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Federal Communications Commission  
Office of the Secretary

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

In the Matter of	)	
	)	
The Tennis Channel, Inc.,	)	
Complainant	)	MB Docket No. 10-204
v.	)	File No. CSR-8258-P
Comcast Cable Communications, LLC,	)	
Defendant	)	

**PROPOSED REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW  
OF DEFENDANT COMCAST CABLE COMMUNICATIONS, LLC**

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**PROPOSED REPLY FINDINGS OF FACT**<sup>536</sup>

**I. The Early Years Before Tennis Channel Existed**

211. Tennis Channel does not, and cannot, dispute that its launch in 2003 came during [REDACTED]

[REDACTED]<sup>537</sup> In contrast, Golf Channel and Versus launched in the mid-1990s, when it was much easier for networks to gain broader distribution due to higher demand from distributors.<sup>538</sup>

**II. Tennis Channel Launches and Pursues a Sports Tier Strategy**

212. The evidence shows that, upon its launch, Tennis Channel successfully implemented a strategy of gaining carriage on the sports tiers of MVPDs, including Comcast.<sup>539</sup> Mr. Bond,<sup>540</sup> who negotiated the Affiliation Agreement on behalf of Comcast, offered un rebutted testimony that sports tier carriage was “what had driven [Comcast’s] interest in doing a deal with [Tennis Channel].”<sup>541</sup> Further, it is undisputed that the parties’ Affiliation Agreement, executed in March 2005, grants Comcast the right

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<sup>536</sup> The paragraph and footnote numbers in Comcast’s Proposed Reply Findings of Fact and Conclusions of Law continue from Comcast’s Proposed Findings of Fact and Conclusions of Law, filed on June 7, 2011.

<sup>537</sup> Comcast Findings ¶ 11.

<sup>538</sup> Comcast Findings ¶¶ 12-14; Tennis Channel Findings ¶¶ 39, 47.

<sup>539</sup> Comcast Findings ¶¶ 16-18.

<sup>540</sup> Mr. Bond was found to be a credible witness in a previous hearing before this Court. *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, 24 FCC Rcd 12967, 12988-89 at ¶ 44 (ALJ 2009), *adopted by* FCC 11-94, \_\_\_ FCC Rcd \_\_\_, Memorandum Opinion and Order (FCC June 13, 2011) (hereinafter “*WealthTV*”).

<sup>541</sup> Bond Direct, Apr. 29, 2011 Tr. 1987:16-1988:4.

to carry Tennis Channel on a sports tier.<sup>542</sup> Tennis Channel has conceded that Comcast has fully complied with the Affiliation Agreement.<sup>543</sup>

213. Tennis Channel submits that its “understanding and expectation” was that Comcast would “adjust the tier on which Tennis Channel was carried.”<sup>544</sup> But there is no competent evidence to support Tennis Channel’s proposed finding. At the hearing, Tennis Channel failed to call any witness who was involved in the negotiations with Comcast over the parties’ Affiliation Agreement. Tennis Channel cites to Mr. Solomon’s testimony, but Mr. Solomon, who arrived at Tennis Channel in April 2005, did not participate in those negotiations.<sup>545</sup> Tennis Channel also cites Mr. Bond’s testimony, even though Mr. Bond testified that the “context of that deal, when we did it, was a sports tier deal. That was the discussion around it.”<sup>546</sup> Mr. Bond’s testimony is supported by contemporaneous documentation, including an e-mail sent by Mr. David Meister, Tennis Channel’s then-CEO, who negotiated the Affiliation Agreement on behalf of Tennis Channel, [REDACTED]<sup>547</sup>

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<sup>542</sup> Tennis Channel Findings ¶ 53 [REDACTED]

<sup>543</sup> Tennis Channel Opening, Apr. 25, 2011 Tr. 121:16-19.

<sup>544</sup> Tennis Channel Findings ¶ 54.

<sup>545</sup> Compare Tennis Channel Findings ¶ 54 (citing Mr. Solomon’s testimony to support the reasons that Tennis Channel entered into a deal with Comcast); *with* Solomon Direct Apr. 25, 2011 Tr. 257:8-20 (cited portion of Mr. Solomon’s testimony which does not discuss negotiations with Comcast nor the understanding of Tennis Channel as to those negotiations). Mr. Solomon joined Tennis Channel in April 2005, after Tennis Channel had signed its deal with Comcast. (Comcast Findings ¶ 21; Comcast Exh. 84).

<sup>546</sup> Bond Cross, Apr. 29, 2011 Tr. 2158:18-2159:18.

<sup>547</sup> Comcast Exh. 52.

214. Tennis Channel's asserted expectation that Comcast would "adjust" its carriage as Tennis Channel added programming and an HD feed is not reflected in the Affiliation Agreement. That agreement expressly requires Tennis Channel to [REDACTED] [REDACTED] over time,<sup>548</sup> and it expressly contemplates the addition of a high definition ("HD") feed of Tennis Channel.<sup>549</sup> But the Affiliation Agreement does not require Comcast to "adjust" Tennis Channel's carriage as a result. Nonetheless, Tennis Channel's carriage by Comcast has increased dramatically since launch, and Tennis Channel is now carried to [REDACTED] million subscribers, including on approximately [REDACTED] systems that carry the network on a more broadly penetrated tier.<sup>550</sup>

215. Comcast does not dispute that Tennis Channel offered valuable launch support – including a [REDACTED] – in connection with Comcast's launch of the network on a sports tier.<sup>551</sup> But Tennis Channel did *not* offer meaningful launch support in connection with its 2009 proposal for broader carriage.<sup>552</sup>

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

216. The evidence shows that upon his arrival at Tennis Channel, Mr. Solomon decided to abandon Tennis Channel's previous sports tier strategy. Instead, Tennis Channel negotiated and eventually entered into equity-for-carriage agreements with

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<sup>548</sup> Comcast Exh. 84 (Affiliation Agreement) § 1.12 at TTCCOM\_00020399-20400.

<sup>549</sup> Comcast Exh. 84 (Affiliation Agreement) § 4.1 at TTCCOM\_00020400.

<sup>550</sup> Comcast Findings ¶ 134.

<sup>551</sup> Tennis Channel Findings ¶ 56.

<sup>552</sup> *See infra* ¶ 221 n.568.

satellite distributors, DIRECTV and Dish Network, which were previously unwilling to distribute Tennis Channel at all.<sup>553</sup>

217. Tennis Channel’s proposed finding that “about two-thirds of Tennis Channel’s distribution is on ‘general interest’ tiers”<sup>554</sup> omits significant context – namely, the fact that nearly all of that distribution – [REDACTED] of the network’s subscribers<sup>555</sup> – is provided by DIRECTV and Dish Network, which carry the network pursuant to equity-for-carriage agreements that granted them nearly [REDACTED] of the equity of the network.<sup>556</sup> DIRECTV alone provides Tennis Channel with [REDACTED] of its total subscribers, and its distribution of Tennis Channel is so out of line with the market that Tennis Channel refers to DIRECTV as its [REDACTED] }<sup>557</sup>

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

218. Tennis Channel does not dispute that it offered equity to Comcast in exchange for broader carriage in 2006 and 2007 (following its equity-for-carriage deals with Dish Network and DIRECTV, respectively), and that Comcast declined each of those offers, choosing to continue to carry an unaffiliated Tennis Channel on its sports tier instead of carrying an affiliated Tennis Channel more broadly.<sup>558</sup> After each decision, Comcast explained the analysis it performed and Tennis Channel did not complain that the analysis was wrong or discriminatory.<sup>559</sup> Mr. Solomon admitted that

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<sup>553</sup> Comcast Findings ¶¶ 21-23.

<sup>554</sup> Tennis Channel Findings ¶ 17.

<sup>555</sup> Comcast Exhs. 201, 1103.

<sup>556</sup> Comcast Findings ¶ 23.

<sup>557</sup> Comcast Findings ¶ 70 n.170.

<sup>558</sup> Tennis Channel Findings ¶¶ 262-64.

<sup>559</sup> Comcast Findings ¶ 26.

Comcast did not discriminate against Tennis Channel by declining the 2007 offer.<sup>560</sup>

Tennis Channel now concedes that no action prior to June 2009 constituted discrimination.<sup>561</sup>

219. Tennis Channel acknowledges that Comcast weighed the value of the equity offered against the increased costs that broader carriage would entail, but now submits that Comcast’s consideration of both MFN offers failed to account for whether “broader carriage of Tennis Channel would benefit Comcast as a distributor.”<sup>562</sup>

Contrary to Tennis Channel’s proposed finding, Mr. Bond consistently and credibly testified at his deposition and at trial that he considered potential benefits to Comcast on the distribution side and, “[b]ased on [his] experience and knowledge of the industry,” concluded that any such benefits “would have been de minimis.”<sup>563</sup> Tennis Channel presents no evidence that broader carriage pursuant to the 2006 or 2007 equity-for-carriage offer would have benefited Comcast as a distributor.

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<sup>560</sup> Comcast Findings ¶ 26.

<sup>561</sup> Tennis Channel Findings ¶ 293.

<sup>562</sup> Tennis Channel Findings ¶ 265. Contrary to Tennis Channel’s proposed finding (Tennis Channel Findings ¶ 270), there was no need for Comcast to perform a valuation of Tennis Channel in 2009 because Tennis Channel’s 2009 proposal did not include an offer of equity, and, in any event, Ms. Jennifer Gaiski, who has a master’s degree in business administration, performed a financial analysis of Tennis Channel’s proposal. (Comcast Findings ¶ 29; Gaiski Direct, May 2, 2011 Tr. 2343:4-11).

<sup>563</sup> Tennis Channel Exh. 139 (Bond Dep.) 83:22-84:15; Comcast Findings ¶¶ 24-26; Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-27. In the portion of his deposition that Tennis Channel cites, Mr. Bond testified that in its final decision Comcast did not weigh the “de minimis” benefits, and instead factored in the only actual benefit Tennis Channel was offering in exchange for increased carriage – equity – and declined the offers as it found the benefits wanting compared to the cost. (Tennis Channel Exh. 139 (Bond Dep.) 92:6-15).

V. The 2009 Proposal

220. The evidence shows that Comcast’s decision to decline Tennis Channel’s 2009 proposal was based on a cost-benefit analysis by Comcast that indicated that the proposal likely would have resulted in substantial losses to Comcast.<sup>564</sup> Tennis Channel does not dispute that accepting its 2009 proposal would have cost Comcast between [REDACTED] } million in additional license fees.<sup>565</sup>

221. Tennis Channel refers to its 2009 proposal as offering “deep discounts,”<sup>566</sup> but Tennis Channel concedes that if Comcast had accepted the offer, “Comcast would have paid Tennis Channel approximately [REDACTED] more for carrying it on D1 and [REDACTED] } million more for carrying it on Digital Starter”<sup>567</sup> in the first year of the new deal alone, and total license fee increases would have continued throughout the contract.<sup>568</sup>

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<sup>564</sup> Comcast Findings ¶¶ 27-28, 37-40.

<sup>565</sup> Comcast Findings ¶ 28; *see also* Tennis Channel Findings ¶ 75 (conceding that accepting the 2009 proposal would have increased Comcast’s license fees by between [REDACTED] } million in 2009 alone).

<sup>566</sup> Tennis Channel Findings ¶ 64.

<sup>567</sup> Subscribing to D1 costs Comcast subscribers an additional \$15-\$18 per month over the cost of Digital Starter. (Tennis Channel Exh. 137 (Gaiski Dep.) 128:2-3; Tennis Channel Exh. 60).

<sup>568</sup> Tennis Channel Findings ¶ 75; Solomon Cross, Apr. 25, 2011 Tr. 325:7-236:8. Under these circumstances, Tennis Channel’s 2009 proposal did not offer meaningful launch support to Comcast. Tennis Channel attempts to justify its failure to offer meaningful launch support by citing Mr. Bond’s testimony that launch support payments were “much more common in the 1990s.” (Tennis Channel Findings ¶ 56 (quoting Bond Direct, Apr. 29, 2011 Tr. 1963:3-5)). But Mr. Bond made clear in that testimony that he was using “launch support” narrowly to mean “an upfront payment that would be paid by a network in order to entice the distributor to enter into a distribution commitment for a network.” (Bond Direct, Apr. 29, 2011 Tr. 1962:1-20). There are many other types of launch support in the market, including marketing assistance, discounted licensing fees, equity, or free periods of carriage. (Joint Glossary of Terms, “Launch Support”).

222. Although Tennis Channel identifies, in the abstract, categories of potential benefits of broader carriage, Tennis Channel presents no evidence to substantiate, much less quantify, any such benefits to Comcast.<sup>569</sup> Therefore, the evidence presented by Comcast that no additional benefits would accrue to Comcast from broader carriage is uncontroverted.<sup>570</sup>

223. In response to the 2009 proposal, Mr. Bond's direct report, Ms. Jennifer Gaiski, conducted a call with Comcast's division executives to determine if there was any indication of subscriber interest in broader carriage of Tennis Channel at the local level.<sup>571</sup> As recorded contemporaneously, there was minimal subscriber interest in Tennis Channel and thus no reason to believe that broader carriage would help attract or retain subscribers, or encourage existing subscribers to upgrade to digital packages.<sup>572</sup> This evidence is uncontroverted.<sup>573</sup>

224. Tennis Channel's attempt to discredit Ms. Gaiski's notes because Comcast was anticipating potential litigation is unsupported.<sup>574</sup> Mr. Solomon's "aggressive" April 22 letter to Mr. Bond, which "seemed to be a threat of litigation" was a reason for Ms. Gaiski to be "a little fearful of some litigation."<sup>575</sup> Under these circumstances, there is no basis to conclude – as Tennis Channel has asked the Presiding Judge to do, from the

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<sup>569</sup> Tennis Channel Findings ¶¶ 65-66, 76; Comcast Exh. 517 (Solomon Dep.) 300:25-302:7.

<sup>570</sup> Comcast Findings ¶¶ 37-38.

<sup>571</sup> Comcast Findings ¶¶ 37-40.

<sup>572</sup> Comcast Findings ¶ 37.

<sup>573</sup> Tennis Channel Findings ¶¶ 70-73.

<sup>574</sup> Tennis Channel Findings ¶ 71.

<sup>575</sup> Gaiski Direct, May 2, 2011 Tr. 2356:1-8; Bond Direct, Apr. 29, 2011 Tr. 2109:6-9; Comcast Exh. 592.

“work product” legend on her notes or otherwise – that the responses that Ms. Gaiski heard from the field (and contemporaneously recorded) were anything other than accurate assessments of the demand for Tennis Channel, or that Ms. Gaiski “anticipated, going into her call,” that Comcast would decline the 2009 proposal.<sup>576</sup>

225. Contrary to Tennis Channel’s proposed finding,<sup>577</sup> the record is clear that Comcast considers its customer surveys in its carriage decisions. Ms. Gaiski testified that although she does not personally review Comcast customer surveys, Comcast’s field representatives, with whom she regularly consults, “have a good grip on their customer surveys.”<sup>578</sup> The evidence is uncontroverted that Comcast’s customer surveys showed that “there’s no consumer demand for” Tennis Channel.<sup>579</sup>

226. Tennis Channel presents no evidence to rebut the testimony of Mr. Bond and Ms. Gaiski that revenue from the sale of advertising availabilities is “de minimis,”<sup>580</sup> and that Comcast already had a large unsold inventory of advertising availabilities and there was no benefit to increasing that excess inventory.<sup>581</sup> Under these circumstances, Tennis Channel’s proposed finding<sup>582</sup> that Comcast failed to quantify the potential benefit of increased advertising availabilities disregards the unrebutted record evidence that Comcast determined that there was no benefit to quantify.<sup>583</sup>

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<sup>576</sup> Tennis Channel Findings ¶ 71.

<sup>577</sup> Tennis Channel Findings ¶ 72.

<sup>578</sup> Gaiski Cross, May 2, 2011 Tr. 2421:17-19.

<sup>579</sup> Rigdon Cross, Apr. 28, 2011 Tr. 1881:15-1882:8.

<sup>580</sup> Tennis Channel Findings ¶ 76; Comcast Findings ¶ 39.

<sup>581</sup> Comcast Findings ¶ 39.

<sup>582</sup> Tennis Channel Findings ¶ 76.

<sup>583</sup> Comcast Findings ¶ 39.

227. Tennis Channel’s proposed finding that Comcast declined its 2009 offer without making a counterproposal conflicts with Mr. Solomon’s concession, on cross-examination, that Mr. Bond had made a counterproposal that he rejected.<sup>584</sup>

228. Although Mr. Solomon initially testified that Comcast ended negotiations between the parties, he eventually conceded that Mr. Bond’s offer “to get personally involved and try to help find more distribution” for Tennis Channel on a regional basis<sup>585</sup> constituted a counterproposal that he rejected.<sup>586</sup> In response to Mr. Bond’s counterproposal, Mr. Solomon stated that he was not interested in “half measures” and that further discussions would be a “waste of time.”<sup>587</sup> But it is undisputed that other networks, including networks on Comcast’s sports tier, have been able to grow their distribution on Comcast on a regional basis as Mr. Bond proposed for Tennis Channel.<sup>588</sup> Mr. Rigdon testified that Comcast remains willing to give Tennis Channel broader

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<sup>584</sup> Tennis Channel Findings ¶ 67. Tennis Channel’s citation to Mr. Bond’s testimony does not support its assertion that “Comcast did not offer a counterproposal.” (Tennis Channel Findings ¶ 67). In the cited excerpt, Mr. Bond testified that Comcast did not make a “*financial* counterproposal.” (Bond Cross, Apr. 29, 2011 Tr. 2215:9-11) (emphasis added). Tennis Channel also cites Ms. Gaiski’s testimony that Comcast sought to continue discussions with Tennis Channel to support the proposition that there was not a counteroffer. (Tennis Channel Findings ¶ 67 (citing Gaiski Cross, May 2, 2011 Tr. 2413:1-16)).

<sup>585</sup> Bond Cross, Apr. 29, 2011 Tr. 2215:18-2216:4.

<sup>586</sup> Comcast Findings ¶ 32; Solomon Cross Apr. 25, 2011 Tr. 348:13-351:15; 350:9-351:18.

<sup>587</sup> Comcast Findings ¶ 32.

<sup>588</sup> Comcast Findings ¶ 42.

carriage on a regional basis to the extent that such carriage would make financial sense for Comcast.<sup>589</sup>

229. Even after Comcast's divisional representatives informed her that there was not sufficient subscriber interest to justify broad national carriage, Ms. Gaiski asked Comcast's divisional representatives to find out if any systems were interested in the pricing offered in Tennis Channel's proposal and report such interest to her.<sup>590</sup> Contrary to Tennis Channel's proposed finding,<sup>591</sup> this request is consistent with Mr. Bond's counteroffer to identify particular systems interested in broader distribution.

230. Tennis Channel next communicated with Comcast in a December 10, 2009 letter that failed to acknowledge any increased cost to Comcast of carrying Tennis Channel more broadly, much less to acknowledge Comcast's legitimate concern about that cost. Instead, the letter falsely accused Comcast of declining the 2009 proposal based on an [REDACTED]

[REDACTED]<sup>592</sup> Tennis Channel's characterization of that letter as "inviting an amicable resolution of the dispute"<sup>593</sup> is not credible. Instead, the letter is consistent with Tennis Channel's take-it-or-leave-it offer for broad carriage.<sup>594</sup>

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<sup>589</sup> Rigdon Cross, Apr. 28, 2011 Tr. 1877:7-1879:5, 1881:15-16. This testimony rebuts Tennis Channel's proposed finding that Mr. Rigdon would not permit a system to carry Tennis Channel more broadly. (Tennis Channel Findings ¶ 61).

<sup>590</sup> Comcast Exh. 130.

<sup>591</sup> Tennis Channel Findings ¶ 73.

<sup>592</sup> Tennis Channel Exh. 88 at 2.

<sup>593</sup> Tennis Channel Findings ¶ 78.

<sup>594</sup> Comcast Findings ¶ 31.

**VI. Golf Channel and Versus Were Not Factors in the 2009 Proposal Discussions**

231. In its previous filings in this case, Tennis Channel alleged that Comcast’s decision to decline the 2009 proposal was discriminatory because, in making its decision, Comcast took Golf Channel and Versus into account.<sup>595</sup> Tennis Channel now takes the opposite tack, asking the Presiding Judge to find that Comcast discriminated by *not* considering Golf Channel and Versus in declining its 2009 proposal.<sup>596</sup> This about-face by Tennis Channel renders not credible the discrimination claim in Tennis Channel’s Complaint.

232. The evidence shows, based on the consistent and credible testimony of Comcast’s executives – supported by contemporaneous documentation – that Golf Channel and Versus were not considerations in the Comcast’s 2009 decision.<sup>597</sup>

233. Mr. Solomon’s testimony that Tennis Channel never discussed or referred to Golf Channel and Versus during the May 2009 negotiations<sup>598</sup> undermines Tennis Channel’s proposed finding that Tennis Channel believed its offer “would be ‘persuasive’ to Comcast” [REDACTED] than Golf Channel and Versus.<sup>599</sup>

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<sup>595</sup> See, e.g., Tennis Channel Exh, 18 (Complaint) ¶¶ 6, 35, 73, 74, 76, 89, 96; Tennis Channel Exh. 20 (Reply) ¶ 39; see also Tennis Channel Trial Brief at 19-20.

<sup>596</sup> Tennis Channel Findings ¶¶ 77, 142, 273.

<sup>597</sup> Comcast Findings ¶¶ 43-46. Contrary to Tennis Channel’s position, the law is that the fact that Comcast did not take Golf Channel or Versus into account in its decision regarding the 2009 proposal is evidence that Comcast did not discriminate. (*See infra* ¶¶ 304-06).

<sup>598</sup> Comcast Findings ¶ 43 (citing Solomon Recross Apr. 25, 2011 Tr. 533:14-20 (“Q: And I guess my last question, just to confirm something again, in your meeting where you made your proposal to Mr. Bond in May of 2009, there was no discussion or reference to Versus or Golf in that discussion, correct? A: Not that I recall.”)).

<sup>599</sup> Tennis Channel Findings ¶ 65 (citing Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 26).

**VII. Tennis Channel’s Purported Improvements Before the 2009 Proposal Were Not New or Compelling**

234. Tennis Channel’s proposed finding that “[a]fter Comcast declined Tennis Channel’s MFN equity offers” and “before approaching Comcast again in 2009” it upgraded by “securing French Open, Australian Open, Wimbledon, and U.S. Open rights”<sup>600</sup> is contrary to the credible evidence. As set forth in Comcast’s Findings, Tennis Channel already had acquired its rights to the Australian Open, French Open, and Wimbledon by 2007 and had [REDACTED] [REDACTED] }<sup>601</sup> Similarly, Tennis Channel already had represented to Comcast in its 2007 MFN offer that it would create an HD channel and the 2005 Affiliation Agreement already required Tennis Channel to provide HD programming to Comcast when it became available.<sup>602</sup> Tennis Channel concedes that those rights and upgrades were not sufficient to make its 2007 offer to Comcast compelling,<sup>603</sup> and acknowledges its recognition that it needed to improve after Comcast declined the 2007 offer.<sup>604</sup>

235. The undisputed evidence also shows that Comcast’s decision to decline the 2009 proposal was consistent with the decisions of other MVPDs – including Time

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<sup>600</sup> Tennis Channel Findings ¶ 266-67.

<sup>601</sup> Comcast Findings ¶ 33.

<sup>602</sup> Comcast Findings ¶ 33.

<sup>603</sup> Comcast Findings ¶ 26 (citing Mr. Solomon’s testimony that Comcast’s 2007 denial was not discriminatory).

<sup>604</sup> Tennis Channel Findings ¶ 266. Tennis Channel’s U.S. Open rights, which it sublicenses from ESPN, are limited to early round matchups involving non-marquee players. (Comcast Findings ¶ 72; *see infra* ¶ 283).

Warner Cable, Charter, Cablevision, Verizon and Dish Network – that, citing cost, rejected offers to carry Tennis Channel more broadly in 2009 and 2010.<sup>605</sup>

**VIII. Tennis Channel’s Claim Regarding the San Francisco Bay Area System Is Unsupported and Irrelevant**

236. Tennis Channel’s proposed finding that “Comcast systems that want to carry Tennis Channel more broadly than the Sports Tier are precluded from doing so by Comcast’s corporate office”<sup>606</sup> conflicts with the record evidence. Tennis Channel asserts that it had an “agreement” with the San Francisco Bay Area system for broader carriage. But regardless of what the system told Tennis Channel, the undisputed evidence shows that Comcast’s San Francisco field office repeatedly told Ms. Gaiski that it had little interest in carrying Tennis Channel on a sports tier, let alone on the more broadly distributed D2 tier.<sup>607</sup> Further, the undisputed evidence shows that the Channel Change Requests (“CCRs”) that the Bay Area told Tennis Channel had been sent to Comcast headquarters for approval were requests to launch the Tennis Channel *on a sports tier*, and those requests were approved.<sup>608</sup>

237. Tennis Channel’s proposed finding that “Ms. Gaiski told Tennis Channel representatives” that Comcast senior executives made the decision not to launch Tennis Channel in San Francisco is contrary to the credible evidence.<sup>609</sup> The language quoted by Tennis Channel was written by Tennis Channel executive Eric Turpin, whose hearsay

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<sup>605</sup> Comcast Findings ¶¶ 47-53.

<sup>606</sup> Tennis Channel Findings ¶ 58.

<sup>607</sup> Gaiski Redirect, May 2, 2011 Tr. 2461:6-2462:9; Tennis Channel Exh. 137 (Gaiski Dep.) 65:18-66:2, 98:5-101:23.

<sup>608</sup> Comcast Ex. 1302 (lines 4438-4441); *see also* Gaiski Redirect, May 2, 2011 Tr. 2467:18-2473:10.

<sup>609</sup> Tennis Channel Findings ¶ 59.

conflicts with Ms. Gaiski’s sworn trial testimony.<sup>610</sup> Because Tennis Channel chose not to call Mr. Turpin as a witness at trial, where Comcast would have had the opportunity to cross-examine him, his unsworn hearsay cannot be credited over Ms. Gaiski’s live testimony on cross-examination. Moreover, Ms. Gaiski’s testimony that the decision not to carry Tennis Channel on D2 in San Francisco was made by the San Francisco system itself is corroborated by contemporaneous documentation showing that Comcast headquarters approved the only request that the San Francisco system submitted – to launch Tennis Channel on its sports tier.<sup>611</sup>

238. Regardless, Tennis Channel’s assertions regarding its carriage in the San Francisco Bay Area in 2006 have no bearing on its claim that Comcast discriminated against it by declining its 2009 proposal.<sup>612</sup> As the Commission recently ruled, the “argument that some number of [local] systems had some interest in carrying [a network] . . . would not demonstrate that [the distributor] acted improperly in making a system-wide [carriage] decision.”<sup>613</sup> That is particularly true here, where the alleged local system interest in broader carriage pre-dated Tennis Channel’s 2009 proposal by nearly three years.

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<sup>610</sup> Gaiski Cross, May 2, 2011 Tr. 2405:15-22; Tennis Channel Exh. 48; *see also* Gaiski Redirect, May 2, 2011 Tr. 2461:6-2462:9; Tennis Channel Exh. 137 (Gaiski Dep.) 65:18-66:2, 98:5-101:23.

<sup>611</sup> Tennis Channel Exh. 137 (Gaiski Dep.) 101:17-23; Gaiski Redirect, May 2, 2011 Tr. 2472:2-2473:10; Comcast Exh. 1302.

<sup>612</sup> Tennis Channel Findings ¶ 263.

<sup>613</sup> *WealthTV*, \_\_\_ FCC Rcd \_\_\_ ¶ 32 n.82 (FCC).

**IX. Comcast Does Not Discriminate in Favor of Its Affiliated Networks**

**A. Comcast's Carriage of Its Affiliated Networks Is Based on Legitimate and Non-Discriminatory Business Reasons**

239. The undisputed testimony of Comcast's fact witnesses, corroborated by contemporaneous documents, shows that Comcast has legitimate and non-discriminatory reasons for carrying its affiliated networks on broadly distributed tiers.<sup>614</sup>

240. Tennis Channel's proposed finding that Comcast launched Golf Channel and Versus on highly penetrated tiers in 1995 at levels of carriage higher than other distributors<sup>615</sup> lacks any support in the testimony cited by Tennis Channel.<sup>616</sup> Further, it is contradicted by Tennis Channel's own trial exhibits, one of which shows that Cox, Cablevision, and Continental all launched Versus broadly,<sup>617</sup> while another states that "six of the country's leading cable operators," including Comcast, began carrying Golf Channel broadly.<sup>618</sup>

241. Tennis Channel does not dispute that both Golf Channel and Versus built their broad distribution by paying hundreds of millions of dollars in launch incentives to distributors, including Comcast.<sup>619</sup> It is also undisputed that Comcast (and other

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<sup>614</sup> Comcast Findings ¶¶ 54-65.

<sup>615</sup> Tennis Channel Findings ¶ 259.

<sup>616</sup> Tennis Channel Findings ¶¶ 39, 47, 259. The testimony cited in support of this proposed finding is inapposite, as Mr. Orszag testified that he had not examined the market's carriage of Golf Channel and Versus in the late 1990s. (Orszag Cross, Apr. 27, 2011 Tr. 1350:5-13).

<sup>617</sup> Tennis Channel Exh. 21 at 7.

<sup>618</sup> Tennis Channel Exh. 61.

<sup>619</sup> Comcast Findings ¶¶ 14, 55, 74.

distributors) carried Golf Channel and Versus broadly long before Tennis Channel launched in 2003.<sup>620</sup>

242. Also uncontroverted is the testimony that it is rare for an established network to be negatively repositioned. Mr. Bond and Ms. Gaiski consistently and persuasively testified that negatively repositioning broadly distributed established networks would generate subscriber churn.<sup>621</sup> This is confirmed by testimony cited by Tennis Channel.<sup>622</sup> Mr. Bond testified that he could recall only one network that Comcast negatively repositioned as part of a renewal negotiation – [REDACTED]

[REDACTED]<sup>623</sup>

243. Contrary to Tennis Channel’s unsupported assertions,<sup>624</sup> Comcast has offered uncontroverted evidence that its affiliated networks generate significant subscriber demand.<sup>625</sup> Mr. Rigdon testified that, in his experience at Charter, Golf Channel and Versus viewers “overwhelmed” Charter with hundreds of thousands of calls and hundreds of e-mails directly to senior executives demanding that it continue to air the networks on highly penetrated tiers.<sup>626</sup> Ms. Gaiski, too, testified that Golf Channel and

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<sup>620</sup> Tennis Channel Findings ¶¶ 39, 47, 133.

<sup>621</sup> Comcast Findings ¶ 57.

<sup>622</sup> Tennis Channel Findings ¶ 242.

<sup>623</sup> Tennis Channel Exh. 139 (Bond Dep.) 220:5-223:5. [REDACTED]

[REDACTED] (*Id.* at 222:13-223:5; Comcast Exh. 77 (Egan Written Direct) ¶¶ 44-45).

<sup>624</sup> Tennis Channel Findings ¶¶ 152, 230-31, 239-40.

<sup>625</sup> Comcast Findings ¶ 59.

<sup>626</sup> Comcast Findings ¶ 59.

Versus have demonstrated a proven ability to attract and retain subscribers,<sup>627</sup> and that NHL Network and MLB Network (and their out-of-market packages) brought a great deal of value to Comcast's cable systems, and that local field representatives informed her that they did not want to lose the ability to offer those packages to subscribers.<sup>628</sup>

244. Contrary to Tennis Channel's assertions that Comcast's carriage decisions for Golf Channel and Versus are motivated by considerations of affiliation,<sup>629</sup> the uncontroverted evidence shows that Comcast conducts its renewal negotiations with Golf Channel and Versus in the same manner as it conducts its renewal negotiations with unaffiliated networks that launched and gained broad carriage during the same period.<sup>630</sup> Comcast's renewal negotiations with broadly distributed networks, "whether it's Golf [Channel] or Versus or Discovery or ESPN," typically do not involve a change in distribution, and tend to focus on changes to the network's per-subscriber fee.<sup>631</sup> Because established networks, whether affiliated or unaffiliated, do not offer Comcast the right to reposition them on less widely distributed tiers, there is no need for Comcast to study the costs and benefits of negatively repositioning these networks.<sup>632</sup>

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<sup>627</sup> Comcast Exh. 78 (Gaiski Written Direct) ¶ 26.

<sup>628</sup> Tennis Channel Exh. 137 (Gaiski Dep.) 272:13-273:5 ("People certainly did not want to lose the outer market packages. So it was – that brought a great deal of value to our cable systems.").

<sup>629</sup> Tennis Channel Findings ¶¶ 40, 47, 69, 77, 139, 219-20, 228-32.

<sup>630</sup> Comcast Findings ¶ 58.

<sup>631</sup> Bond Cross, Apr. 29, 2011 Tr. 2235:3-2237:3.

<sup>632</sup> Tennis Channel Exh. 139 (Bond Dep.) 219:7-220:24; Bond Cross, Apr. 29, 2011 Tr. 2235:3-2237:3; *see also* Comcast Findings ¶ 57 & n.134.

245. The evidence shows that Comcast conducts its renewal negotiations with Golf Channel and Versus at arm's length.<sup>633</sup> Mr. Bond testified that Comcast bargains for "marketplace deals" with its affiliated networks, and, through insisting on advantageous MFN rights, Comcast knows that it does not overpay for Comcast's affiliated networks.<sup>634</sup>

246. Tennis Channel relies on questionable math for the proposition that Comcast's carriage of Golf Channel and Versus is inconsistent with the market.<sup>635</sup> The undisputed evidence shows that every major MVPD except Dish Network carries both Golf Channel and Versus to more than [REDACTED] of their subscribers.<sup>636</sup> Verizon carries Versus to a [REDACTED] of its subscribers than Comcast does.<sup>637</sup> Tennis Channel's proposed finding, based on a single channel lineup, that Cox carries Versus, Golf Channel and Tennis Channel on the same tier is inconsistent with the undisputed evidence that Cox carries Golf Channel and Versus to [REDACTED] [REDACTED] as Tennis Channel across its footprint.<sup>638</sup> Similarly, Tennis Channel's proposed finding concerning DIRECTV's late 2009 decision to briefly drop Versus from its channel lineup,<sup>639</sup> ignores the fact that DIRECTV agreed in early 2010 to carry Versus

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<sup>633</sup> Comcast Findings ¶ 58.

<sup>634</sup> Bond Cross, Apr. 29, 2011 Tr. 2249:18-2250:2.

<sup>635</sup> Tennis Channel Findings ¶ 128; Orszag Cross, Apr. 27, 2011 Tr. 1299:15-17 ("I think it makes more sense to put it in percentage points instead of doing percent of percent.").

<sup>636</sup> Comcast Exh. 1102. Dish Network carries Golf Channel to { [REDACTED] } of its subscribers. (*Id.*)

<sup>637</sup> Comcast Exh. 1102 (listing Versus's penetration on Verizon at [REDACTED])

<sup>638</sup> Comcast Exhs. 1102, 1103.

<sup>639</sup> Tennis Channel Findings ¶ 152.

to [REDACTED] } of its subscribers, [REDACTED] than it gives to Tennis Channel, its affiliated network.<sup>640</sup>

247. Contrary to Tennis Channel’s proposed findings,<sup>641</sup> Comcast’s carriage of NHL Network and MLB Network is also based on legitimate business reasons. Comcast melted NHL Network to D1 and launched MLB Network pursuant to offers that had previously been made to and accepted by DIRECTV.<sup>642</sup> Tennis Channel does not and cannot dispute that, as a result of NHL Network’s price reduction, D1 carriage cost Comcast roughly the same as sports tier carriage.<sup>643</sup> The proposed finding that “Comcast initially intended to place MLB Network on the Sports Tier”<sup>644</sup> is contrary to the credible evidence. Mr. Bond testified that, as a condition of continuing to carry MLB’s out-of-market package Extra Innings, MLB told Comcast that it “had to launch” MLB Network on D1 and did not offer Comcast the choice of carrying the network at another level of distribution.<sup>645</sup> The testimony of Dr. Singer that Tennis Channel relies on is not competent. Dr. Singer admits that he has no knowledge of the relevant facts, and instead

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<sup>640</sup> Comcast Exhs. 1102, 1103.

<sup>641</sup> Tennis Channel Findings ¶¶ 134-35.

<sup>642</sup> Comcast Findings ¶¶ 63-65; Tennis Channel Exh. 165 (Affiliation Agreement between Comcast and MLB Network, dated April 4, 2007); Tennis Channel Exh. 177 (Amendment to Affiliation Agreement between Comcast and NHL Network, dated April 30, 2009).

<sup>643</sup> Comcast Findings ¶¶ 63-64.

<sup>644</sup> Tennis Channel Findings ¶ 134.

<sup>645</sup> Bond Direct, Apr. 29, 2011 Tr. 2141:6-2142:22.

relies on a *Washington Times* article that nowhere states that Comcast intended to distribute MLB Network on a sports tier.<sup>646</sup>

**B. Other Assertions by Tennis Channel That Comcast Favors Its Affiliated Networks Are Unsupported and Irrelevant to Tennis Channel’s Discrimination Claim**

248. Tennis Channel proposes findings relating to Comcast’s efforts to ensure that Versus was carried broadly enough to continue carrying National Hockey League games.<sup>647</sup> Those proposed findings disregard Ms. Gaiski’s unrebutted testimony that “Versus had to go to the entire [MVPD] industry,” not just Comcast, to make sure that its distribution on all MVPDs satisfied its contract with the NHL.<sup>648</sup> Since the rest of the MVPD industry did the same thing, there was nothing “unusual” about Comcast ensuring that Versus would have sufficient distribution.<sup>649</sup> Regardless, those efforts have no bearing on Tennis Channel’s claim that Comcast discriminated against it by declining the 2009 proposal.

249. Tennis Channel also proposes findings relating to Mr. Bond’s involvement in negotiations with DIRECTV over issues including carriage of Versus.<sup>650</sup> Those proposed findings disregard Mr. Bond’s unrebutted testimony that because there was a “personality clash” between Jeff Shell, the head of Comcast’s programming group, and Derek Chang, DIRECTV’s negotiator, and because Mr. Bond had a good relationship

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<sup>646</sup> Singer Cross, Apr. 26, 2011 Tr. 953:7-955:6 (“Q: [I]s it your expert opinion we should believe everything we read in the *Washington Times*? A: No.”); Tennis Channel Exh. 16 (Singer Written Direct) ¶ 20 n.18.

<sup>647</sup> Tennis Channel Findings ¶¶ 148-50.

<sup>648</sup> Gaiski Cross, May 2, 2011 Tr. 2395:12-19.

<sup>649</sup> Tennis Channel Findings ¶ 149.

<sup>650</sup> Tennis Channel Findings ¶¶ 151-53.

with Mr. Chang, Mr. Bond acted as an “intermediary” in those negotiations.<sup>651</sup> That Mr. Bond played that role – which had nothing to do with Comcast’s carriage of Tennis Channel or its carriage of Versus – has no bearing on Tennis Channel’s claim that Comcast discriminated against it by declining the 2009 proposal.

250. Tennis Channel’s proposed finding based on the testimony, in the NFL program carriage proceeding, of Stephen Burke, the former president of Comcast Cable, is not relevant to this case.<sup>652</sup> As the Commission recently ruled as to WealthTV’s attempt to use that same testimony, “there is no evidence that Mr. Burke’s testimony in a separate proceeding had any bearing” on the “specific complaint” at issue here.<sup>653</sup>

251. Tennis Channel’s proposed findings concerning the so-called “three way” deal to acquire U.S. Open rights for Versus and Tennis Channel, and concerning channel placement are rejected for the reasons set forth below.<sup>654</sup>

**C. The NBCU Order Is Not Evidence of Discrimination**

252. There is no dispute that the Commission made clear in its order approving the Comcast/NBCU transaction that it did “not reach any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past,”<sup>655</sup> indicating that the Commission did not intend its order to affect this pending program carriage proceeding. The Commission also indicated that it did not accept the findings

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<sup>651</sup> Bond Cross, Apr. 29, 2011 Tr. 2233:18-2234:1; Tennis Channel Exh. 139 (Bond Dep.) 263:3-8.

<sup>652</sup> Tennis Channel Findings ¶ 123.

<sup>653</sup> *WealthTV*, \_\_\_ FCC Rcd \_\_\_ ¶ 35 (FCC).

<sup>654</sup> *Infra* ¶¶ 282, 296.

<sup>655</sup> Tennis Channel Findings ¶ 163; Tennis Channel Exh. 13 (NBCU Order) at ¶ 116 n.276.

set forth in the Technical Appendix to that order.<sup>656</sup> None of the findings in that order are binding in this proceeding.<sup>657</sup>

**X. Credibility and Weight of Expert Testimony**

253. The weight of the credible expert testimony confirms that Comcast's decision not to accept the 2009 proposal did not constitute discrimination on the basis of affiliation.

**A. The Carriage Decisions of Other MVPDs Provide Independent Evidence That Comcast Did Not Discriminate on the Basis of Affiliation**

254. The evidence regarding carriage of Tennis Channel by other MVPDs, which is not disputed, demonstrates that Comcast's carriage of Tennis Channel is in line with the market.<sup>658</sup>

255. Tennis Channel's proposed findings mischaracterize Mr. Orszag's "revealed preferences" analysis. Mr. Orszag credibly testified that "the most direct and compelling evidence with regard to the reasonableness of an MVPD's carriage of a network are the carriage decisions by other MVPDs."<sup>659</sup> Contrary to Tennis Channel's assertion,<sup>660</sup> Mr. Orszag's analysis considered all MVPDs, including Tennis Channel parent companies DIRECTV and Dish Network and cable companies that have elected not to carry Tennis Channel at all, which Dr. Singer omitted from his analysis.<sup>661</sup>

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<sup>656</sup> Colloquy, Apr. 25, 2011 Tr. 148:18-149:3.

<sup>657</sup> Colloquy, Apr. 25, 2011 Tr. 148:18-149:3.

<sup>658</sup> Comcast Findings ¶¶ 67-72.

<sup>659</sup> Comcast Exh. 80 (Orszag Written Direct) ¶ 17; Orszag Cross, Apr. 27, 2011 Tr. 1291:7-18.

<sup>660</sup> Tennis Channel Findings ¶ 249.

<sup>661</sup> Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23; Comcast Findings ¶ 69 n.168.

Consistent with Mr. Orszag’s “revealed preferences” analysis – and contrary to Tennis Channel’s criticism of it<sup>662</sup> – the Commission held in *MASN* that the carriage decisions of other MVPDs “provide independent evidence that [Time Warner Cable] did not engage in discrimination on the basis of affiliation.”<sup>663</sup>

256. Here, that evidence demonstrates that Comcast’s carriage of Tennis Channel is in line with the market. When the largest distributors are ranked by Tennis Channel’s penetration among their subscribers, Comcast falls in the middle.<sup>664</sup> Tennis Channel’s proposed findings ignore MVPDs like Charter, Cablevision, and Time Warner Cable, which distribute Tennis Channel to [REDACTED] than does Comcast, and do not address the fact that AT&T [REDACTED] as of 2009.<sup>665</sup>

257. Mr. Orszag credibly testified that other cable companies provide the most relevant benchmarks for Comcast’s carriage decisions because they face the same competitive and bandwidth pressures, use similar technologies, and because no cable company distributes Tennis Channel pursuant to an equity-for-carriage deal.<sup>666</sup> Tennis Channel does not dispute that all large cable companies carry Tennis Channel on their

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<sup>662</sup> Tennis Channel Findings ¶¶ 244-48. Contrary to Tennis Channel’s assertion, Mr. Orszag’s “revealed preferences” analysis in no way implies that Comcast “necessarily follow[s] the decisions of other distributors.” (Tennis Channel Findings ¶ 247). Thus, there is no conflict between Mr. Orszag’s analysis and the testimony of Comcast’s fact witnesses.

<sup>663</sup> *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, 18111-12 ¶ 18 (2010), *appeal docketed*, No. 11-1151 (4th Cir. Feb. 22, 2011) (hereinafter “*MASN*”).

<sup>664</sup> Comcast Exh. 1103.

<sup>665</sup> Tennis Channel Findings ¶¶ 16-19, 238; Comcast Findings ¶¶ 67-72.

<sup>666</sup> Comcast Exh. 80 (Orszag Written Direct) ¶¶ 20-23; Comcast Exh. 659; Solomon Cross, Apr. 25, 2011 Tr. 423:15-424:5.

sports tiers, and that Comcast carries Tennis Channel to { [REDACTED] } of its subscribers, while all other cable companies carry Tennis Channel to { [REDACTED] } of their subscribers.<sup>667</sup>

258. Mr. Orszag also opined that comparisons with DIRECTV and Dish Network are not instructive because both satellite companies carry Tennis Channel pursuant to equity-for-carriage deals.<sup>668</sup> Comcast's carriage of Tennis Channel is consistent with the carriage of *all* distributors that do not carry Tennis Channel pursuant to equity-for-carriage arrangements.<sup>669</sup>

259. Tennis Channel's sports tier distribution reflects the limited ability of its programming to retain or attract subscribers for distributors.<sup>670</sup> Tennis Channel's proposed finding that its tennis coverage is "unmatched by other networks"<sup>671</sup> is inconsistent with undisputed facts. Unlike ESPN2, which provides live coverage of all four Grand Slams, including live coverage of two Grand Slams finals and five Grand Slam semifinals,<sup>672</sup> Tennis Channel provides limited later-round Grand Slam coverage and no live coverage of Wimbledon.<sup>673</sup>

260. Tennis Channel also relies on a 2009 study by the United States Tennis Association ("USTA") – one of Tennis Channel's parent companies – regarding

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<sup>667</sup> Comcast Findings ¶¶ 53, 69 & n.168; Comcast Exh. 1103.

<sup>668</sup> Comcast Findings ¶ 70.

<sup>669</sup> Comcast Findings ¶ 206.

<sup>670</sup> Comcast Findings ¶ 72.

<sup>671</sup> Tennis Channel Findings ¶ 7.

<sup>672</sup> Comcast Exh. 77 (Egan Written Direct) ¶¶ 44-45; Comcast Exhs. 151, 160, 161, 162, 163, 170, 171.

<sup>673</sup> Comcast Findings ¶ 72.

participation in tennis.<sup>674</sup> That study was undertaken by an organization with a financial interest in this litigation, the USTA, after Tennis Channel already had hired a litigation consultant to pursue a claim against Comcast. Further, the study's result is inconsistent with a study by an independent source, on which Tennis Channel relies elsewhere, finding that tennis is significantly (60%) less popular than claimed by the USTA.<sup>675</sup> Regardless, any growth in the number of people *playing* tennis has not translated into any growth in the number of people *watching* tennis on television, as all four tennis Grand Slams have suffered steep ratings declines in recent years.<sup>676</sup>

**B. Fundamental Differences Between Tennis Channel and Both Golf Channel and Versus Account for Why All Major MVPDs Carry Golf Channel and Versus More Broadly**

261. As set forth in Comcast's Findings, there are fundamental differences between Tennis Channel and both Golf Channel and Versus that account for why all major MVPDs carry Golf Channel and Versus [REDACTED] than Tennis Channel. Tennis Channel's later launch, during a particularly challenging time to obtain broad distribution, differentiates Tennis Channel from the older, more established Golf Channel and Versus, both of which had achieved broad carriage well before Tennis Channel was created. As established by the credible testimony of Comcast's experts and corroborated by Tennis Channel's contemporaneous research and sales pitches, Golf Channel and

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<sup>674</sup> Tennis Channel Findings ¶ 8.

<sup>675</sup> Comcast Exh. 254 at 10 (2010 Sporting Goods Marketing Association Sports & Fitness Participation Report); *see also* Tennis Channel Findings ¶ 8 (citing Tennis Channel Exh. 63 (2009 Sporting Goods Marketing Association Sports & Fitness Participation Report)).

<sup>676</sup> Comcast Findings ¶ 90.

Versus offer substantially different (and more expensive) programming than Tennis Channel, which attracts different advertisers and different viewers.<sup>677</sup>

262. Tennis Channel's proposed findings that the three networks are similar because each is a sports network<sup>678</sup> conflict with Mr. Solomon's own testimony that Tennis Channel is different from – and does not compete with – the other sports networks on Comcast's sports tier,<sup>679</sup> many of which, like Tennis Channel, are “single-sport networks . . . revolving around a single participatory sport.”<sup>680</sup>

1. *Golf Channel and Versus were launched in a different era*

263. It is undisputed that when Golf Channel and Versus were launched in 1995, neither Tennis Channel nor sports tiers existed.<sup>681</sup> By the time that Tennis Channel launched in 2003, Golf Channel and Versus were broadly distributed by distributors.<sup>682</sup> Thus, Golf Channel and Versus, which Tennis Channel has described as established networks,<sup>683</sup> are fundamentally dissimilar to Tennis Channel, which Mr. Solomon refers to as an “emerging network” and an “emerging business.”<sup>684</sup>

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<sup>677</sup> Comcast Findings ¶¶ 73-102.

<sup>678</sup> Tennis Channel Findings ¶¶ 80-82, 118.

<sup>679</sup> Solomon Cross, Apr. 25, 2011 Tr. 333:8-17 (“[The networks on Comcast's sports tier] are not networks that are necessarily directly in our competitive set.”).

<sup>680</sup> Tennis Channel Findings ¶ 81; Comcast Exh. 203 at 291 (Fox Soccer Channel), 315 (GolTV), 450 (Outdoor Channel), 498 (SPEED), 546 (The Sportsman Channel); Comcast Exhs. 153, 154, 155.

<sup>681</sup> Comcast Findings ¶¶ 74-77.

<sup>682</sup> Comcast Findings ¶¶ 74-77.

<sup>683</sup> See, e.g., Comcast Exh. 289.

<sup>684</sup> Solomon Direct, Apr. 25, 2011 Tr. 285:20, 286:13-14, 295:5-6, 298:16-17.

264. Tennis Channel asserts that the examples of the Major League networks, which Comcast moved to its D1 tier in 2009, are inconsistent with the general rule,<sup>685</sup> established by the credible testimony of Mr. Bond and Mr. Michael Egan, that it was far easier for a cable network to gain broad distribution in the 1990s than in 2003.<sup>686</sup> Contrary to Tennis Channel's assertion, the Major League networks show the type of content (and price reductions) necessary to obtain broad distribution for the first time in 2009. Comcast offered undisputed testimony that its field representatives viewed the Major Leagues' content, including their out-of-market packages, as content that attracts and retains subscribers.<sup>687</sup> Tennis Channel has made no attempt to dispute this uncontroverted fact or to show that it is substantially similar to any of these networks.

2. *Tennis Channel is not similar to Golf Channel or Versus in terms of subscriber demand*

265. The uncontroverted evidence shows that there is no significant subscriber demand for Tennis Channel, whereas there is significant subscriber demand for Golf Channel and Versus.<sup>688</sup>

3. *Tennis Channel's programming content differs significantly from that of Golf Channel and Versus*

266. Mr. Egan, Comcast's programming expert, gave unrebutted testimony – based on his systematic viewing of each network's programming – that Tennis Channel projects a markedly different image than either Golf Channel or Versus projects.<sup>689</sup>

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<sup>685</sup> Tennis Channel Findings ¶ 235.

<sup>686</sup> Comcast Findings ¶¶ 74-77.

<sup>687</sup> Tennis Channel Exh. 137 (Gaiski Dep.) 272:13-273:5; Bond Direct, Apr. 29, 2011 Tr. 2146:4-19.

<sup>688</sup> Comcast Findings ¶¶ 39-40, 47-51, 59-60, 79.

<sup>689</sup> Comcast Findings ¶¶ 80-84.

Rather than challenge Mr. Egan's findings, Tennis Channel attempts to rely on Mr. Egan to support its case.<sup>690</sup> But Tennis Channel repeatedly mischaracterizes Mr. Egan's testimony, and his un rebutted testimony that Tennis Channel's programming is substantially dissimilar to Golf Channel's and Versus's undermines Tennis Channel's claims of similarity.

267. Tennis Channel relies on Mr. Egan's testimony that [REDACTED] of its airtime is dedicated to event coverage,<sup>691</sup> but disregards Mr. Egan testimony that [REDACTED] of Tennis Channel's event coverage consists of repeats, and a majority is more than two months old.<sup>692</sup> Tennis Channel also disregards Mr. Egan's testimony that in contrast to Tennis Channel, Golf Channel and Versus invest in compelling non-event programming to complement their live event broadcasts and to widen their audiences, rather than simply repeat events broadcasts over and over.<sup>693</sup>

268. In its proposed findings, Tennis Channel conflates Golf Channel's shared but exclusive coverage of tournaments, where Golf Channel and another network each air exclusive coverage of different portions of the tournament, with Tennis Channel's "non-exclusive" coverage of tournaments, where Tennis Channel airs the exact programming that another network also airs (often first). Tennis Channel proposes a finding that Golf Channel's PGA Tour coverage is "non-exclusive," because Golf Channel broadcasts certain rounds of PGA Tour events, while other networks might broadcast other rounds of

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<sup>690</sup> Tennis Channel Findings ¶¶ 85-86, 100, 104, 106, 108, 149, 184, 275-79.

<sup>691</sup> Tennis Channel Findings ¶¶ 85-86.

<sup>692</sup> Comcast Findings ¶ 83 & nn.209-10; Comcast Exh. 77 (Egan Written Direct) ¶ 47; Egan Direct, Apr. 28, 2011 Tr. 1563:12-17.

<sup>693</sup> Comcast Findings ¶¶ 80-84.

the same tournament.<sup>694</sup> But Mr. Egan’s unrebutted testimony shows that Golf Channel’s event coverage is almost entirely exclusive to Golf Channel whereas, in contrast, Tennis Channel’s Grand Slam coverage is largely aired first on another network, streamed live on the Internet, or both.<sup>695</sup> Mr. Egan’s testimony is corroborated by Tennis Channel’s internal documents, which [REDACTED]

[REDACTED]<sup>696</sup>

269. Tennis Channel expert Mr. Timothy Brooks acknowledged substantial dissimilarities between Tennis Channel and Versus. Mr. Brooks testified that he did not conduct a “top rated” events comparison between Tennis Channel and Versus because “it was not a logical comparison to make to Tennis Channel.”<sup>697</sup> Mr. Brooks explained that whereas Tennis Channel was a single-sport network, “Versus, on the other hand, is a multi-sport network in which the sports they cover are quite divergent in terms of popularity. . . . Moreover, those events [on Versus] can tend to attract different audiences too. So it didn’t seem to make sense to do a comparison, since it would be full of very disparate kinds of events.”<sup>698</sup>

4. *Tennis Channel’s audience is materially different from Golf Channel’s and Versus’s audiences*

270. The weight of the evidence, including Tennis Channel’s internal research, sales pitches and other contemporaneous documents, establishes that Tennis Channel

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<sup>694</sup> Tennis Channel Findings ¶ 36.

<sup>695</sup> Comcast Findings ¶ 81.

<sup>696</sup> Comcast Findings ¶ 81.

<sup>697</sup> Comcast Exh. 349 (Brooks Dep.) 215:5-14.

<sup>698</sup> Comcast Exh. 349 (Brooks Dep.) 215:5-24; *see also id.* at 51:25-52:5 (conceding that Versus is “more a collection of different kinds of brands” than Tennis Channel is).

viewers differ significantly from Golf Channel and Versus viewers in terms of age, gender, and income.

271. There is no dispute that nearly [REDACTED] of Versus viewers are men and approximately [REDACTED] of Golf Channel viewers are men, while only [REDACTED] of Tennis Channel viewers are men.<sup>699</sup> Instead of disputing the numbers, Tennis Channel disputes their significance. Tennis Channel submits, through the testimony of its head of advertising sales, Mr. Gary Herman, that it pitches advertisers on its “male skew.”<sup>700</sup> Mr. Herman’s testimony is not credible in light of numerous contemporaneous Tennis Channel documents to the contrary, which pitch advertisers and distributors on Tennis Channel’s [REDACTED].<sup>701</sup> While those documents

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<sup>699</sup> Comcast Findings ¶ 86; Tennis Channel Exh. 16 (Singer Written Direct) ¶ 28; Singer Cross, Apr. 27, 2011 Tr. 1144:18-1145:8.

<sup>700</sup> Tennis Channel Findings ¶ 106. Tennis Channel’s attempts to cite Mr. Goldstein for the proposition that all three networks are male-skewing are unconvincing. (Tennis Channel Findings ¶ 107). Mr. Goldstein testified that Tennis Channel, with an even gender balance, does not “skew male” at all. To “skew male,” a network must have “decidedly more men in its viewership than it has women,” and, unlike tennis, “most . . . sports . . . have about two-thirds of their audience as men and about a third of their audience as women.” (Tennis Channel Exh. 136 (Goldstein Dep.) 179:20-180:2, 181:3-9).

<sup>701</sup> Comcast Exh. 8 at 3 [REDACTED]); Comcast Ex. 10 at TTCCOM\_00062193 [REDACTED]; Comcast Ex. 11 at TTCCOM\_00027628 [REDACTED]; Comcast Ex. 21 at TTCCOM\_00035272 [REDACTED] (emphasis supplied); Comcast Ex. 23 at TTCCOM\_00065783 [REDACTED]; Comcast Ex. 180 at TTCCOM\_00020724, 20727; Comcast Ex. 184 at TTCCOM\_00061845 [REDACTED]; Comcast Ex. 214 at TTCCOM\_00063397 [REDACTED]; Comcast Ex. 215 at TTCCOM\_00063397 (same); Comcast Ex. 230 (same); Comcast Ex. 217 at TTCCOM\_00003380 [REDACTED]

include Tennis Channel’s pitch documents – which Tennis Channel now disavows as inaccurate and unreliable because they reflect Tennis Channel’s attempts to differentiate itself from competitors<sup>702</sup> – those contrary documents also include many internal Tennis Channel documents, including documents authored by Frank Garland, the then-head of Tennis Channel’s advertising sales, discussing the [REDACTED] gender breakdown of Tennis Channel’s audience.<sup>703</sup>

272. Likewise, Tennis Channel does not dispute that its viewers are significantly younger than Golf Channel viewers and older than Versus viewers, facts it

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[REDACTED] (emphasis supplied); Comcast Exh. 268 at 2 (“50 percent of our audience is female”); Comcast Exh. 351 [REDACTED]; Comcast Exh. 371 at TTCCOM\_00024313 [REDACTED] Comcast Exh. 292 at TTCCOM\_00062381 ([REDACTED] [REDACTED]; Comcast Exh. 615 at TTCCOM\_00086661 [REDACTED] Comcast Exh. 616 at TTCCOM\_00082560 [REDACTED] Comcast Exh. 655 at TTCCOM\_00093381 [REDACTED] [REDACTED]; Comcast Exh. 704 at TTCCOM\_00009147 [REDACTED] *see also* Comcast Exh. 517 (Solomon Dep.) 270:21-271:14; Herman Cross, Apr. 26, 2011 623:20-624:12.

<sup>702</sup> Tennis Channel Findings ¶ 106.

<sup>703</sup> Comcast Exh. 559; *see also* Comcast Exh. 24 at TTCCOM\_00002270 (noting that networks on the sports tier [REDACTED] [REDACTED]); Comcast Exh. 27 at TTCCOM\_00017643 [REDACTED] Comcast Exh. 51 at TTCCOM\_00090799 [REDACTED] [REDACTED]; Comcast Exh. 127 at TTCCOM\_00019131 [REDACTED] Comcast Exh. 181 at TTCCOM\_00022480 [REDACTED] at TTCCOM\_00022484 [REDACTED] Comcast Exh. 289 at TTCCOM\_00021908 [REDACTED] Comcast Exh. 290 at TTCCOM\_00033319 [REDACTED] Comcast Exh. 589 at TTCCOM\_00086182 (Tennis Channel has [REDACTED] [REDACTED]; Comcast Findings ¶ 89 & n. 231.

emphasizes in its sales pitches.<sup>704</sup> Instead, Tennis Channel submits that the three networks are similar because they target adults, and are not “networks geared toward children or young adults, or networks focused exclusively on elderly audiences.”<sup>705</sup> Defining similarity so loosely would make nearly all networks on television similar to one another in terms of the age group they target. Tennis Channel also submits that Golf Channel targets viewers *between* the ages of 25 and 54,<sup>706</sup> while its own expert relied on inconsistent data showing that Golf Channel’s *median* age is [REDACTED]<sup>707</sup>

273. Tennis Channel also concedes that recent data shows that its viewers are substantially [REDACTED] than Golf Channel and Versus viewers, but dismisses that data as an “outlier.”<sup>708</sup> The data that Tennis Channel disregards is from Experian Simmons, a source which Mr. Brooks conceded has “been in the business for a very long time” and is “widely accepted by the industry,”<sup>709</sup> and a source on which Tennis Channel repeatedly has relied upon in its pleadings, its experts’ written testimony, and its presentations to advertisers and MVPDs (including in its 2009 proposal to Comcast), until Experian Simmons’s data no longer supported Tennis Channel’s litigation position.<sup>710</sup> In addition, Experian Simmons data has been consistent for the last four quarters.<sup>711</sup> And although Tennis Channel now criticizes the Experian Simmons data

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<sup>704</sup> Comcast Findings ¶ 88.

<sup>705</sup> Tennis Channel Findings ¶ 108.

<sup>706</sup> Tennis Channel Findings ¶ 108.

<sup>707</sup> Comcast Findings ¶ 88.

<sup>708</sup> Tennis Channel Findings ¶ 100 n.1.

<sup>709</sup> Comcast Exh. 349 (Brooks Dep.) 331:10-15.

<sup>710</sup> Comcast Findings ¶ 87.

<sup>711</sup> Comcast Findings ¶ 87.

based on its sample size, its own expert admitted that when a research service, which, like Simmons, has “been vetted by the industry,” its sample size has no bearing on its reliability.<sup>712</sup> Regardless, there is no evidence regarding the sample sizes of the studies that Tennis Channel embraces, and therefore no reason to favor those studies over the Experian Simmons study based on sample size.<sup>713</sup>

274. Tennis Channel cites a Comcast advertising sales web site for the proposition that the sports of golf and tennis (as opposed to Golf Channel and Tennis Channel in particular) generally appeal to upper-income viewers.<sup>714</sup> But the information in this document is from 2003 and 2004.<sup>715</sup> More recent information specific to Tennis Channel and Golf Channel show that the audiences and, in particular their median incomes, are entirely different.<sup>716</sup>

275. “Viewer satisfaction” data from Beta Research Corp.<sup>717</sup> does not show that Versus and Tennis Channel have similar audiences. Beta studies are used by networks to promote themselves, but are not generally relied on by MVPDs.<sup>718</sup> Regardless, Versus and Tennis Channel were measured separately in different surveys,

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<sup>712</sup> Comcast Exh. 349 (Brooks Dep.) 315:18-316:10, 331:10-15.

<sup>713</sup> Comcast Exh. 349 (Brooks Dep.) 315:5-17.

<sup>714</sup> Tennis Channel Findings ¶ 103.

<sup>715</sup> Tennis Channel Exh. 107.

<sup>716</sup> Comcast Exh. 3; Comcast Findings ¶¶ 85-88.

<sup>717</sup> Tennis Channel Findings ¶ 116.

<sup>718</sup> Comcast Exh. 77 (Egan Written Direct) ¶ 97 (explaining that “during the 18 years that I led all programming efforts for [two different MVPDs], I did not purchase or rely on Beta’s studies in making carriage decisions” because they were primarily purchased by “networks seeking initial or expanded carriage or higher license fees”).

which are not meant to be comparative tools.<sup>719</sup> Further, although Tennis Channel now embraces Beta's research, multiple internal Tennis Channel documents reject it, stating that [REDACTED]<sup>720</sup> Like its abandonment of Experian Simmons, Tennis Channel's newfound embrace of Beta illustrates Tennis Channel's pattern of opportunistic reliance on data sources to support its litigation position.

5. *Advertisers do not view Tennis Channel as being substantially similar to Golf Channel or Versus*

276. Comcast established that advertisers do not view Tennis Channel as being substantially similar to Golf Channel or Versus.<sup>721</sup> As set forth above, Golf Channel and Versus provide advertisers with substantially different viewers than Tennis Channel does,<sup>722</sup> and, as Tennis Channel's documents acknowledge, the sports on Golf Channel and Versus are more popular than tennis.<sup>723</sup>

6. *Tennis Channel's programming costs are substantially less than Golf Channel's or Versus's programming costs*

277. Tennis Channel does not dispute that, according to Kagan, Golf Channel and Versus spent four and seven times as much on their programming as did Tennis Channel, whose internal documents highlight the lack of [REDACTED] and expense of its programming.<sup>724</sup> In fact, although Tennis Channel highlights its rights

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<sup>719</sup> Comcast Exh. 77 (Egan Written Direct) ¶¶ 93-97.

<sup>720</sup> Comcast Exh. 428; *see also* Comcast Exh. 419.

<sup>721</sup> Comcast Findings ¶¶ 89-92.

<sup>722</sup> *Supra* ¶¶ 270-74.

<sup>723</sup> Comcast Exh. 289 [REDACTED]; Comcast Exh. 572 [REDACTED]

<sup>724</sup> Comcast Findings ¶ 93.

agreement with the USTA for several non-Grand Slam tournaments,<sup>725</sup> that agreement shows not only that Tennis Channel [REDACTED] for those tournaments, but also that the USTA [REDACTED]  
[REDACTED]<sup>726</sup>

7. *Golf Channel and Versus have significantly higher ratings*

278. To support its argument that Tennis Channel is similar to Golf Channel and Versus, Tennis Channel relies primarily on a ratings analysis conducted by Mr. Brooks.<sup>727</sup> But Tennis Channel places undue emphasis on ratings. Contrary to Tennis Channel’s proposed finding,<sup>728</sup> Mr. Egan and Mr. Bond, both experienced cable programming executives, testified that they rarely look to ratings in making carriage decisions.<sup>729</sup> And Tennis Channel’s proposed finding that advertisers would credit the “coverage area ratings” proffered by Mr. Brooks<sup>730</sup> is contradicted by Mr. Brooks’s testimony that “[a]dvertisers, for their particular purposes, don’t use coverage area ratings.”<sup>731</sup>

279. Regardless, the “coverage area ratings” relied on by Mr. Brooks were not calculated by Nielsen, or even by Mr. Brooks, but by Tennis Channel employees with a

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<sup>725</sup> Tennis Channel Findings ¶¶ 10, 187.

<sup>726</sup> Tennis Channel Exh. 178 at TTCCOM\_00020362.

<sup>727</sup> Tennis Channel Findings ¶¶ 109-116.

<sup>728</sup> Tennis Channel Findings ¶ 110. In the testimony cited by Tennis Channel, Mr. Bond testified that he only looks at ratings data – published by Nielsen – “from time to time.” (Bond Cross, Apr. 29, 2011 Tr. 2201:12-17).

<sup>729</sup> Comcast Findings ¶ 94.

<sup>730</sup> Tennis Channel Findings ¶ 115.

<sup>731</sup> Comcast Exh. 349 (Brooks Dep.) 178:22-24.

financial stake in this litigation.<sup>732</sup> Those “coverage area ratings” calculated by Tennis Channel inflate Tennis Channel’s ratings compared to total market ratings calculated by Nielsen and compared to “coverage area ratings” for Golf Channel and Versus.<sup>733</sup> Nielsen – which Mr. Brooks concedes is “the industry standard for measurement of television audiences”<sup>734</sup> – has warned that coverage area ratings cannot be used to compare different cable networks,<sup>735</sup> and Mr. Brooks’s ratings analyses contravene that directive. In contrast, Mr. Egan, who has substantial experience in media research and ratings, relied on authoritative ratings calculated and published by Nielsen, which show that Golf Channel and Versus have significantly higher ratings than Tennis Channel.<sup>736</sup>

8. *There is no meaningful competition between Tennis Channel and Golf Channel or Versus for programming rights*

280. Tennis Channel did not meaningfully compete for programming rights with Golf Channel or Versus during the relevant time period. Tennis Channel’s proposed findings to the contrary are inconsistent with the undisputed evidence.

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<sup>732</sup> Comcast Findings ¶¶ 95-97. Although Mr. Brooks has throughout this litigation consistently referred to the local market “coverage area ratings” calculated by Tennis Channel as “Nielsen” ratings, (*see, e.g.*, Tennis Channel Exh. 18 (Complaint – Brooks Decl.) ¶ 2; Tennis Channel Exh. 20 (Reply – Supplemental Brooks Decl.) ¶ 3; 2/18/11 Brooks Rep. ¶ 2; Tennis Channel Exh. 17 (Brooks Written Direct) ¶ 2), Tennis Channel is careful not to adopt that inaccurate characterization in its proposed findings. (Tennis Channel Findings ¶¶ 111-15).

<sup>733</sup> Comcast Findings ¶¶ 96-97. Because it uses the same flawed methodology, Tennis Channel’s “license-fee-per-rating-point” analysis is flawed and unreliable as well. (Tennis Channel Findings ¶¶ 226-27).

<sup>734</sup> Tennis Channel Exh. 17 (Brooks Written Direct) ¶ 9.

<sup>735</sup> Comcast Findings ¶ 97. The evidence cited by Tennis Channel does not show that Comcast uses coverage area ratings to compare cable networks. (Tennis Channel Findings ¶ 114 (citing Tennis Channel Exh. 46)).

<sup>736</sup> Comcast Findings ¶ 95 & n.255; Tennis Channel Exh. 141 (Egan Dep.) 198:4-201:9.

281. Tennis Channel’s proposed finding that Versus “televises . . . tennis” is disproven by the document that Tennis Channel cites to support it.<sup>737</sup> As demonstrated by the 2010 Versus programming schedule cited by Tennis Channel, Versus airs no tennis.<sup>738</sup> In addition, Tennis Channel’s proposed finding that the Wimbledon rights that NBCU is pursuing for Versus are the Wimbledon rights presently held by Tennis Channel is unsupported by any record evidence.<sup>739</sup> In particular, there is no evidence that NBCU is pursuing the limited rights held by Tennis Channel, which do not include *any* live coverage.<sup>740</sup>

282. Tennis Channel’s proposed findings concerning purported competition with Versus for rights to the U.S. Open years before its 2009 proposal are unsupported and irrelevant to Tennis Channel’s discrimination claim.<sup>741</sup> Tennis Channel submits that Comcast “developed a plan” to offer Tennis Channel broader distribution and acquire U.S. Open rights for Versus, and that the plan is evidence that Comcast discriminates on the basis of affiliation.<sup>742</sup> Tennis Channel fails to mention the fact, however, that the plan was developed not by Comcast, but by Mr. Solomon and Tennis Channel.<sup>743</sup> In a December 10, 2006 e-mail, Mr. Solomon proposed a transaction in which Tennis Channel and Versus would { [REDACTED] } try to get U.S. Open rights from the USTA and Tennis Channel would grant Comcast equity in exchange for additional

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<sup>737</sup> Tennis Channel Findings ¶ 41 (citing Tennis Channel Ex. 129).

<sup>738</sup> Tennis Channel Ex. 129.

<sup>739</sup> Tennis Channel Ex. ¶ 44.

<sup>740</sup> Comcast Findings ¶ 72.

<sup>741</sup> Tennis Channel Findings ¶¶ 43, 89-93.

<sup>742</sup> Tennis Channel Findings ¶¶ 90, 154-59.

<sup>743</sup> Comcast Findings ¶ 99.

distribution.<sup>744</sup> Notably, Mr. Solomon e-mailed Jeff Shell, then Comcast’s head of programming, rather than Mr. Bond or a Comcast cable executive to pitch this transaction.<sup>745</sup> Comcast ultimately did not pursue Mr. Solomon’s proposed transaction.<sup>746</sup>

283. Contrary to Tennis Channel’s proposed finding,<sup>747</sup> Comcast did not compete with Tennis Channel for U.S. Open rights in 2007.<sup>748</sup> Mr. Solomon’s testimony cited by Tennis Channel does not support the assertion that Tennis Channel competed with Versus and “won” those rights.<sup>749</sup> Mr. Solomon testified that Tennis Channel “added” U.S. Open rights in 2009.<sup>750</sup> According to the documentary record, however, ESPN – not Tennis Channel – was awarded the U.S. Open cable rights and sublicensed a small portion of those rights to Tennis Channel.<sup>751</sup> Further, the rights that Versus considered were different from the rights that Tennis Channel sublicensed from ESPN.<sup>752</sup> Therefore, contrary to Tennis Channel’s suggestion,<sup>753</sup> Versus’s view of those rights, and Mr. Egan’s view of those rights, do not apply to the limited package of rights that Tennis Channel obtained.<sup>754</sup>

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<sup>744</sup> Comcast Exh. 666.

<sup>745</sup> Comcast Exh. 666.

<sup>746</sup> Comcast Findings ¶ 99.

<sup>747</sup> Tennis Channel Findings ¶ 43.

<sup>748</sup> Comcast Findings ¶¶ 100-01.

<sup>749</sup> Tennis Channel Findings ¶ 43.

<sup>750</sup> Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 5.

<sup>751</sup> Comcast Findings ¶¶ 100-01.

<sup>752</sup> Comcast Findings ¶ 101.

<sup>753</sup> Tennis Channel Findings ¶ 89.

<sup>754</sup> Comcast Findings ¶¶ 100-01.

284. Although Tennis Channel now submits that it competes with Versus for programming, it proposes findings that show that Comcast has cooperated with Tennis Channel in *sharing* tennis rights, which is inconsistent with Tennis Channel’s discrimination claim.<sup>755</sup> Indeed, as late as December 2009, Tennis Channel was not claiming that it competes against Versus for programming rights. On December 10, 2009, Ken Solomon sent Steve Burke a pre-litigation notice letter repeatedly asserting that Tennis Channel competes against Golf Channel and Versus for [REDACTED] [REDACTED] but making no mention of any competition for programming rights.<sup>756</sup> As set forth above, Tennis Channel’s newfound assertion that it competes against Versus for tennis rights is contradicted by the record.

**C. Dr. Singer’s Analysis Did Not Follow the FCC Staff’s Approach**

285. Comcast established that Dr. Singer’s analyses and opinions raised serious questions as to their validity, reliability and bias.<sup>757</sup> In particular, Dr. Singer’s attempt to replicate the analysis of the FCC staff in the NBCU Order was not credible and suffered from the same flaws that led Dr. Singer’s previous analyses to be rejected as biased.<sup>758</sup> In addition to those flaws, Dr. Singer – unlike the FCC staff – looked at Comcast’s treatment of an unaffiliated network, not a group of affiliated networks.<sup>759</sup> More significantly, his analysis did not compare Comcast’s treatment of Tennis Channel with other distributors’ treatment of Tennis Channel even though comparing Comcast’s

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<sup>755</sup> Tennis Channel Findings ¶ 43.

<sup>756</sup> Tennis Channel Exh. 88.

<sup>757</sup> Comcast Findings ¶¶ 103-17.

<sup>758</sup> Comcast Findings ¶¶ 110-14.

<sup>759</sup> *Compare* Tennis Channel Findings ¶ 164 with Tennis Channel Exh. 13 (NBCU Order) ¶¶ 65-71.

carriage with those of other distributors was a fundamental feature of the FCC staff's analysis.<sup>760</sup>

**XI. Comcast Has Not Unreasonably Restrained Tennis Channel's Ability to Compete Fairly**

286. The evidence shows that Comcast's decision not to accept Tennis Channel's 2009 proposal has not unreasonably restrained Tennis Channel's ability to compete fairly.<sup>761</sup>

**A. Tennis Channel Is a Successful Network, and Comcast Has Contributed Significantly to Tennis Channel's Success**

287. Comcast decided to carry Tennis Channel at a time when few other distributors did, and that Comcast's distribution of the network has grown consistently and significantly, reaching the point where Comcast now distributes Tennis Channel to

<sup>762</sup> As a result, there is no evidence that Comcast's carriage of Tennis Channel harms Comcast competitively, let alone "threatens its ability . . . to survive."<sup>763</sup>

288. Tennis Channel's proposed finding that Comcast concluded that Tennis Channel would have "no value" if carried on a sports tier relies on a dated analysis and mischaracterizes the record evidence.<sup>764</sup> Mr. Donnelly, who performed the valuation analyses of Tennis Channel's equity offers in 2006 and 2007, testified that as of 2006, Tennis Channel lacked a sufficient subscriber base across the entire industry to have

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<sup>760</sup> Compare Tennis Channel Findings ¶ 164 with Tennis Channel Exh. 13 (NBCU Order) ¶¶ 65-71.

<sup>761</sup> Comcast Findings ¶¶ 132-44.

<sup>762</sup> Comcast Findings ¶¶ 133-34.

<sup>763</sup> Tennis Channel Findings ¶ 167.

<sup>764</sup> Tennis Channel Findings ¶ 172.

significant equity value, although it had the potential to gain equity value with additional subscribers, whether from Comcast or any other MVPD.<sup>765</sup> Thus, following Tennis Channel's March 2007 equity-for-carriage deal with DIRECTV, Comcast determined that Tennis Channel was worth [REDACTED] while carried on its sports tier.<sup>766</sup>

**B. Tennis Channel's Current Distribution Allows It to Compete for Subscribers Across the United States**

289. Comcast established that, as set forth in internal Tennis Channel documents, Tennis Channel's national distribution by its parents DIRECTV and Dish Network, make it "Available to Every US Home."<sup>767</sup> Thus, a Comcast subscriber who wants to receive Tennis Channel could subscribe to Comcast's sports tier, or switch to Dish Network, DIRECTV, or, in many markets, to Verizon FiOS, AT&T U-Verse, or a cable over-builder.<sup>768</sup>

**C. Tennis Channel's Current Subscriber Count Results from Its Own Deliberate Decisions**

290. The evidence, including Tennis Channel's internal documents, shows that Tennis Channel has long known that it could obtain greater distribution by lowering its price.<sup>769</sup> In 2009 and 2010, in addition to Comcast, Charter, Cablevision, Time Warner Cable, Verizon, and parent company Dish Network all turned down offers to carry Tennis Channel more broadly, [REDACTED]<sup>770</sup>

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<sup>765</sup> Donnelly Direct, May 2, 2011 Tr. 2528:7-2529:18, 2530:5-16.

<sup>766</sup> Comcast Exh. 66.

<sup>767</sup> Comcast Exh. 435 at TTCCOM\_00019691; Solomon Direct, Apr. 25, 2011 Tr. 247:13-248:9.

<sup>768</sup> Comcast Findings ¶¶ 135-37.

<sup>769</sup> Comcast Findings ¶ 139.

<sup>770</sup> Comcast Findings ¶¶ 41, 47-53.

291. Tennis Channel submits that it is being harmed because it is not receiving the {REDACTED} million in additional license fees that Comcast would have had to pay if it had accepted the 2009 proposal.<sup>771</sup> There is no dispute that the more money that Comcast (or any other distributor) pays to Tennis Channel, the more money Tennis Channel will have. But additional distribution does not necessarily require a distributor to increase its total license payments. To obtain broad distribution, NHL Network reduced its per-subscriber fee so that the total cost to Comcast for carrying it on D1 was effectively the same as the cost for distributing it on the sports tier,<sup>772</sup> and Golf Channel and Versus paid distributors hundreds of millions of dollars in launch incentives to reduce the expense of greater carriage.<sup>773</sup> Comcast is not “unreasonably restraining Tennis Channel’s ability to compete fairly” simply by declining a proposal that demanded both broader distribution and {REDACTED} million in additional license fees.<sup>774</sup>

**D. Tennis Channel’s Failure to Reach {REDACTED} Million Subscribers Did Not Result from Comcast’s Decision Not to Accept Tennis Channel’s 2009 Proposal**

292. Tennis Channel has alleged that the fact that its distribution is less than {REDACTED} million subscribers has limited its ability to compete for programming and advertisers.<sup>775</sup> The undisputed evidence shows that even if Comcast had accepted the D1

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<sup>771</sup> Tennis Channel Findings ¶ 169.

<sup>772</sup> Comcast Findings ¶¶ 63-64.

<sup>773</sup> Comcast Findings ¶¶ 14, 55, 74.

<sup>774</sup> By Tennis Channel’s logic, the more that it had proposed in license fees in 2009, the greater the harm to it would be. But that theory of alleged harm to the ability of a network to compete fairly has no basis in Section 616.

<sup>775</sup> Tennis Channel Findings ¶¶ 183-213; Tennis Channel Trial Brief at 15-16.

option in that proposal, Tennis Channel still would have fewer than {REDACTED} million subscribers.<sup>776</sup> Even Mr. Solomon, in his April 2009 letter to Mr. Bond, did not claim that Tennis Channel warranted any broader than D1 carriage.<sup>777</sup>

293. Comcast’s decision to decline the 2009 proposal did not restrict Tennis Channel’s ability to obtain programming rights.<sup>778</sup> As discussed in Comcast’s Findings, Tennis Channel would fall short of the {REDACTED} million subscriber threshold purportedly identified by certain tennis rights-holders even if Comcast had accepted the D0 option in the 2009 proposal.<sup>779</sup>

294. Tennis Channel submits that its failure to reach {REDACTED} subscribers prevents it from purchasing the national Nielsen ratings that many advertisers require.<sup>780</sup> As Tennis Channel knows, however, other networks on Comcast’s sports tier with comparable distribution, such as Outdoor Channel, Fox Soccer Channel and GolTV purchase national Nielsen ratings,<sup>781</sup> but Tennis Channel affirmatively chose not to do so because it feared its ratings would be too low to attract advertisers.<sup>782</sup> Further, numerous

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<sup>776</sup> Comcast Findings ¶ 141-44.

<sup>777</sup> Comcast Ex. 592 (stating that Tennis Channel’s “ultimate goal” was D1 packaging and arguing that Tennis Channel has “earned” D1 packaging).

<sup>778</sup> Tennis Channel Findings ¶¶ 183-93.

<sup>779</sup> Comcast Findings ¶ 141-44. Tennis Channel’s agreement with its parent, the USTA {REDACTED} which would still leave it with half the distribution of ESPN2. (Tennis Channel Ex. 178).

<sup>780</sup> Tennis Channel Findings ¶¶ 201-06.

<sup>781</sup> Comcast Ex. 368 (Herman Dep.) 133:22-134:4 (listing The Outdoor Channel and Fox Soccer Channel as networks with fewer than 40 million subscribers that receive national Nielsen ratings); *see also* Comcast Ex. 203 at 32, 45 (listing GolTV as a network with fewer than 40 million subscribers that receives a Nielsen rating).

<sup>782</sup> Comcast Ex. 368 (Herman Dep.) 135:8-22 (testifying that the “benefit [of Nielsen ratings] would be a function of what the ratings were”).

other networks on Comcast's sports tier are advertiser-supported, including Big Ten Network, CBS College Sports, Crime & Investigation Network, ESPN Classic, Fox Soccer Channel, GolTV, Hallmark Movie Channel, Outdoor Channel, SPEED, and The Sportsman Channel.<sup>783</sup> These examples disprove Tennis Channel's assertion that sports tier carriage is "not viable" for ad-supported networks.<sup>784</sup>

295. Recognizing that Comcast could not supply Tennis Channel with [REDACTED] million subscribers, Tennis Channel submits that broad carriage by Comcast would cause a "ripple effect" among other, smaller distributors.<sup>785</sup> Tennis Channel offers no competent evidence showing that any MVPD, let alone all MVPDs, follows Comcast's lead in making its carriage decisions.

296. Finally, although Tennis Channel contends that it has suffered harm as a result of its channel placement,<sup>786</sup> it is undisputed both that the Affiliation Agreement gives Comcast complete discretion to carry Tennis Channel on any channel number and that Tennis Channel has never requested that Comcast change its channel number.<sup>787</sup> For example, Mr. Solomon did not mention channel placement in either his April 22, 2009

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<sup>783</sup> Comcast Exh. 203 at 132 (Big Ten Network), 165 (CBS College Sports), 204 (Crime & Investigation Network), 249 (ESPN Classic), 291 (Fox Soccer Channel), 315 (GolTV), 327 (Hallmark Movie Channel), 450 (Outdoor Channel), 498 (SPEED), 546 (The Sportsman Channel); Comcast Exhs. 153, 154, 155 (sports tier channel lineups).

<sup>784</sup> Tennis Channel Findings ¶ 170.

<sup>785</sup> Tennis Channel Findings ¶¶ 170, 255-56, 290.

<sup>786</sup> Tennis Channel Findings ¶¶ 147, 211-213.

<sup>787</sup> Bond Direct, Apr. 29, 2011 Tr. 2057:16-20; Bond Redirect, Apr. 29, 2011 Tr. 2326:10-20; Comcast Findings ¶ 18.

letter to Mr. Bond or his December 10, 2009 letter to Mr. Burke, nor did Tennis Channel mention channel placement in its 2009 proposal to Comcast.<sup>788</sup>

**XII. Tennis Channel’s Requested Relief Is Unwarranted**

**A. The Broad Distribution Requested by Tennis Channel Is Unwarranted**

297. The evidence shows that the distribution that Tennis Channel requests is significantly broader than the increased distribution that Tennis Channel proposed to Comcast in 2009, and is entirely out of line with the distribution provided by other distributors.<sup>789</sup> Tennis Channel admits that all MVPDs other than Comcast carry the network to {REDACTED} of their subscribers, and that number is inflated by the fact that it includes DIRECTV and Dish Network, which carry the network pursuant to equity-for-carriage deals, and does not take into account the large number of distributors that do not carry Tennis Channel at all.<sup>790</sup> If DIRECTV and Dish Network are excluded because of their affiliation with Tennis Channel, then Tennis Channel’s average carriage in the marketplace (again not including Comcast or distributors that do not carry it) is only {REDACTED}.<sup>791</sup> Nonetheless, the penetration that Tennis Channel requests of Comcast is more than {REDACTED} times as high.<sup>792</sup>

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<sup>788</sup> Comcast Exhs. 190, 579, 592.

<sup>789</sup> Comcast Findings ¶¶ 146-48.

<sup>790</sup> Comcast Exh. 201.

<sup>791</sup> Comcast Findings ¶ 206.

<sup>792</sup> Tennis Channel Findings ¶¶ 285-92; Comcast Exh. 1102.

**B. Regardless, the Cost Increase Demanded by Tennis Channel Is Unwarranted**

298. In addition, Tennis Channel requests such broad carriage, which would increase Comcast's costs by more than [REDACTED] million without any of the pricing concessions that networks typically offer to increase their distribution.<sup>793</sup>

**C. Tennis Channel Is Demanding Analog Carriage in Many Markets, Which Would Require Deleting Other Networks to Make Room for Tennis Channel**

299. Mr. Solomon testified in this litigation that Tennis Channel is demanding "deeper penetration" than the Digital Starter tier on those systems that carry Golf Channel and Versus on the analog expanded basic level of service.<sup>794</sup>

300. Because of bandwidth limitations, adding Tennis Channel to the analog expanded basic level of service would require deleting an existing network's position on that tier.<sup>795</sup>

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<sup>793</sup> Comcast Findings ¶¶ 150-51.

<sup>794</sup> Solomon Cross, Apr. 25, 2011 Tr. 323:22-324:3.

<sup>795</sup> Comcast Exh. 78 (Gaiski Written Direct) ¶ 27; Tennis Channel Exh. 137 (Gaiski Dep.) 37:8-39:17.

**PROPOSED REPLY CONCLUSIONS OF LAW**

301. Tennis Channel’s discrimination claim challenges Comcast’s decision to decline Tennis Channel’s 2009 proposal.<sup>796</sup>

302. The credible and reliable evidence shows that Comcast’s decision not to accept Tennis Channel’s 2009 proposal was based on legitimate and non-discriminatory business reasons, and did not unreasonably restrain Tennis Channel’s ability to compete fairly.<sup>797</sup> In particular, Comcast did not act upon any motive to discriminate on the basis of affiliation or non-affiliation, but instead was motivated by legitimate business reasons, including a contemporaneously documented cost-benefit analysis.<sup>798</sup> Accordingly, Tennis Channel has failed to establish a violation of Section 616.<sup>799</sup>

**I. Tennis Channel Bears the Burden of Proof**

303. Contrary to Tennis Channel’s proposed conclusions of law, the Media Bureau’s finding in the *HDO* that Tennis Channel’s untested pleadings set forth a *prima facie* case does not shift the burden of proof to Comcast.<sup>800</sup> In *WealthTV*, the Presiding Judge rejected the same argument,<sup>801</sup> and, unlike in *WealthTV*, the Media Bureau here did not even consider Comcast’s pleadings and the accompanying evidence in assessing

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<sup>796</sup> Comcast Findings ¶¶ 27-42; Tennis Channel Findings ¶ 293.

<sup>797</sup> Comcast Findings ¶¶ 169-210.

<sup>798</sup> Comcast Findings ¶¶ 169-96.

<sup>799</sup> *MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (ALJ).

<sup>800</sup> Tennis Channel Findings ¶ 300.

<sup>801</sup> *WealthTV*, 24 FCC Rcd at 12995 ¶¶ 57-58 (ALJ) (complainant bears “both the burden of proceeding with the introduction of evidence and the burden of proof” (internal quotation marks omitted)). This burden allocation reflects “the usual practice of requiring that the party seeking relief by Commission order . . . bear the burden of proving that the violations occurred.” *Id.* (citing, *inter alia*, *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) and 5 U.S.C. § 556(d)).

whether Tennis Channel had presented a *prima facie* case. On considering the entire record before it, however, the Media Bureau concluded that Comcast had raised “substantial and material questions of fact” as to the merit of Tennis Channel’s claim.<sup>802</sup> Under these circumstances, Tennis Channel bears the burden of proceeding with the introduction of evidence and the burden of proving its claim by a preponderance of the evidence.<sup>803</sup>

**II. Tennis Channel Has Not Carried Its Burden of Proving That Comcast’s Decision Not to Accept Its 2009 Proposal Constituted Affiliation-Based Discrimination**

304. Tennis Channel concedes that Comcast did not take Golf Channel or Versus into account in deciding not to accept Tennis Channel’s 2009 proposal,<sup>804</sup> which is the carriage decision underlying Tennis Channel’s discrimination claim.<sup>805</sup> There is no evidence that Comcast declined the 2009 proposal for any purpose of enhancing the position of any affiliated programming vendor, including Golf Channel and Versus.<sup>806</sup>

305. Prior to the hearing, Tennis Channel took the position that Comcast discriminated against it by affirmatively considering Golf Channel and Versus in

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<sup>802</sup> *The Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, MB Docket No. 10-204, 25 FCC Rcd 14149, 14150 ¶ 2 & n.3 (MB 2010) (hereinafter “*HDO*”).

<sup>803</sup> *MASN*, 25 FCC Rcd at 18106 ¶ 12 n.58 (“[E]ven if there were an evidentiary equipoise in this case, [the MVPD] still would prevail absent a preponderance of evidence favoring [the complainant].”); *id.* at 18104 ¶ 10 (finding for the defendant because the complainant “failed to demonstrate” that the defendant engaged in affiliation-based discrimination); *WealthTV*, 24 FCC Rcd at 12995 ¶ 58 (ALJ).

<sup>804</sup> Tennis Channel Findings ¶¶ 77, 142, 273; *see also* Comcast Findings ¶¶ 169-78.

<sup>805</sup> Tennis Channel Findings ¶ 293.

<sup>806</sup> Comcast Findings ¶¶ 43-46; *supra* ¶¶ 231-33.

declining its 2009 proposal.<sup>807</sup> In light of the undisputed evidence that Comcast did not take either Golf Channel or Versus into account,<sup>808</sup> Tennis Channel now takes the opposite position – namely, that Comcast discriminated by failing to take Golf Channel and Versus into account in declining Tennis Channel’s 2009 proposal.<sup>809</sup> As the Commission confirmed in its recent decision in *WealthTV*, however, evidence that a distributor did not consider affiliated networks in making the challenged carriage decision regarding an unaffiliated network demonstrates the absence of affiliation-based discrimination.<sup>810</sup>

306. Tennis Channel advances the position that Comcast discriminates by adjusting its carriage of Tennis Channel in response to competitive market conditions.<sup>811</sup> That position conflicts with the plain text of the 1992 Cable Act, which expressly instructs the Commission to “rely on the marketplace to the maximum extent feasible” in enforcing the Act.<sup>812</sup> Responding to competition in the marketplace is a legitimate and non-discriminatory business reason for a carriage decision.<sup>813</sup> The undisputed evidence

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<sup>807</sup> See, e.g., Tennis Channel Exh. 18 (Complaint) ¶¶ 6, 35, 73, 74, 76, 89, 96; Tennis Channel Trial Brief at 2 (arguing that Comcast “focused on” protecting Versus in declining the 2009 proposal); see also Tennis Channel Exh. 88.

<sup>808</sup> Comcast Findings ¶¶ 43-46; Tennis Channel Findings ¶¶ 77, 142, 273-84.

<sup>809</sup> Tennis Channel Findings ¶¶ 77, 142, 273-84.

<sup>810</sup> *WealthTV*, \_\_\_ FCC Rcd \_\_\_ ¶ 15 (FCC) (“Overall, there is no credible or reliable evidence that any of the defendants considered MOJO at all in deciding whether or not to carry WealthTV.”).

<sup>811</sup> Tennis Channel Findings ¶ 165 (“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.’”).

<sup>812</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 § 2(b)(2) (“1992 Cable Act”).

<sup>813</sup> *WealthTV*, 24 FCC Rcd at 12998 ¶ 64 (ALJ) (offering content “[i]n order to keep up with competing MVPDs, such as DirecTV and EchoStar” is a “legitimate, non-

that Comcast adjusts its carriage of Tennis Channel in response to competitive conditions is inconsistent with Tennis Channel’s claim of discrimination.<sup>814</sup>

307. In the face of uncontroverted evidence that Comcast’s decision not to accept Tennis Channel’s 2009 proposal was based on a cost-benefit analysis, Tennis Channel cites a 1978 U.S. Supreme Court sex discrimination case in support of the proposition that “incremental cost [is] not a valid justification for . . . discrimination.”<sup>815</sup> Regardless of the proper role of cost in sex discrimination cases, however, the Commission’s recent ruling in *MASN v. Time Warner Cable* confirms that in Section 616 cases, “a cost-benefit analysis” is a “legitimate and non-discriminatory” basis for declining carriage.<sup>816</sup>

308. Tennis Channel advances the position that Comcast’s contractual right to carry Tennis Channel on a sports tier is “not relevant” to the issue of whether Comcast discriminated on the basis of affiliation by declining Tennis Channel’s 2009 proposal for broader carriage.<sup>817</sup> That position is contrary to the Commission’s recent ruling in *WealthTV* that “resolution of Section 616 complaints . . . necessarily focus[es] on the specific facts pertaining to each negotiation, and the manner in which certain rights were

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discriminatory business purpos[e]”); *see also WealthTV*, \_\_\_ FCC Rcd \_\_\_ ¶ 13 (FCC) (same); *MASN*, 25 FCC Rcd at 18113-14 ¶ 20 (channel capacity concerns prompted by DBS competition are “a legitimate and non-discriminatory reason for [an MVPD’s] carriage decision”).

<sup>814</sup> Tennis Channel Findings ¶ 165.

<sup>815</sup> Tennis Channel Findings ¶ 312 (citing *City of L.A. Dep’t of Water v. Manhart*, 435 U.S. 702, 716-17 (1978)).

<sup>816</sup> *See, e.g., MASN*, 25 FCC Rcd at 18106, 18112 ¶¶ 12, 19.

<sup>817</sup> Tennis Channel Findings ¶ 303.

obtained, in order to determine whether a violation has, in fact, occurred.”<sup>818</sup> Here, Tennis Channel obtained carriage by Comcast in 2005, before any of Comcast’s principal competitors were carrying the network, by emphasizing the favorable economics for Comcast of sports tier carriage and granting Comcast the right to carry the network on a sports tier.<sup>819</sup> In 2009, Tennis Channel proposed that Comcast abandon that right and pay [REDACTED] million more to distribute Tennis Channel to additional Comcast subscribers who already had the option of receiving the network on a sports tier, but presumably were not sufficiently interested in Tennis Channel to do so.<sup>820</sup> Under these circumstances, Comcast’s right to carry Tennis Channel on a sports tier is relevant to understanding Comcast’s legitimate and non-discriminatory reasons for declining the 2009 proposal.<sup>821</sup>

309. Because the record evidence shows that Comcast declined Tennis Channel’s 2009 proposal for legitimate business reasons, and not based on any motive to discriminate, Tennis Channel has failed to show that Comcast has discriminated against it on the basis of affiliation.<sup>822</sup> As a result, Tennis Channel attempts to re-cast its claim by asserting that Comcast has discriminated “in favor of” Golf Channel and Versus (and

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<sup>818</sup> *WealthTV*, \_\_\_ FCC Rcd \_\_\_ ¶ 6 (FCC) (internal quotation marks omitted).

<sup>819</sup> Comcast Findings ¶¶ 18-23; *supra* ¶ 213.

<sup>820</sup> Comcast Findings ¶¶ 27-42; *supra* ¶¶ 220-27.

<sup>821</sup> In addition, the fact that Comcast – like Time Warner Cable, Cox and Charter – was offered, and accepted, the right to carry Tennis Channel on a sports tier, distinguishes it from those distributors – such as DIRECTV, Dish Network and AT&T – that were never offered the right to carry Tennis Channel on a sports tier.

<sup>822</sup> *MASN*, 25 FCC Rcd at 18115 ¶ 22 (the “relevant inquiry” under Section 616 is whether the vertically integrated MVPD acted upon a “motive to discriminate” on the basis of affiliation “in reaching its [challenged] carriage decision”).

affiliated Major League networks).<sup>823</sup> Even assuming that theory of liability were valid under Section 616, Tennis Channel has failed to prove a claim of affiliation-based discrimination under that theory here, for at least four independent and sufficient reasons. First, Tennis Channel lacks standing to challenge Comcast’s decisions to carry Golf Channel and Versus broadly, decisions that were made long before Tennis Channel even existed.<sup>824</sup> Second, the evidence shows that Tennis Channel is fundamentally dissimilar to Golf Channel and Versus (and Tennis Channel has neither alleged nor attempted to prove that it is substantially similar to any affiliated Major League network).<sup>825</sup> Third, the evidence shows that Comcast does not discriminate in favor of its affiliated networks on the basis of affiliation, and that Comcast’s carriage decisions as to those networks were based on legitimate business reasons.<sup>826</sup> Fourth, Tennis Channel has not attempted to prove that any of Comcast’s carriage decisions as to its affiliated networks has unreasonably restrained Tennis Channel’s ability to compete fairly.<sup>827</sup>

**III. Tennis Channel Has Failed to Establish That Comcast Has Unreasonably Restrained Its Ability to Compete Fairly**

310. Tennis Channel’s assertion that Comcast is a distribution “bottleneck”<sup>828</sup> is contrary to the undisputed evidence, and that characterization has been rejected as outdated by the D.C. Circuit, which in construing the 1992 Cable Act held that “[c]able operators . . . no longer have the bottleneck power over programming that concerned the

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<sup>823</sup> Tennis Channel Findings ¶ 305.

<sup>824</sup> Comcast Findings ¶¶ 11-15, 192; *supra* ¶ 263.

<sup>825</sup> Comcast Findings ¶¶ 73-102; *supra* ¶¶ 261-84.

<sup>826</sup> Comcast Findings ¶¶ 54-65; *supra* ¶¶ 239-52.

<sup>827</sup> *See supra* ¶¶ 292-96; *infra* ¶¶ 311-13.

<sup>828</sup> Tennis Channel Findings ¶ 171.

Congress in 1992.”<sup>829</sup> There is no dispute that a Comcast subscriber who wants to receive Tennis Channel could subscribe to Comcast’s sports tier, or switch to Dish Network, DIRECTV, or, in many markets, to Verizon FiOS, AT&T U-Verse, or a cable over-builder. Tennis Channel is carried by 130 distributors across the country, and the network’s equity-for-carriage deals with DIRECTV and Dish Network give it access to potential subscribers in every U.S. market.<sup>830</sup> Under these circumstances, Tennis Channel is able to compete fairly for subscribers, including substantially all Comcast subscribers, throughout the United States.<sup>831</sup>

311. Virtually all of Tennis Channel’s assertions of competitive harm are premised on what it calls its “limited distribution” in the marketplace, including by Comcast, and consequences that allegedly result from not having more subscribers.<sup>832</sup> The evidence shows, however, that Tennis Channel’s subscriber count results from its own deliberate decisions regarding breaking off negotiations with Comcast, pricing and investment in programming.<sup>833</sup>

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<sup>829</sup> *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

<sup>830</sup> Comcast Findings ¶¶ 179-181; *supra* ¶ 289.

<sup>831</sup> Quoting the Media Bureau’s decision in *MASN*, which the Commission subsequently reversed, Tennis Channel proposes an erroneous formulation of this statutory element. (Tennis Channel Findings ¶ 309 (quoting *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, 23 FCC Rcd 15783 ¶¶ 27-28 (MB 2008)); *see also* Tennis Channel Findings ¶ 310. Among other errors, Tennis Channel’s proposed formulations omits the essential requirement that the restraint be “unreasonabl[e].” 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c); *see WealthTV*, 24 FCC Rcd at 13002-03 ¶ 78 (ALJ).

<sup>832</sup> Tennis Channel Findings ¶¶ 167-213. In the only exception, Tennis Channel also claims harm from its channel positioning, but Tennis Channel had never sought from Comcast – including in the requests for relief set forth its Complaint in this proceeding – a change to its channel position. (*See supra* ¶ 296).

<sup>833</sup> Comcast Findings ¶¶ 138-140; *see Barkan v. Dunkin’ Donuts, Inc.*, 627 F.3d 34, 40-42 (1st Cir. 2010) (holding that plaintiff had not established proximate cause

312. The principal harms asserted by Tennis Channel allegedly result from not having at least { [REDACTED] } million subscribers. The evidence shows, however, that Tennis Channel would not have { [REDACTED] } million subscribers if Comcast had accepted its 2009 proposal and chosen the D1 option, which is the only level of distribution that Mr. Solomon argued in April 2009 that Tennis Channel warranted.<sup>834</sup> And Tennis Channel concedes that it would not have { [REDACTED] } million subscribers even if Comcast distributed it as broadly as Comcast distributes Golf Channel and Versus.<sup>835</sup>

313. Tennis Channel’s assertions of competitive harm offer no support for a discrimination claim premised on its alternative theory that Comcast discriminated “in favor of” Golf Channel and Versus (and affiliated Major League networks). Tennis Channel’s proposed findings relating to competitive harm all are premised on “Comcast’s refusal to carry Tennis Channel more broadly,”<sup>836</sup> not on Comcast’s carriage decisions regarding its affiliated networks. In particular, Tennis Channel asserts that limited distribution of Tennis Channel “deprives the network of millions of subscribers,”<sup>837</sup>

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because even if defendants had not breached the parties’ agreement, plaintiff would still have suffered alleged injury as a result of his own poor business decisions).

<sup>834</sup> Comcast Findings ¶ 141.

<sup>835</sup> Tennis Channel Findings ¶ 168. Tennis Channel submits that if Comcast distributed the network to about [REDACTED] of its subscribers, it would trigger [REDACTED] (Tennis Channel Findings ¶¶ 22, 291). But even if [REDACTED] Tennis Channel would still have fewer than [REDACTED] million subscribers. (Comcast Exh. 201, Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 8). In any event, this asserted harm is too remote to be attributable to Comcast. *See, e.g., Hemi Group LLC v. City of New York*, 130 S. Ct. 983, 992 (2010) (applying common law causation principles and holding that where multiple steps separate the harm alleged and the injury caused, and the theory of liability rests on the “independent actions of third and even fourth parties,” proximate causation has not been established).

<sup>836</sup> Tennis Channel Findings ¶ 167.

<sup>837</sup> Tennis Channel Findings ¶ 168.

“hinders its ability to obtain premier tennis events,”<sup>838</sup> and “greatly reduces the number of potential viewers that Tennis Channel can offer advertisers.”<sup>839</sup> Because those asserted harms are expressly tied to Comcast’s carriage of Tennis Channel, rather than Comcast’s carriage of Golf Channel and Versus (or other affiliated networks), Tennis Channel has failed to assert, much less prove, any competitive harm resulting from Comcast’s alleged favoritism of those affiliated networks.

**IV. Section 616 Is Not Intended to Eliminate Carriage Differences Among Networks Resulting from Natural Competitive Forces**

314. The evidence shows that Tennis Channel differs from Golf Channel and Versus in many material respects that are reflected in how those networks are carried by distributors.<sup>840</sup> Although Tennis Channel now submits that its viewers are similar to viewers of Golf Channel and Versus, it is clear from the record that Tennis Channel target different audiences than Golf Channel and Versus.<sup>841</sup> As in *WealthTV*, Tennis Channel’s litigation arguments are “inconsistent” with its “marketing presentations to MVPDs and prospective advertisers” which point to the fact that Golf Channel and Versus overwhelmingly deliver male viewers (and that Golf Channel delivers older viewers), while Tennis Channel’s younger audience is evenly divided between men and women.<sup>842</sup> Tennis Channel’s attempts to disavow these materials by claiming product

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<sup>838</sup> Tennis Channel Findings ¶ 190.

<sup>839</sup> Tennis Channel Findings ¶ 197.

<sup>840</sup> Comcast Findings ¶¶ 185-91.

<sup>841</sup> *WealthTV*, \_\_\_ FCC Rcd \_\_\_ ¶ 25 (FCC).

<sup>842</sup> *WealthTV*, \_\_\_ FCC Rcd \_\_\_ ¶ 26 (FCC); Comcast Findings ¶¶ 86-88; *supra* ¶¶ 271-72.

differentiation are belied by the fact that its own *internal* documents highlight these same differences.<sup>843</sup>

**V. Comcast Was Not Required to Conduct a Cost-Benefit Analysis of Golf Channel and Versus in 2009**

315. Tennis Channel’s Findings focus on whether Comcast treated Tennis Channel identically to Golf Channel and Versus. But the Commission’s decision in *MASN*, which Tennis Channel ignores, makes clear that “a vertically-integrated MVPD may treat unaffiliated programmers differently from affiliates, so long as . . . such treatment did not result from the programmer’s status as an unaffiliated entity.”<sup>844</sup> As set forth above and in Comcast’s Findings, Tennis Channel has failed to prove that its status as an unaffiliated network played any role in Comcast’s decision to decline its 2009 proposal, or in Comcast’s decision, years earlier, to broadly distribute Golf Channel and Versus.<sup>845</sup>

**VI. Tennis Channel Has Failed to Establish That the Relief That It Requests Is Necessary or Appropriate**

316. Tennis Channel has not proved the required elements for a Section 616 claim, and thus is not entitled to any relief in this matter.

317. The appropriate remedy if a violation had been found in this matter would be the imposition of a forfeiture pursuant to Section 1.80 of the Commission’s rules.<sup>846</sup>

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<sup>843</sup> Comcast Findings ¶ 86; *supra* ¶¶ 271-72.

<sup>844</sup> *MASN*, 25 FCC Rcd at 18106 ¶ 12; *see also WealthTV*, 24 FCC Rcd at 13000 ¶ 69 (ALJ) (“The defendants 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.”).

<sup>845</sup> Comcast Findings ¶¶ 74, 169-78; *supra* ¶¶ 220-35.

<sup>846</sup> *See* 47 C.F.R. § 1.80.

But, as set forth above, Tennis Channel has not demonstrated that Comcast violated Section 616, let alone done so willfully or repeatedly.

318. Although Tennis Channel now requests that any relief include adjusted channel placement,<sup>847</sup> such relief is inappropriate since Tennis Channel did not request modified channel placement in its Request for Relief,<sup>848</sup> and has never asked Comcast for a change in channel placement.<sup>849</sup>

**A. The Level of Carriage That Tennis Channel Demands Is an Inappropriate Remedy for Tennis Channel’s Claim**

319. Mandatory carriage at the penetration requested by Tennis Channel is particularly inappropriate. Tennis Channel admits that the additional carriage that it requests is far greater than the level it proposed in 2009, and well beyond Tennis Channel’s carriage in the marketplace generally.<sup>850</sup> Mandating additional carriage by Comcast beyond ██████████ } penetration<sup>851</sup> would be contrary to Congress’s instruction to the Commission that, in implementing Section 616, it should “rely on the marketplace to the maximum extent feasible.”<sup>852</sup>

320. Comcast should not, as Tennis Channel demands,<sup>853</sup> be mandated to carry Tennis Channel more broadly at the per-subscriber license fees set forth in the Affiliation

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<sup>847</sup> Tennis Channel Findings ¶ 314.

<sup>848</sup> Tennis Channel Exh. 18 (Complaint) ¶¶ 101-06; *see also* 47 C.F.R. § 76.7(a)(4).

<sup>849</sup> *See supra* ¶ 296.

<sup>850</sup> *See supra* ¶¶ 297, 299.

<sup>851</sup> Comcast Findings ¶ 206.

<sup>852</sup> 1992 Cable Act § 2(b)(2); *see also* *WealthTV*, 24 FCC Rcd at 12994 ¶ 55 (ALJ).

<sup>853</sup> Tennis Channel Exh. 18 (Complaint) ¶ 102; Tennis Channel Findings ¶¶ 314-15.

Agreement. The evidence shows that Tennis Channel justified its rate card by emphasizing the economics of sports tier carriage, and Comcast agreed to those rates only because it intended to carry Tennis Channel on a sports tier.<sup>854</sup>

**B. Any Remedial Carriage Would Not Be Effective Unless and Until Upheld by the Commission**

321. Any order that Comcast carry Tennis Channel at the same penetration as Comcast carries Versus and Golf Channel would require Comcast to delete existing programming from systems on which Comcast carries Versus and Golf Channel on analog tiers.<sup>855</sup> Thus, such an order could not become effective unless and until upheld by the Commission.<sup>856</sup>

322. Moreover, no broader carriage of Tennis Channel should be mandated until Comcast’s statute of limitations defense is finally resolved, especially in light of evidence – newly discovered since the Media Bureau issued the *HDO*<sup>857</sup> – showing that Tennis Channel [REDACTED]

[REDACTED]<sup>858</sup> The *HDO* expressly provides that Comcast’s statute of limitations defense is

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<sup>854</sup> See Comcast Findings ¶ 16 n.31.

<sup>855</sup> See *supra* ¶¶ 299-300.

<sup>856</sup> 47 C.F.R. § 76.1302(g) (“Such order . . . shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor’s programming.”).

<sup>857</sup> *WealthTV*, 24 FCC Rcd at 12996 ¶ 60 (ALJ) (“The evidence compiled after the completion of the evidentiary hearin[g] is more complete, accurate, and reliable than the evidence before the Media Bureau when it issued the *HDO*.”).

<sup>858</sup> See Comcast Findings ¶ 30. Some of the evidence has been considered by the Presiding Judge in this proceeding because, as set forth above, it is independently relevant to the merits of Tennis Channel’s discrimination claim. See *HDO*, 25 FCC Rcd at 14163 ¶ 24.

not before the Presiding Judge to resolve.<sup>859</sup> It does not, however, follow that in discharging the obligation to impose “appropriate” remedial measures,<sup>860</sup> the Presiding Judge must disregard the fact that significant new evidence (that was not before the Media Bureau) exists. Pursuant to the *HDO*, Comcast may raise its statute of limitations defense before the Commission, as necessary, after the Presiding Judge issues his decision.<sup>861</sup>

323. Because Comcast’s statute of limitations defense is not before the Presiding Judge to resolve,<sup>862</sup> it would be inappropriate to adopt Tennis Channel’s proposed conclusion of law quoting the Media Bureau’s reasoning in the *HDO* addressing the statute of limitations defense on the merits.<sup>863</sup>

324. Precisely because the Presiding Judge is not permitted to resolve the statute of limitations issue, and in light of the newly discovered evidence relevant to the issue, justice requires that no carriage be mandated before that evidence can be considered by the Commission.

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<sup>859</sup> *HDO*, 25 FCC Rcd at 14150 ¶ 2 n.4.

<sup>860</sup> *Id.* at 14163 ¶ 24(b).

<sup>861</sup> *Id.* at 14156 ¶ 12 n.57.

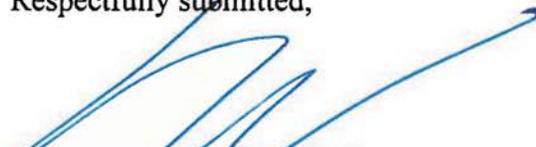
<sup>862</sup> *HDO*, 25 FCC Rcd at 14150 ¶ 2 n.4.

<sup>863</sup> Tennis Channel Findings ¶ 303.

**CONCLUSION**

For the foregoing reasons and the reasons set forth in Comcast's other submissions, Comcast respectfully requests that the Presiding Judge adopt Comcast's Proposed Findings of Fact and Conclusions of Law and Proposed Reply Findings of Fact and Conclusions of Law in support of a decision denying the relief sought by Tennis Channel in this carriage complaint proceeding.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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