8-13 (Brooks); *see also id.* at 701:20-702:3 (Brooks). [REDACTED]

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32. Comcast's efforts to portray the networks as materially different are not persuasive. No two networks are exactly alike, of course,⁷⁹ and in some cases they may be rather different, as I found in the *WealthTV* matter.⁸⁰ But it is difficult to imagine two networks more closely positioned than one that focuses on tennis and one that focuses on golf; indeed, Tennis Channel and Golf Channel are, as Mr. Brooks testified, "virtually peas in a pod."⁸¹ Tennis Channel and Versus are also very close to each other in the programming market. In this respect, I find it particularly noteworthy that Tennis Channel and Versus have competed in the past, and are competing right now, for tennis programming rights. It is clear that all three networks offer similar content and appeal to similar viewers, and their competition for content, viewers, and advertisers provide ample explanation for a decision by Comcast to prefer its affiliated networks while restricting Tennis Channel's distribution.

Similarity in Programming

33. Tennis Channel, Golf Channel, and Versus are all in the same programming category: national, year-round cable sports networks.⁸² Moreover, Golf Channel and Tennis Channel are both single-sport networks, each offering a "full-day schedule revolving around a single participatory sport"⁸³ with "high levels of audience participation: [REDACTED] of Tennis Channel's viewers participate in tennis, and [REDACTED] of the Golf Channel's viewers participate in golf."⁸⁴

34. All three networks have similar programming schedules. They offer a mix of sporting event coverage and non-event content like original lifestyle, instructional, and fitness series and specials.⁸⁵ Tennis Channel offers more sporting event programming than Golf

⁷⁹ For this reason, and to ensure that Section 616 does not become a dead letter, the law does not require that a complaining network be "identical" to any network affiliated with an MVPD. It is sufficient that the networks compete with each other (for ratings, advertisers, and programming, for example) and have generally comparable popularity. *Herring Broad., Inc. v. Time Warner Cable Inc.*, Mem. Op. & Hearing Designation Order, 23 FCC Rcd. 14787, ¶ 75 (MB 2008) [hereinafter *Omnibus HDO*] (Tennis Channel Ex. 3); *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd. 15783, ¶¶ 27-28 (MB 2008) [hereinafter *MASN I*] (Tennis Channel Ex. 4), *rev'd on other grounds*, 25 FCC Rcd. 18099, ¶ 11 (FCC 2010) (Tennis Channel Ex. 12). The Commission has observed that my *WealthTV I* recommended decision did not require the complaining network to show that it was "substantially identical" to any affiliated network. See *WealthTV II* ¶ 22.

⁸⁰ See *WealthTV I* ¶¶ 20-34; see also *WealthTV II* ¶¶ 20-26.

⁸¹ Tr. at 702:14-19 (Brooks).

⁸² Tr. at 703:11-18 (Brooks); Tr. at 1600:9-12 (Egan); Tr. at 2704:6-2705:13 (Goldstein).

⁸³ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 29 (¶ 56).

⁸⁴ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 17 (¶ 28).

⁸⁵ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 2 (¶ 6); see also generally Tennis Channel Exs. 127, 128, 129.

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Channel or Versus,⁸⁶ and more live sporting coverage — though with respect to live coverage, its hours are quite close to those of Golf Channel.⁸⁷

35. Unlike the *WealthTV* case, where the record showed that the unaffiliated and affiliated networks programmed themselves differently and were not pursuing the same audiences,⁸⁸ here the opposite is true. Comcast's own internal documents recognize Tennis Channel as a competitor in the sports marketplace. Versus CFO Kim Armor identified Tennis Channel as a "competitive sports network[]" with Versus in 2009.⁸⁹ And in 2006 and 2007, when Comcast was considering acquiring equity in Tennis Channel, Comcast executives considered Golf Channel and Versus to be the best comparables to Tennis Channel among the Comcast-affiliated networks; they even consulted Golf Channel's head of advertising sales regarding Tennis Channel's advertising projections because his "expertise was in sports advertising."⁹⁰

36. Tennis Channel competes directly with Comcast's affiliated networks for tennis programming. Tennis Channel has shared with Versus, and still shares with Comcast SportsNet, the rights to air some tennis tournament coverage.⁹¹ And Tennis Channel and Versus have been, and continue to be, directly competing bidders for Grand Slam rights — the most important events in tennis. [REDACTED]

⁸⁶ About [REDACTED] of Versus's airtime and [REDACTED] of Golf Channel's airtime is dedicated to event coverage, compared with [REDACTED] for Tennis Channel. Tr. at 1640:2-6 (Egan); see also Tr. at 1506:9-13, 1648:18-1649:5 (Egan).

⁸⁷ According to Mr. Egan, Tennis Channel aired [REDACTED] hours of live event programming in 2010, compared with [REDACTED] live event hours on Golf Channel (a difference of [REDACTED] for the full year) and approximately [REDACTED] live event hours on Versus. Comcast Ex. 77 (Testimony of Michael Egan) at 31 (¶ 51); Tr. at 1651:10-1652:1 (Egan); see also Tennis Channel Ex. 16 (Testimony of Hal Singer) at 37 (¶ 52 & tbl. 5); Tennis Channel Ex. 16-A. See also Tr. at 1637:4-19, 1645:11-15 (Egan); Tennis Channel Ex. 141, Tennis Channel Ex. 141 (Michael Egan Deposition Transcript) at 74:15-24.

⁸⁸ In the instant case, Mr. Egan did not offer "genre" and "look and feel" analyses of the sort that I found helpful in a prior program carriage case. See *WealthTV I* ¶ 25 & n.91. In particular, with respect to the "genre" of the networks, Tennis Channel, Golf Channel, and Versus are clearly all in the same genre of national sports networks, and Mr. Egan admitted that had he performed his genre analysis here, Tennis Channel would be closer to Golf Channel and Versus than *WealthTV* was to MOJO. Tr. at 1598:11-1599:19, 1600:7-12, 1601:20-1602:4 (Egan).

⁸⁹ Tr. at 1744:5-18 (Egan); Tennis Channel Ex. 82, at COMTTC_00010949.

⁹⁰ Tr. at 2547:14-2548:1 (Donnelly); Tennis Channel Ex. 39, at COMTTC_00009009; Tennis Channel Ex. 135 (Joseph Donnelly Deposition Transcript) at 101:7-8.

⁹¹ Until 2008, Tennis Channel shared rights to air the Davis Cup tournaments with Versus. Tr. at 264:15-266:1 (Solomon). Tennis Channel still shares telecast rights with Comcast's SportsNet for World Team Tennis events and the SAP Open; Comcast SportsNet also has televised other major tennis tournaments like the Sony Ericsson Open and the BNP Paribas Open. Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 19 (¶ 42); Tennis Channel Exs. 79, 109, 111, 112.

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income households, a coveted demographic among advertisers” and that tennis is “particularly attractive as an upscale sport.”⁹⁹

39. Comcast makes much of one study that would suggest that the average household income for Tennis Channel’s audience is between [REDACTED], [REDACTED] the average for all networks included in the study.¹⁰⁰ I find that this study is an anomaly that does not reflect the actual wealth demographic of Tennis Channel. There is simply too much data suggesting that the three networks cluster around an audience income of [REDACTED], and that tennis is a sport that attracts affluent viewers, to credit the variant proffered by Comcast.¹⁰¹

40. The demographics for all three networks also skew toward men, making them similar to each other and distinct from the broader universe of non-sports networks.¹⁰² Tennis Channel’s male skew is less pronounced than that of Versus and Golf Channel — but it is still demonstrably present: Tennis Channel has a ratio of [REDACTED] male viewers to [REDACTED] female viewers, while the average network typically has more females than males in the audience, with a male to female ratio of [REDACTED].¹⁰³ Tennis Channel relies on an accurate representation of its audience profile in its efforts to sell advertising, presenting numbers reflecting its approximately 60-percent men/40-percent women audience profile.¹⁰⁴ As Comcast notes, Tennis Channel attempts to “sell” this demographic profile to advertisers as one that is *relatively* more gender-balanced than that of other sports networks, but this effort is like one soft drink’s efforts to distinguish itself from another: it occurs only because the products are so fundamentally similar and within the same competitive set (*i.e.*, sports networks).¹⁰⁵ In this regard, it is significant that a number of Tennis Channel’s marketing

⁹⁹ Tennis Channel Ex. 19, Comcast Answer ¶ 99; Tennis Channel Ex. 108; *see also* Tennis Channel Ex. 107; Tennis Channel Ex. 315 (highlighting tennis’s “growing fan base of upscale viewers” with “sophisticated lifestyle[s]” and the “means to buy luxury goods.”); Tennis Channel Ex. 40, at COMTTC_00011537, 11542 (recognizing upscale demographics of U.S. Open viewers); Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 51:21-25, 141:17-18.

¹⁰⁰ *See* Comcast Ex. 77 (Testimony of Michael Egan) at 50 (¶ 89).

¹⁰¹ The anomalous data proffered by Comcast was based on a questionable and extremely small sample size. *See* Comcast Ex. 195, at 1, 11; Tr. at 1754:8-19 (Egan). Moreover, the figures Comcast proffers are from 2010, after Comcast had rejected Tennis Channel’s May 2009 proposal, meaning Comcast did not contemporaneously rely on this data.

¹⁰² Tr. at 711:2-8 (Brooks).

¹⁰³ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 17 (¶ 33). Mr. Goldstein agreed that a channel that delivers three men for every two women — like Tennis Channel with its approximately 60:40 ratio — skews male. Tr. at 2714:8-11 (Goldstein).

¹⁰⁴ Tr. at 575:17-20, 681:19-682:8 (Herman) (Tennis Channel sells its 60 percent men, 40 percent women audience profile to advertisers); Comcast Ex. 800 at TTCCOM_00070616.

¹⁰⁵ *See generally* Comcast Ex. 181, at COMTTC_00022480; Tr. at 576:13-22 (Herman); Tr. at 2732:3-19 (Goldstein); Tennis Channel Ex. 141 (Michael Egan Deposition Transcript) 238:5-20;

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materials specifically compare Tennis Channel to Golf Channel — an effort that persuasively establishes that Tennis Channel treated Golf Channel as a close competitor.¹⁰⁶

41. Finally, all three networks target adult audiences, primarily those in the 25-to-54 or 35-to-64 age brackets.¹⁰⁷ Tennis Channel, Golf Channel, and Versus generally appeal to adults in the 35 to 64 range.¹⁰⁸

Similarity in Ratings

42. Ratings measure audience size, which is important not only to advertisers but also to program licensors and distributors, who are concerned with the size of the audience they can reach, as well as the size of the audience they can “sell” to advertisers seeking to advertise on each network.¹⁰⁹

43. Mr. Brooks’s helpful and reliable ratings analysis¹¹⁰ showed that Tennis Channel, Golf Channel, and Versus have comparable ratings in markets where all three networks are measured: They all are “within hundredths of a rating point of each other.”¹¹¹ Mr. Brooks’s analysis demonstrates that, in both 2009 and 2010, Tennis Channel was [REDACTED] to Golf Channel and Versus in its ratings.¹¹² In the first nine months of 2010, for instance, [REDACTED]

Tr. at 296:1-16 (Solomon) (“the closer you are as a competitor, probably the more you point out your differences”).

¹⁰⁶ See, e.g., Comcast Exs. 11, 186, 230.

¹⁰⁷ Tr. at 713:1-10 (Brooks); see also Tr. at 625:21-626:1 (Herman) (describing Tennis Channel’s core demographic as “adults [age] 35 to 64”).

¹⁰⁸ See Tr. at 819:19-820:6 (Brooks); Comcast Ex. 77 (Testimony of Michael Egan) at 50 (¶ 87).

¹⁰⁹ Distributors generally receive “ad avails,” or advertising inventory, to sell during the programming of networks they carry. See Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 4 (¶ 10). [REDACTED]

¹¹⁰ Comcast suggests that it was inappropriate for Dr. Singer and Mr. Brooks to rely on data supplied by Tennis Channel. Proposed Findings of Fact and Conclusions of Law of Defendant Comcast Cable Communications, LLC (June 7, 2011), ¶¶ 109, 118 [hereinafter “Comcast Proposed Findings”]. But in litigation, it is not at all remarkable for a testifying effort to rely on data collected at his direction. Comcast has not established any unreliability in the data itself.

¹¹¹ Tr. at 708:20-709:4 (Brooks); Tr. at 709:3-4 (Herman); see also Tennis Channel Ex. 195. Mr. Brooks, a ratings expert, conducted a systematic ratings comparison of the three networks. Mr. Brooks has significant experience in audience research and ratings analysis and has been widely recognized for his work in this area. See Tr. at 695:19-701:12 (Brooks); Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 36.

¹¹² Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 21 (¶¶ 40, 56, 57); Tr. at 709:3-4 (Herman).

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[REDACTED] The three networks were “extremely similar in terms of the audience that they attracted.”¹¹⁵

44. Comcast did not offer its own ratings analyses. None of Comcast’s experts purports to have experience with ratings analysis or methodology that is comparable to Mr. Brooks’s.¹¹⁶ However, Comcast did seek to criticize Mr. Brooks’s use of coverage area ratings, as distinct from total market ratings, in comparing the popularity of Golf Channel, Versus, and Tennis Channel. This critique is unpersuasive. Coverage area ratings measure the number of homes that tuned to each network during an average minute, *as a percentage of homes that receive the network*, within a given market (in this case, the markets that received all three networks as of a given date).¹¹⁷ Total market ratings, by contrast, measure the number of homes that tuned to each network during an average minute, as a percentage of total television households in the market, *without regard to whether they receive the network*.¹¹⁸ [REDACTED]

¹¹³ Tennis Channel Ex. 195; Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 14 (¶ 28, 36).

¹¹⁴ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 20 (¶ 38); *see also* Tr. at 819:8-9 (Brooks).

¹¹⁵ Tr. at 819:2-15 (Brooks). In addition to his ratings analysis, Mr. Brooks considered other metrics for evaluating viewer interest in the networks. Attitudinal measures of viewer satisfaction from Beta Research Corporation showed Tennis Channel and Versus were [REDACTED] by their viewers, except that Tennis Channel had a [REDACTED] perceived value in 2010. Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 25 (¶¶ 47-50). Golf Channel was not included in the Beta study. *Id.* ¶ 50.

¹¹⁶ *See, e.g.*, Tr. at 2691:8-11 (Goldstein); Tr. at 1662:10-15 (Egan).

¹¹⁷ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 9 (¶ 17); Joint Glossary of Terms at 4.

¹¹⁸ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 9 (¶ 17 n.10); Joint Glossary of Terms at 9.

¹¹⁹ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 9 (¶ 17 n.10) [REDACTED]

¹²⁰ [REDACTED]

explained, “[t]he majority of accounts that represent Golf Channel’s top 30 accounts are accounts that either do business with Tennis Channel or we’re pitching.”¹²⁶ The figures for Versus are similar. In 2010, [REDACTED] of Versus’s top-30 revenues came from companies that are also, or recently have been, Tennis Channel billing accounts. And in 2010, [REDACTED] of Versus’s top-30 revenues came from Tennis Channel customers or prospective advertisers from the past two years.¹²⁷

48. Analysis of Tennis Channel’s 30 largest advertisers confirms that the three networks are pursuing the same advertising clients. Out of Tennis Channel’s 30 largest advertisers in 2010, [REDACTED] also purchased advertising on Golf Channel that year and [REDACTED] purchased advertising on Versus.¹²⁸

49. Comcast attempted to minimize the overlap between each network’s advertisers by suggesting that “[a]mong each network’s top fifty advertisers in 2010, only [REDACTED] advertisers overlapped between Tennis Channel and Golf Channel, and only [REDACTED] overlapped between Tennis Channel and Versus.”¹²⁹ But these figures omit many advertisers among Tennis Channel’s top fifty advertisers that *also* advertise on Golf Channel and Versus but are not among the top fifty on the latter networks (and vice-versa: advertisers among Golf Channel’s and Versus’s top fifty advertisers that *also* advertise on Tennis Channel but are not among the top fifty on Tennis Channel). This omission is unwarranted and understates the actual degree of overlap in the advertising client base of Tennis Channel and Comcast’s affiliated sports networks. Moreover, Comcast’s figures understate the degree of advertising competition between Tennis Channel, Golf Channel, and Versus because (a) Tennis Channel competes for business from Golf Channel and Versus advertisers, even though in some instances it does not achieve that business — as reflected by Tennis Channel’s data showing the high percentage of top Golf Channel and Versus advertisers that it has pitched in recent years; and (b) the key reason these advertisers and others have given for not buying time on Tennis Channel is the network’s limited distribution, for which Comcast is largely responsible.¹³⁰ In sum, I find that the three networks are clearly competing for business from, and largely obtaining business from, a significantly overlapping pool of advertisers.¹³¹

I also reject Comcast’s suggestion that Tennis Channel may have “pitch[ed] advertisers that would not advertise on Tennis Channel” for the purpose of inflating the apparent advertiser overlap. Comcast Proposed Findings ¶ 91. Mr. Herman gave un rebutted testimony that this did not occur. Tr. at 684:12-17 (Herman).

¹²⁶ Tr. at 579:13-16 (Herman).

¹²⁷ Tennis Channel Ex. 15 (Testimony of Gary Herman) at 3 (¶ 8 & Ex. B).

¹²⁸ *Id.* ¶ 10 & Ex. C.

¹²⁹ Comcast Proposed Findings ¶ 92.

¹³⁰ See paragraphs 111-114, *infra*. Comcast’s figures are also less helpful than Tennis Channel’s because they rely on a simple count of advertisers without accounting for their relative weights (by revenue).

¹³¹ Comcast’s advertising industry expert, Mr. Marc Goldstein, explained that networks compete “every single day for every single dollar that they feel that they can get their hands on,”

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COMCAST PROVIDES DISPARATE TREATMENT TO SPORTS NETWORKS ON THE BASIS OF THEIR AFFILIATION OR NON-AFFILIATION.

50. Comcast treats its affiliated networks more favorably than non-affiliated networks on the basis of affiliation.

51. Comcast mandates broader distribution for its affiliated networks notwithstanding significantly higher cost in doing so. Comcast also provides better channel positioning for its affiliated networks and uses its leverage as a distributor to provide benefits exclusively to its affiliated networks (all described in more detail below). As Stephen Burke, then President of Comcast Cable and Chief Operating Officer of Comcast Corporation, testified in the NFL Network carriage dispute, 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.¹³² Mr. Bond agreed in this case: “There’s a sibling relationship and probably a greater access to some degree.”¹³³

52. These types of favoritism are highly relevant to the Section 616 inquiry. Section 616 — which refers on its face to both discrimination on the basis of “affiliation” and discrimination on the basis of “nonaffiliation,” each of which must be given effect in construing the statute — was intended not only to address specific *denials* of carriage or broad carriage to non-affiliated networks, but also to address systematic *grants* of carriage benefits to affiliated networks.¹³⁴ These are two sides of the same coin, each reflecting impermissible affiliation-based discrimination that Congress intended to eliminate.

Comcast’s Affiliated Networks Receive More Favorable Carriage Terms Than Tennis Channel.

Comcast Favors Its Affiliated Networks in the Distribution Level and Channel Positioning It Provides to Them.

53. Comcast carries its affiliated sports networks at better levels of distribution, and on more favorable channel positions, than non-affiliated sports networks. Comcast carries Golf Channel and Versus on its Expanded Basic or Digital Starter tiers (depending on the system), reaching in total approximately [REDACTED] of Comcast

suggesting that Golf Channel, Versus, and Tennis Channel vie for all available ad dollars. Tr. at 2693:9-18 (Goldstein). Mr. Goldstein also admitted that sports networks in particular are part of the same “consideration set.” Tr. at 2717:20-2718:7 (Goldstein). He further conceded that Tennis Channel competes with the same networks as Versus for advertising, and that Tennis Channel and Golf Channel attract advertisers seeking affluent viewers. *Id.* at 2715:15-2716:8, 2722:19-2724:10 (Goldstein).

¹³² Tennis Channel Ex. 7.

¹³³ Tr. at 2249:16-18 (Bond).

¹³⁴ The law clearly prohibits carriage discrimination “on the basis of affiliation or nonaffiliation.” 47 U.S.C. § 536(a)(3), 47 C.F.R. § 76.1301(c) (Tennis Channel Exs. 5-6).

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subscribers.¹³⁵ Comcast carries the NHL Network and the MLB Network on the D1 tier, reaching nearly [REDACTED] of Comcast subscribers.¹³⁶ Meanwhile, Comcast systems generally carry Tennis Channel on the Sports Tier, reaching only [REDACTED] of all Comcast subscribers.¹³⁷ In short, *all* sports networks in which Comcast holds an ownership interest are carried on what it acknowledges are [REDACTED] levels of service than the pay-extra Sports Tier, and the larger the interest that Comcast owns in the network, the better the level of distribution.¹³⁸ Moreover, *no* network in which Comcast has an ownership interest is carried exclusively on the Sports Tier.¹³⁹

54. Comcast provides its affiliated networks with favorable carriage despite internally acknowledging problems with their viewer appeal. Comcast granted broad carriage initially to Golf Channel when it was struggling for viewers as a pay-extra channel.¹⁴⁰ It has similarly helped Versus. For example, in January 2006, Mr. Shell acknowledged that Versus — then called OLN or the Outdoor Life Network — was “dead in the water,” at least before it acquired hockey programming.¹⁴¹ Even so, Comcast carried Versus on its analog Expanded Basic tier. In 2009, DIRECTV decided to drop Versus from its line-up during its renewal negotiation with Versus. Comcast executives observed that they were “not sure how many subs will make a service provider decision . . . or even a phone call, based on temporarily losing Versus.”¹⁴² Even so, Comcast still continued to provide Versus with broad carriage.

55. Comcast also favors its own networks in terms of the channel number it assigns to a network, that is, channel placement.¹⁴³ For example, in Comcast’s Washington,

¹³⁵ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20 & tbl. 1); Tennis Channel Exs. 100, 132; Tr. at 1951:1-17, 2096:8-17, 2115:21-2116:12, 2160:19-2161:21, 2219:21-2220:15 (Bond); Comcast Ex. 75 (Testimony of Madison Bond) at 11 (¶ 31). Comcast’s SportsNets are also distributed at the same level. *See, e.g.*, Tennis Channel Ex. 100.

¹³⁶ Comcast Ex. 75 (Testimony of Madison Bond) at 8 (¶¶ 22-24); Tr. at 2190:21-2191:3 (Bond); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20 & tbl. 1); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 19:13-16, 21:3-10.

¹³⁷ Tennis Channel Ex. 130; Tr. at 2012:14-2013:1 (Bond).

¹³⁸ Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 20:10-13; Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20, tbl. 1).

¹³⁹ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 9 (¶ 20); Tr. at 2198:15-21 (Bond).

¹⁴⁰ Tennis Channel Ex. 61; *see also* Tennis Channel Ex. 21.

¹⁴¹ Tr. at 2257:1-3 (Bond); Tennis Channel Ex. 26; *see also* Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 39:13-20.

¹⁴² Tennis Channel Ex. 80 at COMTTC_00015420; Tr. at 2261:3-2262:5 (Bond).

¹⁴³ Channel placement is an important factor to networks because of its effect in driving audiences to a network. Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 33 (¶ 66). Comcast admits that it is better for a network to have a channel number in the single or double digits, lower on the channel dial, and that for sports networks, it is preferable to be near ESPN. Tr. at 2265:6-2266:14 (Bond); Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 86:13-17.

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D.C., channel lineup, Versus is carried on Channel 7, and Golf Channel is carried on Channel 11. The only channels carried between Versus and Golf Channel, and directly adjacent to them, are ESPN, ESPN2, and Comcast SportsNet (Comcast's affiliated regional sports network). Tennis Channel is carried on Channel 735 on Comcast's D.C. lineup, a full 726 channels above ESPN.¹⁴⁴ By contrast, DIRECTV, Dish Network and Verizon FiOS HD all carry Tennis Channel and Golf Channel on adjacent channel numbers.¹⁴⁵

Comcast Expands a Network's Distribution When It Acquires an Ownership Interest.

56. Comcast recognizes that increasing the distribution of a network increases the value of the network.¹⁴⁶ The network receives (among other benefits) more licensing fees and more advertising dollars as a result of increased distribution. Owning equity in a network therefore allows Comcast to share in the increased value that results from broader distribution, and that "therefore [it] would have an incentive to distribute [the affiliated network] more broadly because to the extent it got more value, it would help the equity that [Comcast] own[s]."¹⁴⁷

57. Owning equity thus "moves the needle" for a distributor in setting carriage levels of a given network.¹⁴⁸ Comcast's own expert concedes that equity could impact carriage decisions and that a company with equity in a network has an incentive to grant broader carriage to that network.¹⁴⁹

58. Comcast's acquisition of equity in networks demonstrates that owning equity "moves the needle" for carriage on Comcast's systems. For example, when Golf Channel launched in 1995, Comcast initially carried it on a pay-extra basis, but Comcast repositioned it to a basic tier when it struggled on a pay-extra basis. Comcast has admitted the link between its ownership stake in Golf Channel and the network's broader distribution, acknowledging that its investment in Golf Channel "brought with it one of the most important keys to a fledgling cable network's success — distribution."¹⁵⁰

59. More recently, in 2009, Comcast launched the new MLB Network on the broadly distributed D1 tier. The launch was pursuant to an agreement between Comcast and Major League Baseball in which Comcast acquired an ownership stake in the network.¹⁵¹ Also in 2009, Comcast moved the NHL Network from the Sports Tier to D1. That move also was

¹⁴⁴ Tennis Channel Ex. 100.

¹⁴⁵ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 33 (¶ 66); Tennis Channel Exs. 104, 105, 106.

¹⁴⁶ Tr. at 1922:3-9 (Rigdon).

¹⁴⁷ Tr. at 1922:3-1923:15 (Rigdon).

¹⁴⁸ Tr. at 1110:18-1111:8, 1113:19-1114:1, 1114:12-14 (Singer).

¹⁴⁹ Tr. at 1335:10-14, 1336:14-21 (Orszag).

¹⁵⁰ Tennis Channel Ex. 61; *see also* Tennis Channel Ex. 21.

¹⁵¹ Comcast Ex. 75 (Testimony of Madison Bond) at 8 (¶ 22); Tr. at 2178:16-2179:7 (Bond).

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pursuant to an agreement between Comcast and the National Hockey League in which Comcast acquired an equity stake in the network.¹⁵² Indeed, the precise amount of equity that Comcast would receive in the NHL Network was directly tied to the level of distribution that it provided to the network: “the more carriage that was given, the more equity that Comcast got,” and “the less carriage the less equity it got.”¹⁵³ Comcast’s pattern of launching or expanding the carriage of networks upon acquiring equity in them is also reflected in the cases of the U.S. Olympic Network¹⁵⁴ and Retirement Living TV, each of which was a new network to which Comcast was prepared to offer broad carriage based on its ownership interest.¹⁵⁵

60. Comcast asserts that with respect to each affiliated network, it received other value (such as access to the respective leagues’ out-of-market games packages) that induced it to expand the networks’ carriage.¹⁵⁶ But it is notable that equity was also part of the exchange, suggesting that the other forms of compensation were not sufficient incentives on their own for Comcast to grant the networks broader carriage.¹⁵⁷ There is no dispute that, in the case of the NHL Network, the amount of equity and the level of carriage were directly linked. I find that equity played a material role in the launches and expanded carriage Comcast has provided to its affiliated sports networks.

The Decision to Discriminate in Carriage Between Affiliated and Non-Affiliated Networks is Made at Comcast Headquarters, Not at Local Cable Systems.

61. Comcast enforces a “mandate[] from the top down” that its local systems carry broadly the networks in which it has an ownership interest, whether or not the individual systems wish to do so. This mandate applies regardless of whether an individual system has room in its budget for the mandated level of carriage.¹⁵⁸ Thus, for Versus, Golf Channel, the NHL Network, and the MLB Network, Comcast dictates to its local cable systems around the country the distribution levels that these networks receive.

¹⁵² Comcast Ex. 75 (Testimony of Madison Bond) at 9 (¶ 24); Tr. at 2179:8-20 (Bond).

¹⁵³ Tr. at 2182:7-22 (Bond); *see also* Comcast Ex. 54 § 2.

¹⁵⁴ In 2009, Comcast committed to providing the U.S. Olympic Network, which it would partially own, with D1 carriage, even though the newly launched network would not have had rights to telecast the Olympic Games. The channel was slated to be launched in 2010, but it never got off the ground. Tr. at 2184:1-20, 2186:8-2189:6 (Bond); Tennis Channel Ex. 76-77.

¹⁵⁵ In 2008, Comcast — owning an equity stake in the network — launched Retirement Living TV on D1. Tr. at 2190:6-22 (Bond).

¹⁵⁶ *See, e.g.*, Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 9 (¶ 22).

¹⁵⁷ [REDACTED]

¹⁵⁸ Tr. at 2195:16-2198:14 (Bond); *see also id.* at 2160:19-2161:21 (Bond) (describing Comcast’s carriage of and “system-by-system” commitments to Golf Channel and Versus); *id.* at 2180:12-2181:8 (Bond) (local systems must carry MLB Network and NHL Network on D1); Tr. at 2379:22-2383:5 (Gaiski). *See also* Tr. at 2360:6-11 (Gaiski) (field representatives instructed

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62. Comcast has never considered putting Golf Channel or Versus on the Sports Tier — not when it was creating the Sports Tier and not during the last two years when it renewed its affiliation agreements with those networks: “[n]ot at any time ever.”¹⁵⁹ By contrast, Comcast does not force any of its local systems to carry Tennis Channel on any level broader than the Sports Tier.¹⁶⁰ To the contrary, consistent with the policy against distributing Tennis Channel more broadly described earlier, Comcast admits that it would block a local system’s effort to carry Tennis Channel outside of the Sports Tier.¹⁶¹ It has in the past blocked at least one such effort.¹⁶²

63. Comcast suggests that it is somehow bound to provide broad distribution to Golf Channel and Versus because its affiliation agreements with these networks provide for broad carriage.¹⁶³ But Comcast agrees to its contracts with each network. And because Comcast’s cable group and networks are under common ownership, Comcast, in essence, is agreeing with itself to provide broad carriage. The same point applies to the NHL Network and the MLB Network, which Comcast does not control, but with which it voluntarily enters into affiliation agreements.

Comcast Uses Its Power as a Distributor Selectively to Favor and to Assist Affiliated Programming Services.

64. The record is replete with examples of “special benefits” Comcast affords to its affiliates that are unavailable to Tennis Channel or other unaffiliated networks.

65. First, Comcast has used its power as a cable distributor to gain favorable channel placement for its affiliated networks. For example, in 2008, Ms. Gaiski reported to Mr. Bond on “the current state of affairs with Vs. channel placement,” identifying the numbers of

to “keep all costs flat” with regard to expanding Tennis Channel carriage while being forced to melt the league networks to D1).

¹⁵⁹ Tr. at 2409:17-2410:18 (Gaiski) (emphasis added); Tr. at 2297:12-20 (Bond).

¹⁶⁰ Tr. at 2160:6-9, 2198:5-8 (Bond).

¹⁶¹ Tennis Channel Ex. 48; Tr. at 1877:7-17, 1879:20-1881:1 (Rigdon).

¹⁶² Even though at the time of the launch of Tennis Channel on Comcast’s San Francisco system the network and system had reached an agreement for dual illumination, pursuant to which Tennis Channel would be carried on both the D2 tier and the Sports Tier and would reach more than ████████ of the San Francisco system’s subscribers, *see* Tennis Channel Exs. 24, 30, 31; Tr. at 2243:7-10 (Bond), the planned dual illumination was overridden by Comcast headquarters. As a Comcast executive in the content acquisition department, Ms. Jennifer Gaiski, told Tennis Channel representatives in October 2007, and as the network commemorated in contemporaneous notes, “the decision not to launch TC [Tennis Channel] on D2 in the bay area came from the 35th floor (Brian Roberts [Comcast’s CEO] & Steve Burke [Comcast’s then-President and COO]),” and even if a system wished to migrate Tennis Channel to the D2 tier, the corporate office “would not approve the migration.” Tennis Channel Ex. 48; Tr. at 2404:17-2405:14 (Gaiski).

¹⁶³ *See, e.g.*, Comcast Proposed Findings ¶ 56.

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Versus subscribers on Comcast systems that were receiving the network in a “favorably positioned” channel assignment — that is, “adjacent to or within 2-3 channels slots of ESPN and/or ESPN2” or “within 2 channel slots of the local RSN.”¹⁶⁴ Ms. Gaiski told Mr. Bond that the cable group had made a number of these favorable channel moves happen “by our nudging” and without providing any “monetary incentive” to the local systems.¹⁶⁵ Ms. Gaiski described systems that were “not in ‘favorable’ compliance” and asked Mr. Bond to [REDACTED]

[REDACTED]¹⁶⁶
Comcast has never made similar efforts to use its cable business to assign Tennis Channel a favorable channel position.¹⁶⁷

66. Second, Comcast Cable executives have helped ensure that their affiliated networks meet contractual distribution requirements. Specifically, after the National Hockey League told Versus that the network had to achieve a penetration level of at least [REDACTED] in order to continue to receive the right to telecast professional hockey games, Ms. Gaiski directed her staff to ensure that all Comcast cable systems provided Versus at least this level of carriage.¹⁶⁸ Comcast’s use of its cable business to meet a Versus carriage threshold imposed by the NHL was unusual. Comcast’s cable industry expert, Mr. Egan, testified that he thought it unheard of for a cable company to accede to a network’s demand for a certain level of carriage in order to allow the network to meet obligations to its rights holders.¹⁶⁹ Comcast has never used its cable business to help Tennis Channel meet carriage thresholds imposed by Tennis Channel’s programming licensors.

67. Third, Comcast has used its cable distribution executives to negotiate broader carriage for Versus on other distributors. When Versus was struggling to regain distribution on DIRECTV after the satellite carrier dropped Versus in 2009, it was Mr. Bond, head of Content Acquisition for the cable distribution side of the business, who interceded, using Comcast’s leverage *as a distributor* to persuade DIRECTV to carry Versus in exchange for continued carriage on Comcast of regional sports networks in which DIRECTV had an interest.¹⁷⁰ Mr. Bond acknowledged he was “representing the programming side in these negotiations and . . . [in] the give and take on carriage and other terms for [Comcast’s] networks

¹⁶⁴ Tennis Channel Ex. 55; Tr. at 2271:5-2275:11 (Bond).

¹⁶⁵ *Id.*; see also Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 253:7-13

[REDACTED]

¹⁶⁶ Tennis Channel Ex. 55; see also Tr. at 2275:1-7 (Bond) (agreeing that “Ms. Gaiski is talking about going out and nudging and otherwise taking actions to get the local systems to make sure that Comcast-owned Versus is in a favorable channel position on those local systems”).

¹⁶⁷ See, e.g., Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 255:19-21.

¹⁶⁸ Tennis Channel Ex. 84; Tr. at 2393:10-2398:3 (Gaiski).

¹⁶⁹ Tr. at 1704:17-1705:9 (Egan).

¹⁷⁰ Tr. at 2228:20-2229:3, 2232:32:11-2233:17 (Bond); Tennis Channel Ex. 89(internal discussion of proposal regarding [REDACTED]).

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and DIRECTV's networks."¹⁷¹ Comcast has never used its cable executives to help Tennis Channel negotiate broader carriage on other distributors.

68. Fourth, Comcast considered offering broader distribution to, and taking equity (affiliation) from, Tennis Channel in order to acquire valuable programming rights for Versus. Specifically, in late 2006 and early 2007, Comcast developed a plan to use Comcast's leverage as a cable distributor to create benefits for its affiliated network Versus (that is, cable would have taken a loss to help programming). Under this plan, Comcast was willing to give broader distribution to Tennis Channel, but Comcast explicitly tied that broader distribution to affiliation-based benefits in programming for Versus.¹⁷² Comcast Programming chief Mr. Jeff Shell thought [REDACTED] Comcast did not pursue the "three-way" strategy that it had developed after it learned that Tennis Channel bid on [REDACTED],¹⁷⁴ but Comcast bid [REDACTED] for the rights anyway, ultimately losing to Tennis Channel [REDACTED]. It is notable that Mr. Bond, on the cable side, was involved in e-mail chains considering the three-way proposal, along with Mr. Burke (on both the cable and programming sides).¹⁷⁵ Comcast has never used its cable business to help Tennis Channel acquire valuable programming rights.

The FCC's Merger Analysis Supports a Finding of Discrimination by Comcast in This Case.

69. In its recent order approving the Comcast-NBC Universal merger, the full Commission found evidence that Comcast favors its affiliated networks in carriage and channel placement.¹⁷⁶ The Commission concluded that Comcast "may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons."¹⁷⁷

70. The Commission based this finding on an analysis in the Technical Appendix. This analysis specifically examined Versus, Golf Channel, and two other Comcast-owned channels. The analysis concluded "(1) that Comcast currently favors its affiliated programming [including Golf Channel and Versus] in making [carriage and channel placement] decisions and that (2) this behavior stems from anticompetitive motives rather than due to

¹⁷¹ Tr. at 2234:2-7 (Bond); *see also* Tennis Channel Exs. 92-98.

¹⁷² Tr. at 2521:11-21, 2523:5-19, 2585:3-9, 2589:4-17 (Donnelly); Tennis Channel Exs. 32, 34.

¹⁷³ Tennis Channel Exs. 32, 34.

¹⁷⁴ Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 40:24-41:5.

¹⁷⁵ Tennis Channel Ex. 35; Tr. at 2580:15-21, 2583:7-21, 2584:6-9 (Donnelly); Tr. at 1666:8-10 (Egan), Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 41:2-20.

¹⁷⁶ *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, ¶ 117, Tech. App. ¶¶ 65-71 (FCC rel. Jan. 20, 2011) (Tennis Channel Ex. 13) [hereinafter "NBCU Order"].

¹⁷⁷ *Id.* ¶ 117.

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reasons that arise from vertical efficiencies.”¹⁷⁸ The Commission further found that Comcast carries its own networks less favorably in markets where its carriage decisions are impacted by high levels of competition from other distributors.¹⁷⁹

71. The Commission did not reach “any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past.”¹⁸⁰ However, the Commission’s findings did include Golf Channel and Versus among the affiliated networks that Comcast had favored. It is noteworthy that such an extensive and relevant analysis of Comcast’s historical and ongoing practice of discrimination was performed so close in time to the dispute and hearing in this case.

72. Tennis Channel’s economic expert, Dr. Hal Singer, performed an analysis that was similar to the Commission’s but, unlike the Commission’s analysis, focused on Comcast’s level of carriage Tennis Channel. Dr. Singer explained his findings that Comcast is more likely to carry Tennis Channel [REDACTED] in markets where it faces meaningful competition from other distributors.¹⁸¹ As Dr. Singer explained: “What happens is when Comcast gets exposed to competition, it doesn’t give as much preference to its own. . . . And it doesn’t give as worse treatment to the independents.”¹⁸²

73. I agree with the finding in an earlier proceeding that Dr. Singer is qualified and credible.¹⁸³ He is highly qualified in his field, having published numerous articles in peer-reviewed journals on issues similar to those present in this dispute. Dr. Singer provided credible testimony related to the central issue in this case: whether Comcast discriminates in determining *carriage levels* for the Tennis Channel. Dr. Singer’s analysis supports the conclusion that Comcast discriminates, including through his analysis that Comcast discriminates more where competitive pressures are relatively lower, and less where competitive pressures are relatively higher.¹⁸⁴

¹⁷⁸ *Id.* at Tech. App. ¶ 65.

¹⁷⁹ *Id.* at Tech. App. ¶ 70.

¹⁸⁰ *Id.* ¶ 117 n.276.

¹⁸¹ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 11 (¶¶ 22, 25).

¹⁸² Tr. at 861:12-17 (Singer).

¹⁸³ *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd. 15783, ¶ 46 (MB 2008) [hereinafter *MASN I*] (Tennis Channel Ex. 4), *rev’d on other grounds*, *MASN II*, 25 FCC Rcd. ¶ 11 (Tennis Channel Ex. 12) (agreeing with arbitrator’s assessment that MASN’s economics experts [including Dr. Singer] were qualified and credible).

¹⁸⁴ Comcast’s economist Mr. Orszag does not agree with the method for measuring discrimination that the FCC applied in its Merger Order. *See* Comcast Ex. 80, Written Direct Testimony of Jonathan Orszag, ¶ 68 (describing the Technical Appendix analysis as an application of “flawed methodology”; Tr. at 1247:16-1248-8, 1310:13-20 (Orszag). His testimony is that the FCC’s methodology is not reliable for measuring discrimination. *See id.* Thus, Mr. Orszag is not sponsoring an alternative discrimination analysis using the FCC’s methodology to justify Comcast’s conduct.

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COMCAST'S RATIONALES FOR REFUSING TO TREAT TENNIS CHANNEL EQUALLY DO NOT EXCUSE ITS DISCRIMINATION.

74. Comcast's claimed justifications for discriminating against Tennis Channel are not persuasive, particularly given (1) the competitive benefits with respect to audience and advertiser revenues that Golf Channel and Versus obtain from Tennis Channel's limited penetration, and (2) the significant and increasing competition between Tennis Channel and Comcast's affiliated sports networks for tennis rights, including major rights such as those to [REDACTED] and Wimbledon.¹⁸⁵

The Cost of Carrying Tennis Channel

75. Comcast has stated that it chose not to extend broader carriage to Tennis Channel because of the increased cost that it would bear from the increased penetration.¹⁸⁶ Comcast has never applied the same analysis to its affiliated networks, however, and the application of this test to restrict Tennis Channel's distribution constitutes discrimination.

76. The record in fact discloses that Comcast pays significantly more in carriage fees for its similarly-situated affiliated networks than it would pay to carry Tennis Channel at a comparable level. Comcast pays Golf Channel more than [REDACTED] the per-subscriber rate that it pays Tennis Channel, and it pays Versus nearly [REDACTED] as much. Specifically, it pays Golf Channel [REDACTED] per subscriber, Versus [REDACTED] per subscriber, and Tennis Channel [REDACTED] per subscriber.¹⁸⁷

According to Comcast, it carries Tennis Channel more broadly in select markets due to the existence of "other competitors . . . offering [the network] on a low price value package." Tr. at 2317:11-2318:16 (Bond); *see also* Tennis Channel Ex. 1001, Tennis Channel Ex. 138 (Jonathan Orszag Deposition Transcript) II at 58:9-22 [REDACTED]

[REDACTED]. This behavior is consistent with the economic analysis advanced in the Technical Appendix to the Commission's *NBC Universal* order, and it reflects that, in markets where Comcast does not face effective competition from other distributors, Comcast will make carriage decisions based on considerations unrelated to competition, such as affiliation.

¹⁸⁵ Tr. at 871:20-872:2; 881:17 (Singer), Tr. at 1423:12-17 (Orszag). Comcast has proffered reasons for its distribution decisions in this case, as it and other cable defendants have done in other carriage complaint matters. *See, e.g., WealthTV I* ¶ 67; *MASNII* ¶ 12. Comcast's justifications are not persuasive on this record.

¹⁸⁶ *See, e.g.,* Comcast Ex. 75 (Testimony of Madison Bond) at 6 (¶¶ 17-18); Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 6 (¶ 14).

¹⁸⁷ Tr. at 2377:1-8 (Gaiski); Tr. at 2218:14-2219:4 (Bond); Tr. at 1874:3-11, 1874:20-1875:4 (Rigdon); Tennis Channel Ex. 144 ¶ 5.1.1; Comcast Ex. 86, at COMTTC_00042460; Comcast Ex. 588. Along the same lines, Comcast pays [REDACTED] more per subscriber for MLB Network than it pays for Tennis Channel. Tr. at 2221:12-2222:7 (Bond); Tennis Channel Ex. 144 ¶ 5.1.1; Comcast Ex. 86, at COMTTC_00042460.

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77. As a result of its higher per-subscriber rates, Comcast pays much more for broad carriage of Golf Channel and Versus than it would pay for the same carriage of Tennis Channel. On Expanded Basic/Digital Starter, Golf Channel costs Comcast approximately [REDACTED] per year and Versus costs about [REDACTED] per year.¹⁸⁸ At that same level, Tennis Channel would cost only about [REDACTED] per year at its current contractual rate.¹⁸⁹

78. In short, expanded distribution of Tennis Channel would cost Comcast more than limited distribution, but Comcast pays a great deal more for its similarly-situated affiliated networks, which it carries much more broadly. In this regard, I find that Comcast has not introduced evidence establishing that its networks provide superior value to Comcast than Tennis Channel would at comparable carriage levels, including value that would support the higher rates Comcast provides to its channels.¹⁹⁰ As discussed above, the competitive similarities of the networks requires the opposite conclusion.

79. Comcast's cost argument is also undermined by the way in which it handled the 2009 negotiation with Tennis Channel. First, Comcast refused to provide Tennis Channel with expanded carriage even when Tennis Channel offered to discount its rates. Under Tennis Channel's May 2009 [REDACTED] proposal, Tennis Channel would cost Comcast about [REDACTED] per year if carried at the same level as Golf Channel and Versus.¹⁹¹ Tennis Channel's [REDACTED] would have made the increased carriage of Tennis Channel cost only [REDACTED] of what Comcast pays for broadly carrying Golf Channel, and only [REDACTED] of what it pays for broadly carrying Versus.¹⁹²

80. Second, Comcast did not make a counterproposal for any different term from its existing arrangement in response to Tennis Channel's discount proposal.¹⁹³ If cost of carriage had been the real concern, Comcast would have been expected to make a counter-offer on price, to see how much further Tennis Channel might go, instead of rejecting Tennis Channel's proposal out of hand.¹⁹⁴

¹⁸⁸ Tr. at 2218:14-2219:4 (Bond); Tr. at 1874:3-11 (Rigdon); Tr. at 2377:1-8 (Gaiki).

¹⁸⁹ Tennis Channel Ex. 144 ¶ 5.1.1; Comcast Ex. 86 at COMTTC_00042460.

¹⁹⁰ Indeed, Comcast claims not to have conducted any relative cost comparisons in rejecting Tennis Channel's May 2009 proposal. In rejecting Tennis Channel's May 2009 proposal, Comcast never compared nor considered how much it pays its own similarly-situated sports networks. Tr. at 2433:3-8 (Gaiki); *id.* at 2432:13-16 (Gaiki).

¹⁹¹ Tennis Channel Ex. 70; Comcast Ex. 588; Tr. at 2099:17-2100:11 (Bond).

¹⁹² Tr. at 2218:14-2219:4 (Bond); Tr. at 1874:3-11 (Rigdon); Tr. at 2377:1-8 (Gaiki).

¹⁹³ Tr. at 2215:9-11 (Bond); Tr. at 2413:1-16 (Gaiki); Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 13 (¶ 28).

¹⁹⁴ Comcast does not claim to have even made a counterproposal for expanded carriage provided such carriage were free for incremental subscribers. Instead, Comcast rejected Tennis Channel's proposal. *See* paragraphs 26-27, *supra*.

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81. Third, Comcast's analysis of the increased *cost* of carrying Tennis Channel omitted any consideration of increased *benefits* of carrying Tennis Channel more broadly. Comcast admitted that it never attempted to quantify the offsetting benefits — including additional advertising revenue and subscriber revenue — it could realize as a distributor from broader distribution of Tennis Channel.¹⁹⁵ Comcast's expert economist, who similarly has not quantified these benefits, acknowledged that “[y]ou have to quantify the benefit,” and that an analysis of cost “isn’t all that helpful if you don’t think about what benefit you get” for that cost.¹⁹⁶ It is telling that Tennis Channel’s license-fee-per-rating-point, a metric for measuring the benefit provided per dollar spent, is significantly [REDACTED], than Versus’s or Golf Channel’s: [REDACTED].¹⁹⁷

82. More broadly and more troubling, under Comcast’s test, *any* incremental cost for Tennis Channel becomes a bar to expanded carriage,¹⁹⁸ while the costs and other drawbacks of Golf Channel and Versus are simply ignored. Comcast has admitted that it has never even considered repositioning Golf Channel or Versus to the Sports Tier,¹⁹⁹ even though such repositioning would save Comcast more than it saves by keeping Tennis Channel on the Sports Tier.²⁰⁰ When Comcast renewed its carriage agreements with Versus and Golf Channel in 2009 and 2010,²⁰¹ Comcast did not calculate the cost of carriage for either of those networks at the distribution levels set forth in their contracts,²⁰² nor did it conduct any sort of cost-benefit analysis in connection with those renewal discussions.²⁰³

¹⁹⁵ Tr. at 2437:18-2440:1, 2441:21-2442:6, 2414:3-21 (Gaiski).

¹⁹⁶ Tr. at 1284:4-12, 1440:8-13, 1470:12-19 (Orszag).

¹⁹⁷ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 33 (¶ 46, tbl. 4). The license-fee-per-rating-point metric is one means of measuring the value proposition of a network. Tennis Channel Ex. 16 (Testimony of Hal Singer) at 32 (¶ 46). Comcast is familiar with this metric; it used it to compare the value of Versus to other networks in its negotiations with DIRECTV over carriage of Versus. *See* Tennis Channel Ex. 82, at COMTTC_00010949; *see* Tr. at 1743:19-1744:14 (Egan).

¹⁹⁸ Comcast has indicated that Tennis Channel should receive expanded carriage only if it provides its content to any incremental subscribers for free. *See* Comcast Ex. 81 (Testimony of Gregory Rigdon) at 3 (¶ 9); Tr. at 1881:3-22, 1912:1-1914:22 (Rigdon). I do not find this theory persuasive, particularly since Tennis Channel relies on license fee revenues in order to remain viable. Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 17 (¶ 38). I also find it noteworthy that Comcast carries its own affiliates on broadly distributed tiers without expecting those networks to give their service away for free.

¹⁹⁹ *See* Tr. at 2297:12-20 (Bond).

²⁰⁰ Tr. at 1441:2-8 (Orszag).

²⁰¹ *See* Tr. at 1891:15-19, 1921:11-16 (Rigdon).

²⁰² Tr. at 2225:21-2227:2, 2227:17-22 (Bond).

²⁰³ *Id.* at 2227:9-15, 2228:5-8 (Bond)

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83. Comcast also did not survey the field to gauge local interest in Golf Channel or Versus prior to renewing their contracts, as it did in considering the Tennis Channel proposal.²⁰⁴ Comcast also did not conduct an analysis to determine how many potential subscribers it would lose if it negatively repositioned Golf Channel or Versus to a less-broadly distributed tier.²⁰⁵ (As noted above, Comcast's internal documents suggest that not many subscribers would be concerned if Comcast dropped at least one of these networks or moved them to a sports tier.²⁰⁶) Plainly, Comcast has not applied the same standards to determine whether its networks merit broad carriage that it used to determine whether Tennis Channel merited broad carriage.

Comcast's "Year of Launch" Test.

84. Comcast suggests that the difference in carriage is due in part to the fact that Versus and Golf Channel are established incumbents, while Tennis Channel is a newcomer that necessarily faces an uphill battle. Comcast argues that Tennis Channel "missed the multichannel TV marketplace opportunity for distribution on highly-penetrated programming tiers by launching in 2003 after that window had largely closed."²⁰⁷ This theory is inconsistent with the purpose of Section 616, which is to promote a diversity of programming voices, not to insulate and ossify the broad carriage already given to networks affiliated with MVPDs.²⁰⁸ Indeed, if a "first in" policy could be used to defend against a Section 616 discrimination charge, the provision would be a dead letter in *any* case in which a new service seeking carriage or expansion claimed that an MVPD discriminated against it and in favor of a previously initiated service. Comcast's theory of the case ignores the core intention of the statute, which is simply to prevent vertically integrated MVPDs from engaging in conduct that protects what they own against competition from new services, *whenever* they were founded.

85. I find, in any event, that launch dates do not in this case explain Comcast's differential treatment of Tennis Channel and its affiliated networks.²⁰⁹ Comcast has launched

²⁰⁴ Tr. at 2227:3-8, 2228:1-4 (Bond); Tr. at 2419:2-5 (Gaiski).

²⁰⁵ Tr. at 2234:15-2235:7 (Bond); Tr. at 1275:8-19 (Orszag).

²⁰⁶ See paragraph 54, *supra*; Tennis Channel Ex. 26; see also Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 39:13-20; Tennis Channel Ex. 80 at COMTTC_00015420; Tr. at 2261:3-2262:5 (Bond).

²⁰⁷ Comcast Ex. 77 (Testimony of Michael Egan) at 5 (¶ 7).

²⁰⁸ See paragraphs 118-122, *infra*.

²⁰⁹ In connection with years of launch, Comcast has suggested that there are more competitors for its scarce bandwidth than ever before. But Comcast faces no bandwidth constraints in granting Tennis Channel broader digital carriage. Tr. at 1428:16-1429:1 (Orszag); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 33:5-19; Tennis Channel Ex. 139 (Madison Bond Deposition Transcript) at 76:11-17; Tennis Channel Ex. 141 (Michael Egan Deposition Transcript) at 52:16-53:6. In systems where Tennis Channel is already carried on the Sports Tier, moving the network to a more widely distributed digital tier would require [REDACTED] extra bandwidth. Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 197:15-21.

several affiliated sports networks at broader levels than Tennis Channel in the years after Tennis Channel's launch. The MLB Network launched in 2009, nearly six years after Tennis Channel's 2003 launch, and the NHL Network did not launch in the U.S. until 2007.²¹⁰ Comcast repositioned the NHL Network from the Sports Tier to D1 in 2009; Comcast launched MLB on D1 that same year.²¹¹ Today, both of these Comcast-affiliated sports networks are carried on both D1 and the SEP, reaching at least [REDACTED] Comcast subscribers.²¹² Comcast claims that it agreed to carry these networks broadly in order to get special features from the leagues, such as baseball's "Extra Innings" package, but if that were true, then the only thing the leagues would have had to do was give that special benefit, and not also equity in their networks.

86. Similarly, the evidence does not support any claim that Comcast gives Golf Channel and Versus broad carriage because of a considered determination that, because of their seniority or any other reason, they deserve such carriage. In fact, there is no evidence that Comcast has ever considered whether Golf Channel and Versus merit the broad carriage Comcast grants them. In renewal discussions, Comcast automatically decided to keep these networks on Expanded Basic/Digital Starter, without conducting any analysis of the costs of doing so and without undertaking any effort to gauge consumer demand for their programming.²¹³

87. Comcast claims that it cannot move networks to less broadly distributed tiers because of a desire to avoid disrupting viewers' "settled expectations,"²¹⁴ but it has offered no evidence to show that repositioning Golf Channel or Versus would have that effect.²¹⁵ Instead, the evidence of viewers' "settled expectations" regarding Golf Channel and Versus shows that Comcast has, for example, granted Versus broad carriage even for periods in time in which Comcast's head of programming described Versus as "dead in the water," and even for periods when Comcast executives were "not sure how many subs will make a service provider decision . . . or even a phone call, based on temporarily losing Versus."²¹⁶

²¹⁰ Comcast Ex. 80 (Testimony of Jonathan Orszag) at 32 (¶ 41, figure 6).

²¹¹ Tr. at 2178:16-2180:9 (Bond).

²¹² Tr. at 2178:16-2180:2 (Bond); Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 19:13-15, 21:3-10. In addition, Comcast planned to launch the U.S. Olympic Network — in which it held a financial interest — on D1 beginning in 2010, even though the planned network would not have had the rights to show any of the Olympic Games. Tr. at 2184:1-20, 2186:8-2189:6 (Bond); Tennis Channel Ex. 76-77. And Retirement Living TV launched in 2008; Comcast owned an equity stake in the network and launched it on D1. Tr. at 2190:6-22 (Bond).

²¹³ Tr. at 2225:21-2228:8, 2234:15-2235:7, 2297:12-20 (Bond); Tr. at 2419:2-5 (Gaiski); Tr. at 1275:8-19 (Orszag).

²¹⁴ Comcast Ex. 75 (Testimony of Madison Bond) at 11 (¶ 31).

²¹⁵ See Tr. at 2234:15-2235:7 (Bond); Tr. at 1275:8-19 (Orszag).

²¹⁶ See Tr. at 2257:1-3 (Bond); Tennis Channel Ex. 26; [REDACTED]; Tennis Channel Ex. 80 at COMTTC_00015420; Tr. at 2261:3-2262:5 (Bond).

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88. Moreover, Comcast has negatively repositioned unaffiliated networks several times. In 2007, for instance, Comcast repositioned the NFL Network from the D2 level of service, which had approximately [REDACTED] subscribers, to the narrowly-penetrated Sports Tier, which had less than [REDACTED] subscribers at the time.²¹⁷ Comcast [REDACTED]²¹⁸ Indeed, moving a network from a more broadly distributed tier to a narrowly distributed tier is sufficiently common at Comcast that the company has a defined term for it, “negative repo.”²¹⁹

89. In these circumstances, Tennis Channel’s year of launch is not a sufficient justification for Comcast’s restriction of the network to the sports tier. Nor are the launch dates of Comcast’s affiliated networks a basis for their carriage on broader tiers.

Comcast’s “Revealed Preferences” Theory.

90. Comcast’s expert economist, Mr. Orszag, suggested that the reasonableness of Comcast’s carriage decisions for Golf Channel, Versus, and Tennis Channel could be measured by the carriage decisions of other MVPDs — a so-called “revealed preferences” examination.²²⁰ I find this testimony, which disregards a number of important factors, neither credible nor helpful.²²¹ Comcast’s fact witnesses did not support Mr. Orszag’s revealed preferences claim. For example, Mr. Bond noted that Comcast does not necessarily

Comcast offered testimony from Mr. Rigdon that when Charter proposed to negatively reposition Golf Channel and Versus in 2007, Comcast instituted a marketing campaign and ran a “crawl” — a prompt scrolling across the bottom of the television screen encouraging viewers to contact Charter — on its Golf Channel and Versus programming. Tr. at 1906:12-1907:1 (Rigdon). Comcast has offered no contemporaneous evidence to substantiate Mr. Rigdon’s claim that Charter received numerous calls and e-mails from Golf Channel and Versus viewers. Nor has Comcast shown that Charter’s decision to maintain Golf Channel and Versus on highly penetrated tiers was based on consumer response to the “crawl.” In fact, Comcast

[REDACTED]

²¹⁷ Tr. at 2243:5-21 (Bond); Tennis Channel Ex. 113.

²¹⁸ Tennis Channel Ex. 139 (Madison Bond Deposition Transcript) at 220:25-221:24.

²¹⁹ Tr. at 2366:5-9 (Gaiski).

²²⁰ Comcast Ex. 80 (Testimony of Jonathan Orszag) at 8 (¶ 17).

²²¹ Mr. Orszag conducted no quantitative analysis of the benefits Comcast could realize from broader carriage of Tennis Channel or the costs it would incur if it retired Golf Channel or Versus. Tr. at 1282:1-4, 1282:21-1283:6, 1284:4-12, 1284:13-1285:5, 1285:6-14 (Orszag). Mr. Orszag did not specifically analyze the terms of Comcast’s affiliation agreements with Versus, Golf Channel, and Tennis Channel, which he stated were all “secondary or tertiary” factors in his analysis. See Tr. at 1267:11-1268:11, 1269:7-14, 1272:17-21 (Orszag).

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follow the decisions of other distributors because in its view, “sometimes the other distributors might be wrong.”²²² And Mr. Orszag acknowledges that “it is reasonable for different MVPDs to come to *different* carriage decisions for Tennis Channel, depending on the MVPDs’ business strategies, geographic territories, judgments about subscriber preferences, and the terms of their individual affiliation agreements.”²²³ In any event, representatives of other MVPDs were not examined at this hearing,²²⁴ so we cannot know precisely why any distributor other than Comcast carries Tennis Channel, Golf Channel, and Versus the way it does.²²⁵

91. But even if other MVPDs’ distribution decisions were relevant to this case, I would not rely on Mr. Orszag’s selective approach, which was to analyze only cable companies whose decisions allegedly supported Comcast’s.²²⁶ Mr. Orszag’s analysis ignored data from many important MVPDs, including Comcast’s self-identified chief competitors, which

²²² Tr. at 2199:13-20 (Bond).

²²³ Comcast Ex. 80 (Testimony of Jonathan Orszag) at 14 (¶ 24) (emphasis added).

²²⁴ No witness testified on behalf of any distributor other than Comcast. To be sure, Mr. Rigdon offered some testimony concerning his period of employment at Charter Communications, but he was not presented as a representative of Charter, nor could he have been. Given the degree to which Mr. Rigdon’s claimed knowledge about Charter’s carriage of Tennis Channel changed between the day of his deposition and the trial, *see* Tr. at 1856:6-1863:21 (Rigdon), the fact that he was not at Charter when Tennis Channel entered into its affiliation agreement with Charter, Tr. at 1847:3-21 (Rigdon), and his admission that he is not qualified to testify on why Charter launched Tennis Channel on its sports tier, Tennis Channel Ex. 140 (Gregory Rigdon Deposition Transcript) 62:20-63:3, I do not rely on his limited testimony regarding Charter.

In any event, the carriage decisions of Charter — a cable company that operates in different geographic markets and competes for different subscribers than Comcast, *see* Tr. at 1795:19-21, 1809:4-9 (Rigdon); that was financially struggling and even bankrupt for a significant period, *see* Tr. at 1865:11-1866:3 (Rigdon); Tennis Channel Ex. 140 (Gregory Rigdon Deposition Transcript) at 81:20-22, 83:3-89:3; and that simply was not in a comparable position to Comcast — do not establish that the practices of a large, profitable, vertically-integrated market leader were legitimate. *See generally* *see* Tr. at 1866:13-17 (Rigdon); Tennis Channel Ex. 308 at 39; Tr. at 2385:8-2386:16 (Gaiski); Tennis Channel Ex. 140 (Gregory Rigdon Deposition Transcript) at 20:6-10, 20:16-18.

²²⁵ DIRECTV and Dish Network have minority ownership stakes in Tennis Channel. The evidence at trial established that they acquired this equity in exchange for agreeing to forego the “free period” (a period without having to pay carriage fees) that would otherwise have been a standard part of their affiliation agreements. *See* Tr. at 507:13-508:3 (Solomon).

²²⁶ *See generally* *MASN II* ¶ 18 & nn. 98-102 (examining carriage decisions of cable operators as well as satellite distributors).

all carry Tennis Channel considerably more broadly than Comcast: Dish Network, DIRECTV, AT&T, and Verizon.²²⁷ Mr. Orszag excluded these MVPDs and counted only cable companies in his calculation of Tennis Channel's average penetration rate,²²⁸ but he could offer no explanation for that decision.

92. I find that Mr. Orszag's "revealed preferences" methodology, had it accounted for the whole market, would actually have supported the proposition that Comcast is discriminating against Tennis Channel. Inclusion of the above-named non-cable MVPDs in Mr. Orszag's revealed preferences analysis (Dish Network, DIRECTV, AT&T, and Verizon) shows that Comcast carries Tennis Channel at a rate lower than the rest of the market.²²⁹ Tennis Channel's average penetration rate among the largest MVPDs (defined as those serving more than two million subscribers, including cable companies, satellite companies, and telcos) other than Comcast is [REDACTED], nearly [REDACTED] Tennis Channel's penetration rate on Comcast.²³⁰ Taking into account the entire marketplace of MVPDs, including Comcast, Tennis Channel's average penetration rate is approximately [REDACTED].²³¹ Comcast's penetration rate for Tennis Channel thus is roughly [REDACTED] of that market-wide average.²³² Excluding Comcast, the average market-wide penetration rate for Tennis Channel is even [REDACTED].²³³ Thus, under various measures, Comcast carries Tennis Channel at best at [REDACTED] of the market rate and generally a good deal less than that.²³⁴

93. Mr. Orszag's revealed preferences analysis also shows that Comcast carries Golf Channel and Versus at penetration levels that are higher than the broader market. Comcast carries Golf Channel at a rate that is approximately [REDACTED] than the rest

²²⁷ Tr. at 2309:14-2310:4 (Bond); Tennis Channel Ex. 139 (Madison Bond Deposition Transcript) at 21:6-11; Tr. at 1351:10-1353:13, 1354:3-8, 1357:6-8 (Orszag); Comcast Ex. 80 (Testimony of Jonathan Orszag) at 11 (¶¶ 20-22).

²²⁸ Tr. at 1351:10-1353:13 (Orszag).

²²⁹ Tr. at 1360:11-1361:2 (Orszag); *see also* Tennis Channel Ex. 16 (Testimony of Hal Singer) at 44 (¶ 62).

²³⁰ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 40 (¶ 54, tbl. 6). It is true that some of the MVPDs that carry Tennis Channel do so on a sports tier, but not all sports tiers are equal — for example, Cox's Digital Sports & Information Tier is distributed to 34 percent of its subscribers, *see* Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 3 (¶ 8) — and the bulk of Tennis Channel's subscribers do not receive the network on a sports tier, *see* Tr. at 248:14-22 (Solomon).

²³¹ Comcast Ex. 80 (Testimony of Jonathan Orszag) at 29 (tbl. 2B) (as reported by SNL Kagan); Tr. at 1377:17-20 (Orszag).

²³² Tr. at 1378:3-10 (Orszag).

²³³ *Id.* at 1377:21-1378:2 (Orszag).

²³⁴ Mr. Orszag acknowledged that it would be a "piece of evidence" of discrimination if Comcast carried Tennis Channel at less than [REDACTED] of the market of all MVPDs. *Id.* at 1381:9-19 (Orszag).

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of the market, and it carries Versus at a rate that is approximately [REDACTED].²³⁵ In his testimony, Mr. Orszag agreed that, in terms of its carriage levels, Comcast generally treats its affiliated channels Golf Channel and Versus [REDACTED] the remainder of the marketplace.²³⁶

94. Comcast's "revealed preferences" analysis also fails to account for Comcast's ability, based on its size and prominence, to influence the carriage decisions of other MVPDs — making other MVPDs' decisions poor evidence of what an independent business judgment about carriage levels should look like.²³⁷ Comcast's broad carriage of Golf Channel and Versus, and its limited carriage of Tennis Channel, could send a "signal" to the rest of the industry, impacting their carriage decisions.²³⁸ Indeed, Comcast's documents themselves recognize that [REDACTED]

[REDACTED]²³⁹ Mr. Rigdon agreed that [REDACTED] that if one MVPD obtained rights, such as rights to negatively reposition a network, his "colleagues at the other distributors" would seek those same rights.²⁴⁰ And as the largest MVPD, Comcast's carriage decisions may be creating a particularly large [REDACTED] on the carriage decisions of other MVPDs.²⁴¹ In fact, if Comcast granted the carriage to Tennis Channel that it gives its own channels, that would immediately result in Tennis Channel obtaining increased carriage from other MVPDs. By the terms of the parties' affiliation agreement, [REDACTED]

[REDACTED]²⁴²

95. The broad carriage of Golf Channel and Versus on some other distributors is influenced not only by the "ripple effect" of Comcast's own broad distribution of these networks, but also by Comcast's use of its leverage as a distributor to obtain broad carriage of Comcast's networks by other distributors, in exchange for Comcast's broad carriage of those

²³⁵ *Id.* at 1300:1-5, 1300:17-20 (Orszag).

²³⁶ *Id.* at 1301:6-14 (Orszag).

²³⁷ Tr. at 722:15-21 (Brooks); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 41 (¶¶ 55, 89, 101).

²³⁸ See Tr. at 1388:1-5, 1393:5-13 (Orszag); Tennis Channel Ex. 38, at COMTTC_00052319.

²³⁹ Tennis Channel Ex. 38, at COMTTC_00052319; see also Tr. at 1388:1-5, 1391:8-20 (Orszag); Tennis Channel Ex. 140, Tennis Channel Ex. 140 (Gregory Rigdon Deposition Transcript) at 114:2-16.

²⁴⁰ Tr. at 1903:3-1904:3 (Rigdon).

²⁴¹ See Tr. at 722:15-21 (Brooks); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 41 (¶¶ 55, 89, 101); Tr. at 1393:4-15 (Orszag).

²⁴² Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 5 (¶ 8 n.4).

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distributors' networks,²⁴³ and by Comcast's cash payments to distributors (notwithstanding the distributor's original lack of interest in broad carriage of Comcast's affiliated networks).²⁴⁴

96. Mr. Orszag's "revealed preferences" analysis also failed to account for historical carriage patterns by Comcast.²⁴⁵ Comcast launched Golf Channel and Versus on highly penetrated tiers in 1995, at levels of carriage that were much higher than the rest of the MVPD market.²⁴⁶ And as recently as 2006, Comcast was even further ahead of the market in its carriage of Golf Channel and Versus than it is today.²⁴⁷ By granting Golf Channel and Versus broad carriage, Comcast — as the market leader — has increased their ability to receive broad carriage from other MVPDs, again undermining the reliability of other MVPDs' carriage decisions as independent evidence.

Comcast's Valuations of Tennis Channel Equity in 2006 and 2007.

97. In 2006 and 2007, Tennis Channel offered Comcast an opportunity to acquire equity in the company, as it was required to do under a "most favored nations" (MFN) clause in the parties' affiliation agreement.²⁴⁸ Under these offers, Comcast could obtain a minority equity stake in Tennis Channel if it committed to providing, and paying for, broader carriage for Tennis Channel.²⁴⁹ Comcast analyzed and rejected both offers, and it argues that this fact supports its claim that, in 2009, it was not discriminating when it rejected Tennis Channel's May 2009 proposal.²⁵⁰

98. In fact, Comcast's analyses of the 2006 and 2007 equity offers are simply irrelevant to this case. First, both of these evaluations took place before Tennis Channel invested substantially in high definition and premier programming rights, acquiring rights to all four of tennis' major events. After Comcast declined the equity offers and before Tennis Channel made its May 2009 proposal, Tennis Channel invested heavily in building its service, telecasting its first Australian Open, Wimbledon, and U.S. Open. It expanded its non-Grand Slam tournament offerings as well, obtaining exclusive rights to major events like the U.S. Davis Cup. In January 2008, it launched Tennis Channel HD, investing ██████████ to build a stand-alone studio

²⁴³ See Tennis Channel Ex. 89 (internal discussion of proposal regarding ██████████); Tr. at 2228:20-2229:3, 2232:32:11-2233:17, 2234:2-7 (Bond); see also Tennis Channel Exs. 92-98.

²⁴⁴ See Tennis Channel Ex. 140 (Gregory Rigdon Deposition Transcript) at 11:22-113:14 (\$20 million payment from Comcast to Charter to prevent negative repositioning of Versus and Golf Channel).

²⁴⁵ Tr. at 1277:18-1278:11, 1280:2-10, 1339:10-18, 1340:7-18 (Orszag).

²⁴⁶ See *id.* at 1350:5-13 (Orszag).

²⁴⁷ See Tennis Channel Ex. 306; Tr. at 1344:10-1345:2 (Orszag).

²⁴⁸ See, e.g., Opening Tr. at 163:17-165:8, 174:16-176:11; Tr. at 2014:1-2045:15, 2049:1-2084:14 9 Bond); Tr. at 2498:20-2521:7, 2531:19-2539:20 (Donnelly).

²⁴⁹ See generally Comcast Ex. 76 (Testimony of Joseph Donnelly) at 1 (¶¶ 3-6).

²⁵⁰ Opening Tr. at 164:1-5, 176:2-3; Comcast Proposed Findings ¶¶ 173-74.

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to facilitate the network's 24-hour high-definition feed. And the network invested in contracts with the most famous and well-known announcers and former players in the sport, bringing on Jimmy Connors, John McEnroe, Martina Navratilova, and others as commentators for the network's programming.²⁵¹ Thus, by 2009, Tennis Channel was a very different network from what it was in 2006 and 2007, as Comcast knew at the time of the 2009 negotiation.²⁵²

99. Second, neither of the two equity offers involved the [REDACTED] that Tennis Channel offered Comcast in 2009 that would be relevant to Comcast's 2009 decision. The proposals involved different value propositions, and the fact that Comcast declined the 2006 and 2007 offers does not explain its 2009 rejection of [REDACTED]. Reflecting the fact that different deals were on the table, Mr. Donnelly, the then-CFO whose group evaluated the earlier offers, played no role in the 2009 carriage decision.²⁵³ Mr. Donnelly's group did not evaluate whether Tennis Channel's programming improvements and investments added value to the network, and it never compared that value to the [REDACTED] carriage fees Tennis Channel offered in 2009.²⁵⁴

100. Third, the analyses Comcast conducted in connection with the 2006 and 2007 MFN offers considered the cost of carrying Tennis Channel but did not address whether broader carriage of Tennis Channel would benefit Comcast as a distributor.²⁵⁵ The benefits that Comcast ignored included, for example, increased revenues from new subscriptions, upgrades from analog to digital, and increased value of ad avails during Tennis Channel programming.²⁵⁶

Comcast's Other Explanations for Its Discrimination.

101. Comcast offers other explanations for its discrimination, but in making its carriage decisions for Tennis Channel and its affiliated sports networks, it never considered the factors it now relies upon in this litigation.

²⁵¹ Tr. at 261:13-264:14, 267:1-269:19 (Solomon); Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 6 (¶¶ 11-13); Tr. at 2172:18-2178:12 (Bond).

²⁵² Tr. at 2178:5-15, 2203:16-2204:3 (Bond).

²⁵³ Tr. at 2545:16-2546:20 (Donnelly).

²⁵⁴ *Id.*

²⁵⁵ Tr. at 2500:9-21, 2532:15-2533:15 (Donnelly); *see also* Comcast Ex. 76 (Testimony of Joseph Donnelly) at 3 (¶¶ 11-12, 16).

²⁵⁶ *See* Tr. at 2543:21-2545:9 (Donnelly). Although Mr. Bond now claims that when Comcast evaluated the MFN offers it considered whether it would realize any offsetting benefits as a distributor, *see* Comcast Ex. 75 (Testimony of Madison Bond) at 10 (¶ 26), he testified earlier that [REDACTED]

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102. *Programming costs.* Comcast's experts suggest that the amount of money a network spends on programming is relevant to the level of carriage it should receive.²⁵⁷ But the Comcast executives in charge of distribution did not [REDACTED]²⁵⁸ The amount of Tennis Channel's programming expenditures played no role in Comcast's decisionmaking regarding the level of Tennis Channel's carriage, because programming expenditures are not, in fact, a "proxy for the value or quality of programming offered by the network."²⁵⁹

103. *Mr. Egan's factors.* Mr. Egan outlined various factors that, in his view, MVPDs consider in deciding whether to carry a network: (1) content, (2) ownership and management, and (3) cost and revenue potential.²⁶⁰ But there is no evidence that Comcast considered any of these factors in making its carriage decisions for the Tennis Channel, or that Tennis Channel would fare poorly relative to Comcast's affiliated networks if the factors had been considered. With respect to content, part of Mr. Egan's content evaluation is whether a channel serves an "underserved niche," providing programming that is not available elsewhere.²⁶¹ Mr. Egan concedes that there is no network other than Tennis Channel dedicated solely to tennis programming, and that there is far more golf available outside of the Golf Channel than there is tennis outside of the Tennis Channel, but he did not examine whether Golf Channel is as necessary to the golf niche as Tennis Channel is to the tennis niche.²⁶² He also did not examine whether hockey was an underserved niche in 2009, when both Versus and the NHL Network had broader distribution than Tennis Channel on Comcast systems.²⁶³

104. Mr. Egan did not evaluate Tennis Channel's ownership and management and has no reason to believe its management is "anything other than professional and accomplished." He also does not know whether Comcast considered this factor in making its 2009 carriage decision for the network.²⁶⁴ And as for cost and revenue potential, to the best of Mr. Egan's knowledge, Comcast did not try to quantify "the dollar difference [increased carriage of Tennis Channel] might make in terms of revenue."²⁶⁵ He does not know whether Comcast considered revenue potential in making carriage decisions for the Tennis Channel.²⁶⁶ No one

²⁵⁷ See Comcast Ex. 77 (Testimony of Michael Egan) at 17 (¶¶ 27, 53, 65); Comcast Ex. 80 (Testimony of Jonathan Orszag) at 25 (¶¶ 36-40).

²⁵⁸ Tennis Channel Ex. 137 (Jennifer Gaiski Deposition Transcript) at 157:12-158:4.

²⁵⁹ Tr. at 1884:2-19 (Rigdon); Tr. at 2255:12-16 (Bond); see also Tennis Channel Ex. 16 (Testimony of Hal Singer) at 55 (¶ 79).

²⁶⁰ Comcast Ex. 77 (Testimony of Michael Egan) at 6 (¶ 8); see also Tr. at 1605:13-20 (Egan); Tennis Channel Ex. 141 (Michael Egan Deposition Transcript) at 27:7-12.

²⁶¹ Tr. at 1609:3-10 (Egan); Comcast Ex. 77 (Testimony of Michael Egan) at 6 (¶ 8).

²⁶² Tr. at 1609:11-1610:7 (Egan).

²⁶³ *Id.* at 1610:8-11 (Egan).

²⁶⁴ *Id.* at 1611:9-21 (Egan).

²⁶⁵ *Id.* at 1613:5-13 (Egan).

²⁶⁶ *Id.* at 1613:14-17 (Egan).

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from Comcast headquarters actually involved in the decision concerning Tennis Channel's 2009 proposal ever looked at this factor either.²⁶⁷

105. *Local interest.* Comcast has not introduced facts supporting its claim that Tennis Channel does not inspire enough local interest among its cable systems to warrant carriage at the same level as Golf Channel and Versus.²⁶⁸ Comcast's cable executives do not review customer surveys relevant to whether Tennis Channel, Golf Channel, Versus, the NHL Network, and the MLB Network should be on the Sports Tier.²⁶⁹ And, as noted above, the circumstances surrounding Ms. Gaiski's June 8, 2009 call with four division representatives and an attorney — including the fact that it was undertaken in anticipation of litigation and the fact that Comcast ended the negotiation before results could be obtained — render that effort irrelevant. I note that Comcast renewed its affiliation agreements with Golf Channel and Versus without requiring a field survey to determine local system interest in those networks.²⁷⁰ In fact, Comcast has always carried those networks broadly but has offered no evidence to show local system interest in their programming.²⁷¹

HARM TO TENNIS CHANNEL'S ABILITY TO COMPETE

106. Comcast's refusal to carry Tennis Channel more broadly threatens the network's ability to operate and even to survive as a network — as Comcast's own executives have admitted and its own internal analyses show. By restricting Tennis Channel to the Sports Tier while carrying its affiliated sports networks more broadly, Comcast hinders Tennis Channel in its pursuit of viewers, in its sale of advertising, and in its efforts to obtain valuable programming rights.

Fundamental Harm to Tennis Channel's Ability to Operate As a Network.

107. Comcast's discriminatory restriction of Tennis Channel to the Sports Tier unquestionably deprives the network of millions of subscribers. Tennis Channel could reach [REDACTED] additional subscribers — taking it from nearly [REDACTED] subscribers to approximately [REDACTED] across all its distributors — if Comcast carried the network at the same level at which it carries its wholly-owned affiliates, Golf Channel and Versus.²⁷² This limitation on Tennis Channel's subscriber base also affects the network's ability

²⁶⁷ Tr. at 2414:3-21, 2437:18-2439:11 (Gaiski).

²⁶⁸ Comcast Ex. 75 (Testimony of Madison Bond) at 6 (¶ 16); Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 6 (¶ 16).

²⁶⁹ Tr. at 2198:22-2199:12 (Bond); Tr. at 2421:10-19, 2364:1-5, 2431:5-22 (Gaiski).

²⁷⁰ Tr. at 2227:3-8, 2228:1-4 (Bond); Tr. at 2419:2-5 (Gaiski).

²⁷¹ Comcast has raised a number of other issues that I do not find to be relevant, credible justifications for Comcast's discrimination. *See, e.g.*, Comcast Proposed Findings ¶¶ 23 n.49 (recusal of DIRECTV and Dish board members); 26 n.57 (overstated advertising projections in 2005 business plan); 30 (Tennis Channel's purported plans to join the NFL Network's program carriage complaint).

²⁷² Tennis Channel Exs. 130, 131, 132.

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to earn carriage fees and to invest those funds in operations and growth.²⁷³ And, because of Comcast's status as the market leader and the "ripple effect" in the MVPD marketplace, it limits Tennis Channel's ability to obtain carriage with other distributors.²⁷⁴

108. Comcast executives have acknowledged that placement on its Sports Tier is "not viable" for an ad-supported network like Tennis Channel.²⁷⁵ Indeed, Comcast concluded in pre-litigation financial analyses, performed in connection with the equity MFN offers made by Tennis Channel in 2006 and 2007, that Tennis Channel would have "no value" if it remained on Comcast's Sports Tier.²⁷⁶ Comcast reached this conclusion even assuming natural subscriber growth from distributors other than Comcast.²⁷⁷ Comcast further concluded that the network would need to be carried beyond Comcast's Sports Tier to have any value at all.²⁷⁸

Harm to Tennis Channel's Ability to Compete for Viewers.

109. Tennis Channel is harmed in its ability to compete for viewers by virtue of its limited distribution on Comcast. This is true in part because other distributors follow Comcast's lead in making distribution decisions.²⁷⁹ The disadvantage to Tennis Channel in competing for viewers is also reflected within Comcast's customer base. The fact that Comcast subscribers must pay \$5 to \$8 for the Sports Tier in order to view Tennis Channel, without having to do the same to access the Comcast-affiliated networks with which it competes, "means limited exposure to occasional viewers, such as channel surfers, some of whom can be converted into regular viewers over time, but only if they are exposed to the network in the first place."²⁸⁰ As Mr. Brooks explained, absence from the channel lineup on broadly penetrated tiers

²⁷³ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 17 (¶ 38); *see also* Tr. at 720:9-22 (Brooks); Tr. at 298:16-20 (Solomon); Tr. at 613:7-18 (Herman); Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 20 (¶ 44).

²⁷⁴ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 17 (¶ 38); *see also* Tennis Channel Ex. 16 (Testimony of Hal Singer) at 41 (¶¶ 55, 89); Tennis Channel Ex. 38, at COMTTC_0005231; Tr. at 722:5-23 (Brooks).

²⁷⁵ Tennis Channel Ex. 9. Comcast and its experts admit the importance of broad distribution. Tr. at 2125:3-6, 2158:12-17 (Bond); Tr. at 1922:3-9 (Rigdon); Tennis Channel Ex. 136 (Marc Goldstein Deposition Transcript) at 195:6-10; Tr. at 2751:14-17, 2731:14-17 (Goldstein).

²⁷⁶ Tennis Channel Ex. 33; Tr. at 2567:6-13 (Donnelly).

²⁷⁷ *See* Tr. at 2569:2-6, 2570:1-18 (Donnelly).

²⁷⁸ Tennis Channel Ex. 33; Tr. at 2570:19-2571:1 (Donnelly).

²⁷⁹ Tr. at 722:6-723:3 (Brooks); Tennis Channel Ex. 16 (Testimony of Hal Singer) at 41 (¶¶ 55, 89); Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 17 (¶ 38); Tennis Channel Ex. 38, at COMTTC_00052319.

²⁸⁰ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 33 (¶ 66); *see also* Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 5 (¶ 9); Comcast Ex. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

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“eliminates any possibility that the majority of casual viewers can sample a network.”²⁸¹ Sports programming, in particular, is an “experience good” that can “best be learned about while surfing the channels.”²⁸² While Comcast subscribers can gain experience with Golf Channel and Versus casually, by simply surfing through channels on their basic package, they may not even be aware of the existence of Tennis Channel or have any experience with its programming, which is available only on the Sports Tier.²⁸³ In turn, these casual viewers will be more likely to watch the more familiar and readily accessible Golf Channel and Versus than to watch Tennis Channel, with which they have little experience.²⁸⁴

110. In addition, Comcast’s channel placement of Tennis Channel harms its ability to compete with Comcast’s affiliated networks. Comcast recognizes that networks perceive their channel placement to be something of value and that sports networks want channel numbers next to or near ESPN.²⁸⁵ Comcast understands that Tennis Channel’s placement on a pay-extra sports tier, with a channel number in the triple digits, disadvantages the network vis-à-vis Golf Channel and Versus in its competition for new viewers.²⁸⁶

Harm to Tennis Channel’s Ability to Compete for Advertising Revenues.

111. Comcast’s discriminatory restriction of Tennis Channel to the Sports Tier hinders Tennis Channel in its ability to sell advertising and to obtain advertising revenues.²⁸⁷ Being restricted to the Sports Tier harms Tennis Channel’s ad sales efforts because advertisers

²⁸¹ Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 33 (¶ 66); *see also* Tr. at 719:3-15 (Brooks) (Because “a good deal of viewing to any network comes from casual viewers . . . [i]f you’re not distributed, if they can’t get you literally, then obviously you’re not going to get any of those casual viewers into your tent.”.)

²⁸² Tennis Channel Ex. 16 (Testimony of Hal Singer) at 61 (¶ 87).

²⁸³ *Id.*; *see also* Tr. at 299:12-17 (Solomon).

²⁸⁴ Tennis Channel Ex. 16 (Testimony of Hal Singer) at 61 (¶ 87).

²⁸⁵ Tr. at 2265:6-14, 2266:9-14 (Bond). As a general matter, it is better to have a channel number in the single or double digits rather than to have one in the triple or quadruple digits. Tr. at 2265:15- 2266:8 (Bond) (“[P]eople tended to watch television by channel surfing, and a typical behavior pattern was to start at Channel 1 and then push the Channel Up button. And so that allowed -- that meant that the lower channel position would tend to have higher viewership.”). A network’s channel positioning continues to be important today. Tr. at 2267:7-9 (Bond); *see also* Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 86:2-17

²⁸⁶ *See, e.g.*, Tr. at 2265:6-2266:14 (Bond); Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 86:13-17.

²⁸⁷ [REDACTED]; *see also* Tennis Channel Ex. 9 (Comcast Programming chief explaining that Comcast’s Sports Tier is “not viable” for an ad-supported network.)

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care about the number of viewers who see their advertisements; the more potential viewers Tennis Channel can offer, the more it can earn from advertising sales.²⁸⁸ As Tennis Channel's head of advertising sales, Mr. Gary Herman, observed, "[f]rom my experience, distribution is the single most important factor in our ability to compete and to increase revenues. And on the flip side, it turns out to be the single most prevalent reason that we get from advertisers for not doing business with us."²⁸⁹

112. Mr. Herman also explained that "[t]o 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 to be considered nationally distributed."²⁹⁰ As he noted based on his experience in the advertising industry, "[t]hough advertisers will display flexibility on the exact number of subscribers they view as the threshold for purchasing national advertising, the further a network is from the 40 million subscriber level,

²⁸⁸ See Comcast Ex. 79 (Testimony of Marc Goldstein) at 9 (¶ 43); [REDACTED]

Lower distribution leads to lower advertising revenues. Tr. at 2550:22-2551:4 (Donnelly) ("With lower distribution, you would expect to have lower advertising [revenues]."); Tr. at 593:3-19 (Herman) ("[T]he more households you have, the more people are going to see the commercials, and advertisers want to have more people see the commercials. The more households you get, the more impressions you have to sell, it changes your rate basis. When your rates go up, then your inventory becomes more valuable, and you can earn higher shares of ad budgets."). The additional viewers that Tennis Channel would receive if Comcast carried it at the same level it carries its sports networks would make Tennis Channel more attractive to advertisers. Tr. at 2750:3-16 (Goldstein) (as an advertiser, "we would go for the one . . . that delivered more viewers than less," and "being broadly distributed helps the network").

²⁸⁹ Tr. at 592:16-22 (Herman); see also Tennis Channel Ex. 15 (Testimony of Gary Herman) at 6 (¶ 14). For example, [REDACTED] and other major advertisers "have excluded [Tennis Channel] as a competitor for national television advertising contracts because of its reduced nationwide distribution and lack of Nielsen national ratings information." Tennis Channel Ex. 15 (Testimony of Gary Herman) at 6 (¶¶ 16, 20). [REDACTED] has purchased advertising on Tennis Channel, but [REDACTED] was attributable to advertising during freeviews — periods when Tennis Channel was distributed to about 50 million subscribers — and [REDACTED]. The company has told Tennis Channel that, although it has "attractive content and demographics outside of the freeview periods, [its] distribution is not large enough for them to consider a significant advertising purchase on Tennis Channel separate from what they have purchased in connection with [the] freeviews." *Id.* ¶ 17. [REDACTED] informed Tennis Channel that the network "was too narrowly distributed to warrant a media buy"; in 2010, the company made a one-time purchase on Tennis Channel during its freeview periods but has not bought advertising on the network at any other time. *Id.* ¶ 18. Other advertisers that target affluent consumers, including [REDACTED], have declined to purchase advertising on Tennis Channel until very recently, again citing its limited distribution, and their advertising purchases remain significantly curtailed. *Id.* ¶¶ 19-20, 24.

²⁹⁰ Tennis Channel Ex. 15 (Testimony of Gary Herman) at 5 (¶ 11).

the less able it generally is to attract national advertisers.”²⁹¹ Because Tennis Channel is restricted to Comcast’s Sports Tier and has only about [REDACTED] million homes, “many companies that otherwise would be interested in advertising on Tennis Channel are unwilling to do so” — but if Comcast were to carry Tennis Channel as broadly as it carries Golf Channel and Versus, the network would be in over 40 million homes and would be much better positioned in its advertising sales efforts.²⁹²

113. Moreover, in line with other networks of its size, Tennis Channel purchases [REDACTED]

[REDACTED]²⁹⁴ Without the [REDACTED] that would make sense to purchase if Tennis Channel had broader distribution on Comcast’s systems, Tennis Channel lacks an important marketing tool that it could use in competing for the business of advertisers.²⁹⁵ Comcast’s advertising expert Marc Goldstein conceded that [REDACTED]

[REDACTED]²⁹⁶ Tennis Channel, among other things, offering prospective advertisers information [REDACTED]
[REDACTED]²⁹⁷

114. Comcast harms Tennis Channel’s ad sales efforts not only by its tiering of the network, but also by its channel placement. Jeffrey Shell, Comcast’s former head of programming, admitted that [REDACTED]

[REDACTED]²⁹⁸ As noted above, Comcast carries Golf Channel and Versus on low channel

²⁹¹ *Id.*

²⁹² *Id.* ¶¶ 14-15.

²⁹³ *Id.* ¶ 27; *see also* Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 5 (¶ 11) (noting that Versus did not purchase national Nielsen ratings until it reached 56 million households and Golf Channel did not do so until it reached 74 million households); Tr. at 705:20-706:13 (Brooks).

²⁹⁴ *See* Tr. at 2753:22-2754:5 (Goldstein); *see also* Tennis Channel Ex. 136 (Marc Goldstein Deposition Transcript) at 205:9-206:8 (Goldstein).

²⁹⁵ Tennis Channel Ex. 15 (Testimony of Gary Herman) at 10 (¶¶ 27-28); Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 34 (¶ 68).

²⁹⁶ Tennis Channel Ex. 136 (Marc Goldstein Deposition Transcript) at 197:22-198:7 (Goldstein).

²⁹⁷ Tr. at 612:22-613:6 (Herman).

²⁹⁸ Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 86:2-17.

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numbers near ESPN, but it carries Tennis Channel on high channel numbers far from these networks.²⁹⁹

Harm to Tennis Channel's Ability to Compete for Programming Rights.

115. Comcast's limited distribution of Tennis Channel harms the network's ability to compete for programming rights.³⁰⁰

116. The evidence establishes that a network with limited distribution has less money to spend on programming,³⁰¹ and is less attractive to rights-holders,³⁰² than networks with broader distribution. Here, Tennis Channel has been turned down in its efforts to telecast portions of a number of tournaments because of its limited distribution.³⁰³ If Comcast granted

²⁹⁹ Tennis Channel Exs. 55, 100; Tr. at 2265:6-2266:14, 2271:5-2275:11 (Bond); Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 86:13-17.

³⁰⁰ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 18 (¶¶ 40-41).

³⁰¹ Higher distribution leads to increased licensing revenue, which in turn "allows for money to be spent on programming." Tr. at 2254:8-13 (Bond). Typically, networks with higher revenues have larger programming budgets, *id.* at 2254:18-2255:2 (Bond), allowing them to compete more effectively for the most expensive rights. *See* Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 17 (¶¶ 38, 40).

³⁰² Owners of programming rights want their events to be seen "as widely as possible" in order to promote the popularity and value of the event; hence, "they favor wider distribution vehicles to do their deals, no matter what kind of money [prospective networks] offer them." Tr. at 718:13-21 (Brooks); *see also* Tennis Channel Ex. 17 (Testimony of Timothy Brooks) at 33 (¶ 65). Rights holders need Tennis Channel to be able to "show their tournament[s] in as many homes as possible without . . . being fettered by charging people more money to get it." Tr. at 287:6-10 (Solomon).

³⁰³ Rights holders of the [REDACTED], for example, refused to grant Tennis Channel the rights for each tournament's last singles final match because of Tennis Channel's limited distribution. Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 18 (¶ 40). Tennis Channel has rights to telecast the [REDACTED] of these tournaments, but [REDACTED] awarded the final match to [REDACTED], which reaches substantially more homes. *Id.* [REDACTED] was also chosen over Tennis Channel to air the semi-final and final matches of the [REDACTED]. *Id.* Tennis Channel produced all the relevant programming for the event, including that which aired on [REDACTED]; [REDACTED]. *Id.* Tennis Channel's contract with the [REDACTED] specifies that [REDACTED]. *Id.*; Tennis Channel Ex. 178, at 5. The rights holders to the [REDACTED] also were reluctant to award tournament rights to the Tennis Channel because of the network's limited distribution. To secure those rights, Tennis Channel had to promise that [REDACTED]. [REDACTED] Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 18 (¶ 41). [REDACTED] officials also required that

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Tennis Channel the same level of carriage that it grants its own networks, Tennis Channel's ability to secure valuable content would be substantially strengthened.

117. Comcast benefits from exploiting Tennis Channel's distribution limitations, which it has itself created. Comcast has recognized internally that Tennis Channel's limited distribution hinders its ability to obtain rights to premier tennis events — rights for which Comcast competes, including [REDACTED]³⁰⁴ and Wimbledon.³⁰⁵ Comcast believed it would be a [REDACTED]

[REDACTED]³⁰⁶

CONCLUSIONS OF LAW

Statutory and Regulatory Scheme

118. Congress enacted Section 616 as part of the Cable Television Consumer Protection and Competition Act of 1992.³⁰⁷ Section 616 directs the Commission to “establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors.”³⁰⁸ Among other things, Congress directed that the regulations:

contain provisions designed to prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of 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,

Tennis Channel offer a free preview, licensing its coverage to its distribution partners for free in order to meet the required distribution threshold. Tr. at 288:10-17 (Solomon). With broader carriage from Comcast, Tennis Channel would have been able to meet the threshold on its own, without needing to give its programming away for free.

³⁰⁴ See Tr. at 871:20-872:2, 881:17, 1423:12-17 (Orszag); [REDACTED]

³⁰⁵ See Tr. at 871:20-872:2, 881:17, 1423:12-17 (Orszag); Tennis Channel Ex. 179.

³⁰⁶ Tennis Channel Ex. 143 (Jeffrey Shell Deposition Designations) at 53:12-54:4. Rights holders for sporting events get revenue from sponsorship deals. Tr. at 287:13-17 (Solomon). The sponsors, in exchange, prefer that the sponsored event be distributed at a certain penetration level, reaching a minimum number of viewers. *Id.* at 287:18-20 (Solomon).

³⁰⁷ Pub. L. No. 102-385, 106 Stat. 1460 (1992) [hereinafter “Cable Act”].

³⁰⁸ 47 U.S.C. § 536(a).

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terms, or conditions for carriage of video programming provided by such vendors.³⁰⁹

119. In accordance with this directive, the Commission adopted an implementing regulation that closely tracks the statutory language:

No [MVPD] shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.³¹⁰

120. In enacting Section 616, Congress found that cable operators have “undue market power . . . compared to . . . video programmers.”³¹¹ Congress also found that “[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership,” as a consequence of which “cable operators have the incentive and ability to favor their affiliated programmers,” in turn potentially “mak[ing] it more difficult for noncable-affiliated programmers to secure carriage on cable systems.”³¹² Congress’s stated purposes included “ensur[ing] that cable television operators do not have undue market power vis-a-vis video programmers and consumers.”³¹³

121. Comcast suggests that developments in the MVPD marketplace since the enactment of Section 616 mean that Section 616 and its implementing regulations “[m]ust [b]e [c]onstrued and [a]pplied [n]arrowly.”³¹⁴ In fact, the statute and regulations are binding law and must be construed and applied as written, according to their plain language and intent. Congress has not repealed Section 616, nor has the Commission indicated that its implementing regulations should be construed in any way other than according to their terms. In fact, the Commission found only a few years ago, in addressing rules that are very similar to its program carriage rules, that there is still affiliation-based discrimination in the MVPD marketplace and still an ongoing need for anti-discrimination provisions.³¹⁵ And in the NBC Universal merger

³⁰⁹ 47 U.S.C. § 536(a)(3).

³¹⁰ 47 C.F.R. § 76.1301(c).

³¹¹ 47 U.S.C. § 521 note, Pub. L. No. 102-385 § 2(a)(2), 106 Stat. at 1460.

³¹² 47 U.S.C. § 521 note, Pub. L. No. 102-385 § 2(a)(5), 106 Stat. at 1460-61.

³¹³ 47 U.S.C. § 521 note, Pub. L. No. 102-385 § 2(b)(5), 106 Stat. at 1463. The legislative history of the Act shows Congress’s concern with practices of “anticompetitive abuses” on the part of vertically integrated MVPDs. 138 Cong. Rec. S426-27 (daily ed. Jan. 27, 1992) (statements of Sen. Danforth and Sen. Gore); *see also* H.R. Rep. No. 102-628, at 41 (1992).

³¹⁴ Comcast Proposed Findings ¶¶ 156-58.

³¹⁵ *Leased Commercial Access*, 23 F.C.C. Rcd. 2909, 2939-40 (MB rel. 2008); *see also Implementation of the Cable Television Consumer Protection & Completion Act of 1992 (Program Access Order)*, 22 F.C.C. Rcd. 17791, 17810 (2007). The Commission has made similar findings in other contexts, too. *See Review of the Commission’s Program Access Rules*

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proceeding, the Commission specifically found that “Comcast’s extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming.”³¹⁶ Based on this concern, Comcast submitted voluntary carriage conditions on the merger, and the Commission, finding them inadequate, added additional conditions, in the process reaffirming the vitality of Section 616.

122. Accordingly, Section 616 and Section 76.1301(c) will be applied as written, with the ultimate question being whether Comcast has engaged in conduct (1) amounting to discrimination on the basis of affiliation or non-affiliation in the terms or conditions for carriage; and (2) having the effect of unreasonably restraining the ability of Tennis Channel to compete fairly.

Burden of Proof

123. The parties argue for different burdens of production and proof after the Media Bureau has made a *prima facie* finding of discrimination and designated the case for a hearing.³¹⁷ I note that in the program access context, which is closely analogous to the program carriage framework, the burdens following a *prima facie* finding are as stated by Tennis Channel.³¹⁸ I believe that approach is appropriate here and conclude that, following the *prima facie* finding of discrimination, Comcast bears the burden of proving that its conduct was non-discriminatory.³¹⁹ But even if I determined that the burden of proof rested with Tennis Channel, it would not change the outcome in this case. I find that here, as in the *WealthTV* matter, “the manner in which the burden of proof is allocated becomes immaterial to the decision. Whatever the allocation of burdens, the preponderance of the evidence, viewed in its entirety,

& Examination of Programming Tying Arrangements, 25 FCC Rcd 746, ¶¶ 25, 42 & n.172 (MB 2010) (“cable operators continue to have an incentive and ability to engage in unfair acts or practices involving their affiliated programming;” the governmental interest in promoting fair competition in the video marketplace “remains substantial today;” “regulations intended to promote competition in the video distribution market in accordance with the objectives of Congress are still warranted”), *vacated in part, Cablevision Systems Corp. v. FCC*, -- F.3d --, 2011 WL 2277217 (D.C. Cir. 2011). *See also id.* ¶¶ 7, 26, 30.

³¹⁶ *NBCU Order*, ¶ 116.

³¹⁷ Comcast Proposed Findings ¶¶ 1, 152; Tennis Channel Proposed Findings ¶ 300.

³¹⁸ *See Implementation of the Cable Television Consumer Protection & Competition Act of 1992*, Report and Order, 13 FCC Rcd. 15822, ¶ 56 (1998) (“Once a *prima facie* complaint has been determined, the burden of proof is on the defendant to establish that it did not violate the program access provisions of the Communications Act.”); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd. 3359 ¶¶ 76-77, 140 (MM 1993).

³¹⁹ The Commission has stated that the precise rules regarding burden of production and burden of proof are an open question. *See WealthTV II* ¶ 18 & n.50; *see also MASN Decision on Review* ¶ 11 & n.49. The Commission stated that it anticipated addressing these questions in an upcoming rulemaking proceeding. *See WealthTV II* ¶ 18 & n.50.

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demonstrates” a clear result.³²⁰ The record as a whole establishes that Comcast violated Section 616 and Section 76.1301(c), and I so find, regardless of how the burdens of production and proof are allocated.

Discrimination on the Basis of Affiliation or Non-Affiliation

124. Comcast has “engag[ed] in conduct the effect of which is to unreasonably restrain the ability of [Tennis Channel,] 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.”³²¹

125. There was direct evidence in this case that Comcast discriminates on the basis of affiliation, distributing its affiliated networks far more broadly notwithstanding far greater costs. Comcast treats its networks in which it owns a financial interest like “siblings as opposed to like strangers” and affording them “a better audience” and a “different level of scrutiny” than unaffiliated channels.³²² As Mr. Bond testified, “[t]here’s a sibling relationship and probably a greater access to some degree.”³²³ I have previously noted that distributors “are not obligated to employ identical criteria in their carriage decisions; they are only required not to discriminate on the basis of affiliation or non-affiliation.”³²⁴ But here, it is clear that Comcast not only applied different standards to Tennis Channel and to its affiliated networks, but also did so on the basis of affiliation — applying a “different level of scrutiny” to its sibling networks than to others. I have found, as explained above, that Comcast’s explanations for applying different tests to different networks (*e.g.*, the relative seniority or launch dates of the networks) are not justifications for its discrimination in this case.³²⁵

126. In this case, there was also clear evidence that Comcast systematically favors its affiliated networks and disfavors networks, like Tennis Channel, with which it is unaffiliated. This is clear from the tiers on which affiliated and non-affiliated networks are carried or refused carriage, pursuant to top-down mandates from Comcast’s corporate office. It is clear from the channel placement of the networks. It is clear from contemporaneous, internal Comcast documents reflecting the cable division’s efforts to do favors for, and exercise its distribution leverage on behalf of, Comcast’s affiliated “siblings.” And it is clear from economic analysis, including that conducted both by the FCC and by the economists in this case.

127. The preponderance of the evidence establishes that affiliation plays a clear role in Comcast’s treatment of Golf Channel, Versus, the MLB Network, and the NHL Network,

³²⁰ *WealthTV I* ¶ 62.

³²¹ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c) (Tennis Channel Exs. 5-6); *HDO* ¶ 24(a).

³²² Tennis Channel Ex. 7.

³²³ Tr. at 2249:16-18 (Bond).

³²⁴ *WealthTV I* ¶ 69.

³²⁵ See paragraphs 74-105, *supra*.

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and that non-affiliation plays a clear role in Comcast's treatment of Tennis Channel. Under the law, Tennis Channel is similarly situated with Comcast's affiliated sports networks — though they need not be “identical”³²⁶; they pursue the same demographic audiences, they appeal to those audiences at similar levels (as reflected by their ratings), they target and serve the same advertisers, and they show similar types of content. With respect to content, I further find that Tennis Channel and Versus (among other Comcast-affiliated networks) compete for the rights to tennis programming, and that Comcast knowingly benefits directly in that competition from the limits it places on Tennis Channel's distribution.

128. The evidence showed that Comcast's proffered business justifications could not be applied consistently to provide non-discriminatory reasons for Comcast's decisions. I find that Comcast's efforts to rely on cost of carriage and other factors were not applied in a non-discriminatory manner to justify the carriage decisions in the summer of 2009 or at other times, including at the times it renewed its affiliation agreements with Golf Channel and Versus without applying to these networks any of the tests allegedly applied to Tennis Channel.

Unreasonable Restraints on Tennis Channel's Ability to Compete Fairly

129. The clear weight of the evidence established that Comcast's restriction of Tennis Channel to the Sports Tier on most of its local systems unreasonably harms Tennis Channel's ability to compete fairly. Comcast's discrimination is unlawful under Section 616 and Section 76.1301(c), and therefore unreasonable and unfair. With respect to the degree and scope of the harm caused to Tennis Channel, I conclude that Comcast's restriction of this network to the Sports Tier on most of its systems, while providing much broader carriage to its affiliated networks, harms Tennis Channel's basic ability to operate as a network, as well as its ability to compete for viewers, advertisers, and programming.³²⁷

130. Comcast suggests that Tennis Channel has not been harmed because the network can seek carriage on other MVPDs.³²⁸ But this fact is legally irrelevant. As I have noted previously:

By denying linear carriage on all of its systems, each defendant made it more difficult for WealthTV to gain access to millions of customers, which in turn had a negative competitive impact on WealthTV. The denial of carriage had the effect of impairing the growth in WealthTV's subscription revenues, making it more difficult for WealthTV to attract advertisers, and preventing

³²⁶ *Omnibus HDO* ¶ 75; *MASN I* ¶¶ 27-28; see also *WealthTV II* ¶ 22.

³²⁷ Tennis Channel has established that Comcast's differential treatment has harmed its ability to compete in the marketplace. *HDO* ¶¶ 20-21; *MASN I* ¶ 30; *Omnibus HDO* ¶¶ 77-78. Tennis Channel 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.” *MASN I* ¶¶ 30, 31.

³²⁸ Comcast Proposed Findings ¶¶ 4, 143, 168.

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WealthTV from spreading its costs across a larger subscriber base. Contrary to the defendants' argument, WealthTV's ability to secure carriage from other MVPDs by itself does not establish that the actions of the defendants in this case could not have unreasonably restrained WealthTV's ability to compete fairly within the meaning of sections 616 and 76.1301(c). If defendants' argument were to prevail, virtually no MVPD ever would be found to have violated sections 616 and 76.1301(c).³²⁹

131. Comcast's reliance on the existence of other potential distributors is especially misplaced because Comcast is the market leader, and its denial of equitable carriage to Tennis Channel has ramifications for Tennis Channel's carriage on other MVPDs

Legal Impermissibility of Defenses Raised By Comcast

132. Certain defenses offered by Comcast are inconsistent with federal law, including the statutory scheme envisioned by Congress for Section 616.

133. *The affiliation agreement.* The affiliation agreement does not specify Sports-Tier-only carriage. It provides flexibility as to tiering, and Comcast must exercise that flexibility in accord with Section 616 and the FCC's implementing regulations. In any event, regardless of what the contract provides, Comcast would be obligated to comply with the non-discrimination requirements of Section 616 and the regulations. Comcast's obligations under Section 616 are ongoing, and it has a duty to avoid engaging in discrimination over the course of time, not only when it executes a contract.³³⁰

134. *Cost.* Comcast's objection to the increased cost of carrying Tennis Channel more broadly — even if that had been its actual motivation for denying the network's May 2009 proposal — is legally unsound.

135. First, Comcast's cost justifications were not applied in a non-discriminatory manner. As noted above, the cost of distribution has not dissuaded Comcast from continuing to carry its affiliated networks outside of the Sports Tier, at a cost many times what Comcast would pay for Tennis Channel. Comcast may have rejected Tennis Channel because of the cost of increased distribution, but its decision to do so is discrimination nonetheless — given that it never asked the same question about its own affiliated networks.

³²⁹ *WealthTV I* ¶ 72 (footnotes omitted).

³³⁰ *See, e.g., HDO* ¶ 15 (“[W]hether or not Comcast had the right to [make a tiering decision] pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules.” (quoting *Omnibus HDO*, ¶ 72)); *see also id.* (holding that “a complainant may have a timely program carriage claim in the middle of a contract term if the basis for the claim is an allegedly discriminatory decision made by the MVPD, such as tier placement, that the contract left to the MVPD’s discretion”).

136. In any event, Comcast cannot defend its conduct by asserting it would cost more to comply with the law. Comcast’s “cost” excuse fails for the simple reason that an entity cannot avoid complying with laws prohibiting discrimination by claiming that it is too expensive to do so. It is well established that, as the Supreme Court held in 1978, a “prima facie showing of discrimination [generally cannot be] rebutted by [a] demonstration that there is a . . . difference in the cost of providing benefits for the respective classes.”³³¹ As the Court observed, a cost defense “might prevail” only if an antidiscrimination statute expressly listed cost as a valid affirmative defense, which, of course, Section 616 does not.³³² To the contrary, the legislative history of Section 616 makes clear that Congress did not intend cost to be a viable defense to a program carriage discrimination claim.³³³ Accordingly, if Comcast is required to pay additional license fees to comply with Section 616 — albeit fees that are dwarfed by the fees that Comcast pays itself — then that is a cost that Comcast assumed by becoming vertically integrated.³³⁴

137. The incremental costs of compliance cannot excuse Comcast’s non-compliance with Section 616’s requirements and does not relieve it of its obligation to treat Tennis Channel equitably.³³⁵

138. *Year of launch/seniority.* The date of a non-affiliated network’s launch, standing alone or compared to the launch dates of affiliated networks, cannot be a legally sufficient justification for an MVPD’s differential treatment of the networks. As Congress expressly stated in enacting Section 616, “It is the policy of the Congress in this Act to . . . promote the availability to the public of a *diversity of views and information* through cable television and other video distribution media; . . . and . . . ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.”³³⁶ It would be flatly contrary to the purpose of the law if cable operators could shut out new and diverse programming voices simply on the ground that the “door has closed” to new services. (This is in addition to the fact, as noted above, that the door has evidently *not* closed for new sports services in which Comcast acquires a financial interest.)

³³¹ *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 716-18 (1978) (gender discrimination case).

³³² *Id.* See also *Int’l Union v. Johnson Controls*, 886 F.2d 871, 910-911 (1989) (Easterbrook, J., dissenting) (characterizing *Manhart*’s “approach [as] the norm in anti-discrimination law”).

³³³ The Senate committee report observed that “costs or good-faith efforts to meet the prices of competitors” might be a permissible reason for a programmer to give a volume discount to a distributor but specifically omitted cost as a justification for program carriage discrimination, which was discussed in the next paragraph. See S. Rep. No. 102-92, at 64 (1991) (describing § 640 of the 1992 Cable Act, which was struck prior to the bill’s passage in the Senate). See also S. 12 as reported.

³³⁴ Indeed, if Comcast is concerned about costs, it could keep its expenses flat, or even reduce them, by moving Versus and Golf Channel to less-penetrated tiers.

³³⁵ In discrimination cases in which the plaintiff seeks a special accommodation, the cost of providing that accommodation might be a defense, but Tennis Channel does not seek special treatment here — just equal treatment.

³³⁶ Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463 (1992) (emphasis added).

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139. *First Amendment.* The findings of fact and conclusions of law in this Recommended Decision, including the remedies set forth herein, are consistent with the First Amendment. I note that Section 616 is an economically-based regulation that prohibits discrimination based on ownership *affiliation*, not on the basis of *content*. Regulation on the basis of affiliation is content-neutral, as the courts have consistently confirmed.³³⁷ Because Section 616’s anti-discrimination provision is content-neutral, it must be “sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”³³⁸ Section 616 easily passes that constitutional test; Comcast never argues to the contrary. It is clear that Section 616 serves important governmental interests unrelated to the suppression of free speech,³³⁹ and that Section 616 does not burden more speech than necessary—in fact, courts have upheld governmental actions that are at least as burdensome to the cable operator (if not much more so)³⁴⁰ than the remedy ordered here: requiring Comcast to treat in a nondiscriminatory fashion a network that it has already agreed to carry.

140. I also note that Comcast has not made any fact-based First Amendment arguments. It has not objected to securing tennis content for the channels it owns, it carries Tennis Channel on the Sports Tier, and in very limited circumstances it carries Tennis Channel more broadly, all with no indication that speech concerns are influencing these decisions.

Remedy

141. The regulations implementing Section 616 clearly contemplate and permit an order of mandatory carriage, where appropriate.³⁴¹ Comcast’s discrimination in this case warrants an order requiring it to provide equitable treatment to Tennis Channel and its affiliated sports networks. (I note that this is not strictly an order of “mandatory carriage,” given that

³³⁷ See, e.g., *Time Warner Entm’t Co., L.P. v. United States*, 211 F.3d 1313, 1320-22 (D.C. Cir. 2000); see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”); *id.* at 658-59.

³³⁸ *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”).

³³⁹ “[P]romoting the widespread dissemination of information from a multiplicity of sources” is one such interest; “promoting fair competition in the market for television programming” is another. *Turner I*, 512 U.S. at 662; see also *id.* at 662-64; *Turner II*, 520 U.S. at 189-90, 198-200.

³⁴⁰ See *Turner II*, 520 U.S. at 215-16 (upholding must-carry provisions); *WRNN License Co., LLC v. Cablevision Sys. Corp.*, 22 F.C.C. Rcd. 21054, 21057 (2007) (same); *Time Warner Entm’t*, 211 F.3d at 1323 (upholding channel occupancy provision); *Time Warner Entm’t Co., L.P. v. FCC*, 93 F.3d 957, 967-71 (D.C. Cir. 1996) (upholding leased access provisions); *Leased Commercial Access*, 23 F.C.C. Rcd. at 2939-40 (same); *Time Warner Entm’t*, 93 F.3d at 976-79 (upholding program access provisions).

³⁴¹ See 47 C.F.R. § 76.1302(g)(1) (reference to “appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor’s programming on defendant’s video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor’s programming”).

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Comcast already carries Tennis Channel pursuant to an affiliation agreement into which it entered of its own accord.)

142. *Equal carriage.* Comcast should be required to carry Tennis Channel in each of its cable systems on the most highly penetrated tier in that system on which it carries any of its affiliated national sports networks. Comcast should further be required to carry Tennis Channel on a channel number that is reasonably proximate to the channel placement of Golf Channel and Versus in each local system. It is up to Comcast to choose the level on each system at which it will carry Tennis Channel and its affiliated sports networks (Expanded Basic, Digital Starter, Sports Tier, or other) — provided that in each system, it carries Tennis Channel at least as broadly as it carries Golf Channel, Versus, the MLB Network, and the NHL Network (whichever is broadest).³⁴² The appropriate level of carriage for these networks in each system is left to Comcast’s business judgment, subject to its obligation not to discriminate.

143. Comcast objects that “Tennis Channel requests greater penetration on Comcast than [REDACTED],³⁴³ Factually, this claim is incorrect, since Tennis Channel seeks equitable carriage on Comcast’s systems vis-à-vis Comcast’s affiliated networks, and that carriage could be provided (if provided to Tennis Channel, Golf Channel, Versus, the MLB Network, and the NHL Network) on the D1 tier, the Sports Tier, or any other level on any given system. Legally, Comcast’s objection is irrelevant, since the question under Section 616 is whether Comcast is discriminating on the basis of its affiliation or non-affiliation in its own carriage decisions — not what other MVPDs are doing. And, as noted above, Comcast’s characterization of the carriage of Tennis Channel, Golf Channel, and Versus in the MVPD marketplace is distorted.³⁴⁴

144. Equal treatment would address the harms arising from Comcast’s discrimination by removing the restrictions on Tennis Channel’s ability to compete in the marketplace against Comcast’s affiliated sports networks for programming rights, viewers, and advertisers. The networks are similarly situated, and they should be on equal competitive footing. I find immaterial Comcast’s suggestion that if it moves Tennis Channel to the same carriage level as that currently received by Golf Channel and Versus, Tennis Channel still would not have 50 million subscribers, and therefore still would not easily qualify as a bidder for certain content.³⁴⁵ If Comcast were to carry all three networks at the Expanded Basic/Digital Starter level, Tennis Channel would have over 40 million subscribers, which would materially improve its standing as a national network competing for advertising revenues and

³⁴² Comcast suggests that an order of equal treatment would provide Tennis Channel with broader carriage than it would have settled for (D1) under its May 2009 proposal. (Comcast Proposed Findings ¶ 205.) An effort to reach a negotiated improvement in carriage does not affect Tennis Channel’s legal right to seek full relief in this proceeding; to hold otherwise would discourage negotiations, among other flaws.

³⁴³ Comcast Proposed Findings ¶¶ 74, 206.

³⁴⁴ See paragraphs 90-96, *supra*.

³⁴⁵ Comcast Proposed Findings ¶ 142.

programming.³⁴⁶ And Comcast disregards the powerful effect that broader carriage on its systems would have on Tennis Channel's carriage across the marketplace — both because Comcast is a market leader and because there are specific contractual provisions guaranteeing broader carriage for TC if it can get its distribution above a certain level.³⁴⁷

145. *Price.* Comcast should have to pay for any incremental subscribers to which it carries Tennis Channel, at the per-subscriber rate set forth in the affiliation agreement (including any volume discounts as set forth in the agreement or any amendments). Comcast suggests that it should get the incremental subscribers for free, in part by saying that the pricing in the affiliation agreement assumes Sports-Tier-only carriage.³⁴⁸ But the affiliation agreement does not specify sports-tier-only carriage; it creates flexibility as to tiering [REDACTED] — so broad carriage (if Comcast elects to provide it to Tennis Channel, alongside Golf Channel and Versus) is built into the contract pricing.

146. *Term.* The requirement of equal treatment is effective immediately.³⁵⁰ The obligation shall continue throughout the term of the affiliation agreement, plus any renewal periods, if applicable. At the expiration of the affiliation agreement (or, if applicable, at the end of any renewal periods for which the contract provides), Comcast should be required to negotiate in good faith with Tennis Channel for continued carriage of the network on nondiscriminatory terms and conditions, and to continue carrying Tennis Channel on terms at least as advantageous to Tennis Channel as those then in effect until a new agreement is reached. Comcast shall also be obliged to engage in good faith negotiation with Tennis Channel for any amendments that may arise.

147. *Forfeiture.* Pursuant to the *HDO*, which directed the undersigned to consider forfeiture, and the Commission's regulations,³⁵¹ I determine that Comcast should be subject to a forfeiture of \$375,000 in this case. This forfeiture is calculated as follows: a base penalty of \$7,500 per day³⁵²; adjusted upward in light of aggravating factors (described below) to

³⁴⁶ See, e.g., Tennis Channel Ex. 15 (Testimony of Gary Herman) at 5 (¶¶ 11, 14).

³⁴⁷ Tennis Channel Ex. 14 (Testimony of Ken Solomon) at 5 (¶ 8 n.4).

³⁴⁸ Comcast Proposed Findings ¶ 208.

³⁴⁹ Tennis Channel Ex. 144, ¶ 5.1.3.

³⁵⁰ See 47 C.F.R. § 76.1302(g)(1) (order of mandatory carriage “shall become effective upon release, unless any order of mandatory carriage would require the defendant [MVPD] to delete existing programming from its system to accommodate carriage of a video programming vendor's programming”). Comcast offered no evidence that equal treatment in this case would require it to delete any programming from its systems. Cf. Tennis Channel Ex. 140 (Gregory Rigdon Deposition Transcript) at 167:12-168:7.

³⁵¹ “The remedies provided in paragraph (g)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.” 47 C.F.R. § 76.1302(g)(2). See also 47 C.F.R. § 1.80(a)(2).

³⁵² Although base forfeiture amounts for violations of program carriage rules are not expressly provided in the regulations, see 47 C.F.R. § 1.80(b)(4) note § I, such violations are most closely

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the maximum daily forfeiture amount of \$37,500 per day, for each day of the continuing violation; times 742 days (from Comcast's June 9, 2009 denial of Tennis Channel's proposal until the June 21, 2011 filing date of the Proposed Recommended Decision)³⁵³; but subject to the statutory maximum cap of \$375,000 for continuing violations.³⁵⁴

148. A forfeiture penalty may be assessed against any person found to have willfully or repeatedly failed to comply with any provision of the Communications Act or any rule or regulation promulgated under the Act, pursuant to 47 C.F.R. § 1.80(a)(2).³⁵⁵ The forfeiture amount must take into account the "nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³⁵⁶

149. I find that the statutory maximum forfeiture should be imposed here because Tennis Channel has suffered substantial harm as a result of Comcast's conduct,³⁵⁷ Comcast intentionally discriminated against Tennis Channel for its own economic gain,³⁵⁸ Comcast did not voluntarily disclose its misconduct and indeed continues to discriminate against Tennis Channel today,³⁵⁹ Comcast has a history of discriminatory and anticompetitive behavior including favoring its own networks in making carriage and channel placement decisions,³⁶⁰ and

analogous to broadcast carriage rules, cable leased access rules, and cable program access rules, all of which provide a base penalty of \$7,500. *Id.*; see also e.g., *Nexstar Broad., Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd. 18160, ¶ 8 (MB 2005); *Fox Television Stations, Inc., Licensee of WTTG (TV) Washington, D.C.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd. 9847, ¶ 14 (EB 2005).

³⁵³ Cf. *Roger L. Hoppe, II*, Letter Re: Petition for Reconsideration & Informal Objection, 22 FCC Rcd. 19313, 19316 (MB 2007) (continuing violation is repeated for the purpose of forfeiture calculation if it lasts for more than one day).

³⁵⁴ 47 C.F.R. § 1.80(b)(1).

³⁵⁵ See also 47 U.S.C. § 503(b)(1)(B).

³⁵⁶ 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

³⁵⁷ See 47 C.F.R. § 1.80(b)(4) note § II ("substantial harm" as upward adjustment factor).

³⁵⁸ See 47 C.F.R. § 1.80(b)(4) note § II ("intentional violation" and "substantial economic gain" as upward adjustment factors).

³⁵⁹ See 47 C.F.R. § 1.80(b)(4) note § II ("good faith or voluntary disclosure" as downward adjustment factor).

³⁶⁰ See 47 C.F.R. § 1.80(b)(4) note § II ("repeated or continuous violation[s]" as upward adjustment factor).

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Comcast has ample resources.³⁶¹ I find no basis for adjusting the forfeiture amount downward.³⁶²

ULTIMATE CONCLUSIONS

150. Based on the foregoing findings of fact and conclusions of law, it is concluded that Comcast engaged in discrimination in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation.

151. Based on the foregoing findings of fact and conclusions of law, it is further concluded that Comcast unreasonably restrained Tennis Channel's ability to compete fairly.

152. Based on the foregoing findings of fact and conclusions of law, it is further concluded that Comcast should be required to carry Tennis Channel at least as broadly as it carries Golf Channel, Versus, the MLB Network, or the NHL Network (whichever is broadest) in each of its local systems, and that it should be required to pay the rates set forth in the affiliation agreement for that carriage.

153. Based on the foregoing findings of fact and conclusions of law, it is further concluded that Comcast should be required to pay a forfeiture of \$375,000.

154. In light of the ultimate conclusions reached in paragraphs 150 through 153 above, all issues set forth for hearing in the *HDO* are resolved in Tennis Channel's favor.

³⁶¹ See 47 C.F.R. § 1.80(b)(4) note § II ("ability to pay" as upward adjustment factor); 47 C.F.R. § 1.80(b)(2). Comcast reported \$36 billion in revenues for its cable division alone in 2010. Tennis Channel Ex. 308 at 39; Tr. at 2385:8-2386:16 (Gaiski).

³⁶² See 47 C.F.R. § 1.80(b)(4) note § II.

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RECOMMENDED DECISION

155. IT IS RECOMMENDED that the complaint filed by The Tennis Channel, Inc. in MB Docket No. 10-204 BE GRANTED.³⁶³

FEDERAL COMMUNICATIONS
COMMISSION³⁶⁴

Richard L. Sippel
Chief Administrative Law Judge

³⁶³ Section 5 of the Communications Act authorizes an aggrieved person to seek Commission review of “any” actions issued under delegated authority, including this Recommended Decision. *See* 47 U.S.C. § 155(c)(4). The parties may seek Commission review of this Recommended Decision by filing exceptions in accordance with Sections 1.276 and 1.277 of the Commission’s rules governing appeals for Initial Decisions. 47 C.F.R. §§ 1.276, 1.277.

³⁶⁴ Copies of this Recommended Decision are e-mailed to counsel for each party upon issuance.

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* * *

Respectfully submitted,



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June 21, 2011

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CERTIFICATE OF SERVICE

I, Leah E. Pogoriler, hereby certify that on this 21st day of June, 2011, I caused a true and correct copy of the foregoing Proposed Recommended Decision to be served by electronic mail upon:

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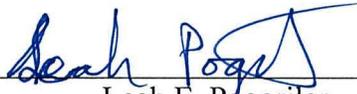
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