

JUN 21 2011

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)
 v.)
Comcast Cable Communications, LLC,)
Defendant)

MB Docket No. 10-204
File No. CSR-8258-P

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

Appearances

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

PRELIMINARY STATEMENT

1. On January 5, 2010, Tennis Channel, Inc. (“Tennis Channel”), a video programming vendor,¹ filed a program carriage complaint against Comcast Cable Communications, LLC (“Comcast”), a multichannel video programming distributor (“MVPD”),² alleging that Comcast had violated Section 616 of the Communications Act of 1934, as amended,³ and Section 76.1301(c) of the Commission’s rules,⁴ by discriminating against Tennis Channel in video programming distribution.⁵

2. Comcast distributes Tennis Channel to approximately [REDACTED] million subscribers, primarily on its sports tier, the Sports & Entertainment Package (“SEP”), as is permitted under the parties’ 2005 Affiliation Agreement.⁶ In May 2009, Tennis Channel made a proposal to Comcast to amend the existing Affiliation Agreement to require broader distribution on Comcast systems. The proposed broader distribution would have increased Comcast’s total licensee fee payments to Tennis Channel by between [REDACTED] million over the remaining life of the Affiliation Agreement.

3. Tennis Channel asserts that Comcast’s denial of the 2009 proposal constituted discrimination on the basis of affiliation that unreasonably restrained its ability to compete fairly.⁷ Tennis Channel has requested that Comcast be ordered to carry Tennis Channel on the same tier as Versus and Golf Channel, which Comcast carries on its expanded basic tier.⁸

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

² An MVPD is “an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming.” 47 C.F.R. § 76.1000(e).

³ 47 U.S.C. § 536(a)(3).

⁴ 47 C.F.R. § 76.1301(c).

⁵ See The Tennis Channel, Inc. Carriage Agreement Complaint Against Comcast Cable Communications, LLC, File No. CSR-8258-P (filed Jan. 5, 2010).

⁶ Comcast Exh. 84 (Affiliation Agreement).

⁷ Tennis Channel Exh. 18 (Complaint) ¶ 52.

⁸ Tennis Channel Exh. 18 (Complaint) ¶¶ 101-102; Solomon Cross, Apr. 25, 2011 Tr. 322:15-324:21 (“Q: You are suing here for greater distribution than the D1 distribution you proposed in May of 2009, correct? A: As it stands today, yes.”).

4. On October 5, 2010, the Media Bureau designated the case for hearing before an Administrative Law Judge (“Presiding Judge”).⁹ The issues designated by the *HDO* are as follows:

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

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

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

5. On December 9, 2010, the Presiding Judge issued an Order setting an expedited discovery and procedural schedule. On March 17, 2011, the Presiding Judge granted a motion for extension of time filed by Tennis Channel and issued a revised scheduling order. Following the completion of discovery, and the submission of written direct testimony, proposed exhibits and trial briefs, a formal hearing was held in the Office of Administrative Law Judges (“OALJ”) courtroom at Commission headquarters from April 25, 2011 through May 2, 2011. Two fact witnesses and two expert witnesses appeared on behalf of Tennis Channel¹¹ and four fact witnesses and three expert witnesses appeared on behalf of Comcast.¹²

⁹ *In the Matter of The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Hearing Designation Order, MB Docket 10-204, File No. CSR-8258-P, DA 10-1918, 25 FCC Rcd 14149, 14162 ¶ 22 (MB 2010) (“*HDO*”). The Media Bureau did not designate for hearing the issue of whether Tennis Channel’s complaint was filed in accordance with the program carriage statute of limitations, and Comcast reserved its rights with respect to that issue. *See id.* at ¶ 2 n.4.

¹⁰ *HDO*, 25 FCC Rcd at 14163 ¶ 24.

¹¹ Mr. Ken Solomon, Tennis Channel’s chairman and chief executive officer, and Mr. Gary Herman, Tennis Channel’s senior vice president of advertising sales, testified as fact witnesses on behalf of Tennis Channel. In addition, Tennis Channel presented

6. On May 19, 2011, the Presiding Judge issued an Order setting forth a schedule for post-trial briefing. Pursuant to that Order, Tennis Channel and Comcast each filed (1) Proposed Findings of Fact and Conclusions of Law; (2) Proposed Reply Findings of Fact and Conclusions of Law; (3) a Proposed Recommended Decision; and (4) a Post-Trial Brief. Tennis Channel and Comcast together filed a Joint Glossary of Terms. The Enforcement Bureau, participating as a party limited to representing the public interest, conducted cross-examination and filed Comments.

FINDINGS OF FACT

Description of Parties

7. Complainant Tennis Channel is a single-sport network launched in 2003 that offers programming relating to tennis.¹³ Tennis Channel's owners include satellite operators DIRECTV and Dish Network, which collectively own approximately [REDACTED] of the network.¹⁴

8. Defendant Comcast Cable Communications, LLC is a subsidiary of Comcast Corporation, which is a leading provider of entertainment, information and communications products and services. Comcast Cable operates the company's multichannel video programming distribution service.¹⁵

9. As the Commission reiterated in its recent ruling in *WealthTV v. Time Warner Cable*, "resolution of Section 616 complaints . . . necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were

two expert witnesses: Mr. Timothy Brooks, a media research consultant; and Dr. Hal J. Singer, managing director at Navigant Economics.

¹² Mr. Gregory Rigdon, Comcast's executive vice president of content acquisition; Mr. Madison Bond, executive vice president of content distribution for NBCUniversal and formerly Comcast's executive vice president of content acquisition; Ms. Jennifer Gaiski, Comcast's senior vice president of content acquisition; and Mr. Joseph Donnelly, senior vice president and chief financial officer of Comcast Programming Group, testified as fact witnesses on behalf of Comcast. In addition, Comcast presented three expert witnesses: Mr. Jonathan Orszag, senior managing director of Compass Lexecon LLC, an economic consulting firm; Mr. Michael Egan, founder and principal of Renaissance Media Partners, LLC; and Mr. Marc Goldstein, former chief executive officer of Groupm, N.A.

¹³ Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 5.

¹⁴ Solomon Cross, Apr. 25, 2011 Tr. 509:12-510:1; Comcast Exhs. 100, 241, 242, 247, 398, 439; *see infra* ¶ 23.

¹⁵ Tennis Channel Exh. 308 (Comcast Corp. 2010 Form 10-K) at 1, 88; Comcast Exh. 75 (Bond Written Direct) ¶¶ 2, 32.

obtained, in order to determine whether a violation has, in fact, occurred.”¹⁶ Accordingly, the following findings of fact focus on the parties’ negotiations and the manner in which their respective rights were obtained.

The Early Years Before Tennis Channel Existed

10. Tennis Channel launched in 2003, during [REDACTED] [REDACTED].¹⁷ By that time, distributors already had comprehensive program offerings as a result of network launches in the 1980s and 1990s.¹⁸

11. Two of the channels which had been launched in the mid-1990s were Golf Channel and The Outdoor Life Network (later renamed Versus).¹⁹ When Golf Channel and Versus were first launched, Comcast owned a minority interest in them, but through a series of acquisitions over the years, Comcast came to be the sole owner.²⁰

12. By the early 2000s, Golf Channel and Versus had achieved wide distribution not only on Comcast systems but on MVPDs throughout the industry.²¹ The distribution reflected the fact that in the 1990s it was easier to launch a new network because newfound competition with satellite providers and regulatory changes facilitating the addition of programming created greater demand for new networks and because total license fees paid by distributors were lower.²²

13. Golf Channel and Versus provided hundreds of millions of dollars in financial incentives, commonly referred to as launch support payments, to Comcast and

¹⁶ *Herring Broad., Inc. d/b/a WealthTV, v. Time Warner Cable, Inc., et al.*, MB Docket No. 08-214, ___ FCC Rcd ___, Memorandum Opinion and Order ¶ 6 (FCC June 13, 2011), *adopting* MB Docket No. 08-214, 24 FCC Rcd 12967 (ALJ 2009) (hereinafter “*WealthTV*”).

¹⁷ Comcast Exh. 573 at TTCCOM_00037385.

¹⁸ Comcast Exh. 583; Bond Direct, Apr. 29, 2011 Tr. 1952:2-1954:2.

¹⁹ Bond Direct, Apr. 29, 2011 Tr. 1953:7-12; Comcast Exh. 203 at 312, 600.

²⁰ Tennis Channel Exh. 126 at COMTTC_00052118-19. As a result of the recent NBCUniversal (“NBCU”) transaction which closed in early 2011, Comcast’s ownership of Golf Channel and Versus was reduced to just over 50%. (Tennis Channel Exh. 13 ¶¶ 16-17).

²¹ Bond Direct, Apr. 29, 2011 Tr. 1964:3-9; Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-13.

²² Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-15; Orszag Direct, Apr. 27, 2011 Tr. 1223:9-1224:16.

other distributors (including distributors subsequently acquired by Comcast) to make broader distribution more attractive to distributors.²³

14. By the time Tennis Channel launched in 2003, however, much of the initial demand for new programming had already been filled, and the increasing costs to distributors of carrying all of this existing programming had become a significant issue.²⁴ Competition from telephone companies such as AT&T and Verizon, as well as from satellite providers such as DIRECTV and Dish Network, also had made it increasingly difficult for cable companies to absorb higher programming costs.²⁵

Tennis Channel Launches and Pursues a Sports Tier Strategy

15. Tennis Channel's earliest distributor agreements in 2002 and 2003 were with other cable companies and the National Cable Television Cooperative ("NCTC"), not Comcast.²⁶ Consistent with the sharply reduced demand for broadly distributed cable networks, those early agreements were generally for carriage on a sports tier – the industry term for an arrangement whereby programming, in this case sports programming, is provided not to everyone who signs up for more broadly distributed tiers of cable service but, instead, only to those subscribers who request the programming and are willing to pay an additional monthly fee to receive it.²⁷ One of the advantages of this type of distribution is that it allows the distributor to control costs by paying for programming only to the extent that subscribers are interested in it and willing to pay for it.²⁸ From the perspective of a programmer attempting to launch a new network, sports tiers are an attractive option to offer distributors because by limiting costs, sports tiers make it less risky for distributors to launch new networks.²⁹ Sports tiers are an attractive

²³ Comcast Exh. 76 (Donnelly Written Direct) ¶ 18; Donnelly Direct, May 2, 2011 Tr. 2494:21-2495:17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 28-29; Bond Direct, Apr. 29, 2011 Tr. 1962:5-10; Comcast Exh. 77 (Egan Written Direct) ¶ 13.

²⁴ Comcast Exh. 77 (Egan Written Direct) ¶¶ 14-15; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15; Bond Direct, Apr. 29, 2011 Tr. 1969:15-1970:4.

²⁵ Comcast Exh. 77 (Egan Written Direct) ¶ 14; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15.

²⁶ Comcast Exh. 165 (6/7/02 Time Warner Cable Affiliation Agreement); Comcast Exh. 231 (6/17/02 NCTC Affiliation Agreement); Comcast Exh. 235 (3/7/03 Cox Letter Agreement).

²⁷ Comcast Exh. 75 (Bond Written Direct) ¶ 4; Comcast Exhs. 52, 165, 231, 235.

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

²⁹ Tennis Channel expressly stated to Comcast that sports tier carriage would provide Comcast with [REDACTED] (Comcast Exh. 52).

option to consumers as well, giving sports fans the option of a specialized tier of sports networks without passing on the costs of those networks to consumers who do not wish to pay for them.³⁰

16. In 2005, Tennis Channel persuaded Comcast to carry it by agreeing to contract terms that permitted Comcast to carry Tennis Channel on a sports tier, as other MVPDs, such as Time Warner and Cox, already were doing.³¹ The Affiliation Agreement between Comcast and Tennis Channel contained a most favored nation (“MFN”) provision entitling Comcast to benefit from other agreements that Tennis Channel might already have or might negotiate with other MVPDs in the future, and also

[REDACTED]
The Affiliation Agreement also gives Comcast complete discretion to assign Tennis Channel to any channel number.³³

17. At the hearing, Tennis Channel did not call any witness who was involved in the negotiations with Comcast over the parties’ March 2005 Affiliation Agreement. Mr. Solomon, who arrived at Tennis Channel in April 2005, did not participate in those negotiations.³⁴ Mr. Bond gave un rebutted testimony that the “context of that deal, when we did it, was a sports tier deal. That was the discussion around it.”³⁵ Mr. Bond’s testimony is supported by contemporaneous documentation, including [REDACTED]

18. The 2005 Affiliation Agreement expressly [REDACTED] and contemplates the addition of a high definition (“HD”) feed of Tennis Channel. But the Affiliation Agreement does not require Comcast to adjust Tennis Channel’s carriage as a result.

³⁰ Gaiski Cross, May 2, 2011 Tr. 2409:1-15.

³¹ Comcast Exh. 84 (Affiliation Agreement); Comcast Exh. 52; Comcast Exh. 75 (Bond Written Direct) ¶ 5; Bond Direct, Apr. 29, 2011 Tr. 1985:20-1988:13.

³² Comcast Exh. 84 (Affiliation Agreement) § 15.1 at TTCCOM_00020421-23.

³³ Comcast Exh. 84 (Affiliation Agreement) § 6.1 at TTCCOM_00020405-06. Tennis Channel has never asked Comcast to change its channel number. (Bond Direct, Apr. 29, 2011 Tr. 2057:16-20; Bond Redirect, Apr. 29, 2011 Tr. 2326:10-20; Comcast Exh. 517 (Solomon Dep.) 225:6-11).

³⁴ Solomon Cross, Apr. 25, 2011 Tr. 353:6-10; Comcast Exh. 84.

³⁵ Bond Cross, Apr. 29, 2011 Tr. 2158:18-2159:18.

³⁶ Comcast Exh. 52.

³⁷ Comcast Exh. 84 (Affiliation Agreement) § 4.1 at TTCCOM_00020400.

19. The parties' Affiliation Agreement, as amended, remains in full force and effect, and Tennis Channel concedes that Comcast has fully complied with its terms.³⁸ Tennis Channel's carriage by Comcast has increased dramatically since launch, and Tennis Channel is now carried to [REDACTED] Comcast subscribers, including on approximately [REDACTED] systems that carry the network broadly.³⁹

20. Shortly after the parties' Affiliation Agreement was signed, Tennis Channel hired Mr. Solomon, who soon pursued a very different distribution strategy.⁴⁰

Tennis Channel's New Equity-for-Carriage Strategy

21. Ken Solomon took over as Tennis Channel's new CEO in April 2005.⁴¹ Mr. Solomon had extensive prior experience in the video programming industry, though none of that experience was with a single-sports network.⁴² Shortly thereafter, Mr. Solomon decided to abandon sports tiers as a strategy, telling the Tennis Channel board that [REDACTED].⁴³

22. Mr. Solomon decided to pursue broader distribution through equity-for-carriage deals with MVPDs.⁴⁴ An equity-for-carriage deal is one in which a programmer induces an MVPD to give its programming broader distribution by offering the MVPD an equity stake in the programmer.⁴⁵ Internal Tennis Channel documents, including e-mail and Mr. Solomon's own notes, refer to equity-for-carriage offers that Tennis Channel

³⁸ Comcast Exh. 84 at TTCCOM_00020400; Comcast Exhs. 85, 204; Tennis Channel Opening, Apr. 25, 2011 Tr. 121:16-19.

³⁹ Comcast Exhs. 205, 206; Bond Direct, Apr. 29, 2011 Tr. 1989:15-1990:5; Comcast Exh. 75 (Bond Written Direct) ¶ 7; Comcast Exh. 78 (Gaiski Written Direct) ¶ 21; Comcast Exh. 80 (Orszag Written Direct) ¶ 28.

⁴⁰ Shortly before Mr. Solomon's arrival, Frank Garland, Tennis Channel's then-senior advertising executive, informed Tennis Channel's top management that its ratings and advertising projections [REDACTED]

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

⁴¹ Solomon Cross, Apr. 25, 2011 Tr. 353:6-10.

⁴² Solomon Cross, Apr. 25, 2011 Tr. 353:11-354:2.

⁴³ Comcast Exhs. 268, 701 at TTCCOM_00067839; Solomon Cross, Apr. 25, 2011 Tr. 395:11-17.

⁴⁴ Comcast Exh. 701 at TTCCOM_00067839; Solomon Cross, Apr. 25, 2011 Tr. 407:22-410:5, 413:11-16, 419:3-420:10.

⁴⁵ Solomon Cross, Apr. 25, 2011 Tr. 397:6-399:11.

made to DIRECTV and Dish Network not long after Mr. Solomon took over as CEO and chairman.⁴⁶ Though Mr. Solomon at first denied during his testimony that the transactions with DIRECTV and Dish Network were negotiated as equity-for-carriage deals,⁴⁷ his testimony on that point was not credible, and eventually Mr. Solomon conceded that Tennis Channel made equity-for-carriage proposals to both Dish Network and DIRECTV to incentivize them to provide distribution.⁴⁸

23. In 2006 and 2007, Tennis Channel signed equity-for-carriage deals first with Dish Network and then with DIRECTV.⁴⁹ In exchange for distribution to a guaranteed minimum percentage of subscribers, Dish Network received a {REDACTED} equity interest in Tennis Channel and DIRECTV received a {REDACTED} stake. Each MVPD also received a seat on Tennis Channel's board of directors.¹

The 2006 and 2007 Equity-for-Carriage Offers to Comcast

24. Pursuant to the MFN provisions of the parties' Affiliation Agreement, Tennis Channel made the same equity-for-carriage offers to Comcast that it made to Dish Network in 2006 and DIRECTV in 2007.⁵² Each time, Comcast performed a cost-benefit analysis and concluded that the costs of broader carriage outweighed the benefits of Tennis Channel's offer, and each time Comcast declined the offer on that basis.⁵³ In both cases, the cost-benefit analysis conducted by Comcast was documented in

⁴⁶ Comcast Exhs. 111 at TTCCOM_00003632, 508 at TTCCOM_00065359, 517, 703, 704.

⁴⁷ Solomon Cross, Apr. 25, 2011 Tr. 383:10-384:5; *see also* Tennis Channel Exh. 14 (Solomon Written Direct) at ¶ 8 n.3.

⁴⁸ Solomon Cross, Apr. 25, 2011 Tr. 408:13-410:5 (“Q: So this, you agree, is an equity for carriage offer that you made to DirecTV? A: It’s a proposal for them to make an offer back to us. Q: An equity for carriage proposal? A: Yes.”), 413:11-16, 419:3-420:10 (“Q: This letter is describing an equity for carriage proposal in which you are offering [Dish Network] equity in exchange for getting greater distribution, correct? . . . THE WITNESS: . . . It appears, yes, that that’s what we’re proffering in this note. BY MR. CARROLL: Q: And that is what you proffered in the note to Dish, correct? A: Yes.”); Comcast Exhs. 503, 703.

⁴⁹ Comcast Exhs. 100, 241, 242, 247.

⁵⁰ Comcast Exhs. 100, 241, 242, 247, 398, 439.

⁵¹ Solomon Direct, Apr. 25, 2011 Tr. 316:10-14.

⁵² Comcast Exh. 58; *see also* Comcast Exh. 84 at TTCCOM_00020421-23; Comcast Exh. 86.

⁵³ Comcast Exhs. 60, 66, 86; Comcast Exh. 76 (Donnelly Written Direct) ¶¶ 7-17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 25-26.

contemporaneous business records.⁵⁴ [REDACTED]

25. It is undisputed that after each of its decisions in 2006 and 2007, Comcast explained to Tennis Channel the cost-benefit analysis that it had performed, and there is no evidence that anyone at Tennis Channel complained that Comcast’s analysis of each offer was in any way wrong or discriminatory.⁵⁶ In fact, during hearing testimony, Mr. Solomon admitted that he did not believe Comcast’s decision in 2007 was discriminatory.⁵⁷

Comcast Had Legitimate and Non-Discriminatory Business Reasons for Declining Tennis Channel’s 2009 Proposal

26. The central factual dispute in this case concerns another proposal which Tennis Channel made to Comcast in 2009 and communications between the two sides relating to that proposal. The two key witnesses on this central issue were Tennis Channel’s CEO, Mr. Solomon, and the former head of content acquisition at Comcast, Mr. Bond.⁵⁸ Mr. Bond’s testimony was consistent, competent and credible.⁵⁹ The testimony of Mr. Solomon, by contrast, was often inconsistent and not credible. Based on these credibility findings, the testimony of Mr. Bond is accepted and that of Mr. Solomon rejected on factual issues where the two gave differing accounts.

⁵⁴ Comcast Exhs. 60, 66.

⁵⁵ Comcast Exhs. 112, 320.

⁵⁶ In particular, Tennis Channel did not complain about Comcast’s changes to the projections in Tennis Channel’s business plan. (Comcast Exh. 106; Donnelly Direct, May 2, 2011 Tr. 2519:22-2520:17). Tennis Channel was aware that the projections set forth in its business plan were significantly overstated. Upon his arrival at Tennis Channel, Mr. Solomon had described Tennis Channel’s business plan as a [REDACTED] (Comcast Exh. 709; *see also* Comcast Exhs. 104, 572 (stating that Tennis Channel employees had previously inflated ratings and advertising projections)).

⁵⁷ Solomon Cross, Apr. 25, 2011 Tr. 457:11-16. Tennis Channel now disclaims that any action by Comcast prior to June 9, 2009 violated Section 616. (Tennis Channel Findings ¶ 293).

⁵⁸ After the NBCU transaction closed in 2011, Mr. Bond changed jobs and became the Executive Vice President of Content Distribution for NBCU, where he is responsible for distributing all of the NBC cable channels, broadcast stations and other content. (Bond Direct, Apr. 29, 2011 Tr. 1945:4-22; Comcast Exh. 75 (Bond Written Direct) ¶ 2).

⁵⁹ In *WealthTV*, Mr. Bond testified before the Presiding Judge who found Mr. Bond’s testimony to be “consistent, competent and credible.” *WealthTV*, 24 FCC Rcd at 12988-89 ¶ 44 (ALJ).

27. Mr. Solomon testified that he approached Comcast in May 2009 and made a proposal for Comcast to move Tennis Channel off the sports tier where it generally had been distributed since 2005.⁶⁰ Under the 2009 proposal, Comcast was offered two options for increased distribution: (1) D0, or digital starter, with a penetration level among Comcast subscribers of approximately [REDACTED]; or (2) D1, also known as digital classic, with a penetration level of roughly [REDACTED]. Because the fees Tennis Channel charges are calculated per subscriber, the options, even at the discounted rate offered, would have increased the total fees Comcast would have to pay Tennis Channel over the remaining life of their contract by [REDACTED] million.⁶² Tennis Channel presented no evidence showing that Comcast would be able to earn additional revenues to offset this substantial increase in costs it would have incurred under the 2009 proposal.⁶³

28. Mr. Solomon testified, however, that he believed that Comcast would find the 2009 proposal “irresistible” because of the increased Grand Slam and high definition coverage which Tennis Channel was able to provide.⁶⁴ Comcast already had the rights to offer this programming to its subscribers on its sports tier. And Comcast had already declined two equity-for-carriage proposals in 2006 and 2007, the terms of which were more favorable financially to Comcast than the “irresistible” proposal in 2009.⁶⁵ Prior to 2009, Tennis Channel had had no success in persuading other cable companies that, like Comcast, had contracts entitling them to sports tier carriage to surrender those contract rights in favor of broader distribution agreements.⁶⁶ By distributing Tennis Channel on its sports tier, Comcast makes the network available to nearly all of its subscribers, making it unlikely that subscribers would choose to terminate their cable service to receive a network to which they already have access.⁶⁷ In early 2009, every other major

⁶⁰ Solomon Direct, Apr. 25, 2011 Tr. 304:4-305:9.

⁶¹ Comcast Exhs. 588, 638; Comcast Exh. 75 (Bond Written Direct) ¶ 14; Comcast Exh. 78 (Gaiski Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2093:4-2097:18; Joint Glossary of Terms, “Tier”; Tennis Channel Exh. 19 (Answer – Orszag Declaration) Table 1.

⁶² Comcast Exhs. 588, 638; Comcast Exh. 78 (Gaiski Written Direct) ¶ 14; Gaiski Direct, May 2, 2011 Tr. 2344:1-2347:14. Tennis Channel’s own contemporaneous analysis confirmed that accepting Tennis Channel’s 2009 proposal would have increased Comcast’s costs considerably. (Comcast Exh. 467).

⁶³ Under these circumstances, Tennis Channel’s proposal did not offer meaningful launch support to Comcast. (Joint Glossary of Terms, “Launch Support”).

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

⁶⁵ Comcast Exhs. 86, 87.

⁶⁶ Comcast Exhs. 112, 320.

⁶⁷ See *infra* ¶ 40.

cable company that carried Tennis Channel did so on some form of a sports tier, and two other distributors (AT&T and Cablevision) still did not carry Tennis Channel at all.⁶⁸

29. In addition, the evidence showed that since at least January 2007, Tennis Channel had been considering [REDACTED]

[REDACTED] and that by early 2009, months before it made its “irresistible” offer to Comcast, Tennis Channel already was [REDACTED]

30. Mr. Solomon’s testimony that the 2009 proposal was “irresistible” is therefore not credible, and it seems more likely that the 2009 offer was part of a legal strategy to set up a claim against Comcast than a sincere effort to start a negotiation. Mr. Bond testified that, in April 2009, Mr. Solomon sent a letter that was threatening in tone, and that the offer itself in May 2009 was presented more as a take-it-or-leave-it proposition than as the start of a negotiation.⁷¹

31. Mr. Solomon testified on direct examination that after receiving Tennis Channel’s offer in May 2009, Mr. Bond never made a counterproposal and that it was Mr. Bond who ended negotiations.⁷² Mr. Solomon recanted that testimony on cross-examination, however, and admitted that, in fact, Mr. Bond had made a counterproposal and that it was Mr. Solomon, and not Mr. Bond, who had cut off any further discussion by declaring that he, Mr. Solomon, was not interested in “half measures” and that further discussion between the two sides would be “a waste of time.”⁷³ During his testimony, Mr. Bond explained that Mr. Solomon had presented the 2009 proposal as almost a take-it-or-leave-it offer but that notwithstanding that approach, he, Mr. Bond, was prepared to

⁶⁸ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23; Comcast Exh. 659; Comcast Exh. 517 (Solomon Dep.) 196:9-197:19.

⁶⁹ Comcast Exhs. 22, 24, 125, 136, 137, 271, 516, 522, 626. For example, in early 2007, [REDACTED] (Comcast Exh. 24).

⁷⁰ Herman Cross, Apr. 26, 2011 Tr. 662:20-663:19; Comcast Exh. 368 (Herman Dep.) 162:17-178:19; 206:10-208:19; Comcast Exh. 517 (Solomon Dep.) 278:9-280:6.

⁷¹ Comcast Exh. 592; Comcast Exh. 75 (Bond Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2107:16-2109:17.

⁷² Solomon Direct, Apr. 25, 2011 Tr. 283:5-21; *see also* Tennis Channel Exh. 14 (Solomon Written Direct) ¶¶ 28-29.

⁷³ Solomon Cross, Apr. 25, 2011 Tr. 348:13-350:1; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2130:7.

engage in further discussions and had even offered to explore ways in which he might identify some regions where Comcast might be able to offer Tennis Channel increased distribution.⁷⁴ Mr. Bond confirmed, though, that Mr. Solomon had cut off further discussions by making the pronouncements about half measures and further discussions being a waste of time.⁷⁵

32. It is also not credible that Mr. Solomon would have believed that improvements in the quality of programming on Tennis Channel would cause Comcast to view the 2009 proposal more favorably than the 2006 and 2007 MFN offers. First, Tennis Channel had been unsuccessful at persuading other MVPDs to carry its programming more broadly, and thus at the time of the 2009 proposal, most other major distributors continued to carry Tennis Channel on a sports tier or did not carry it at all.⁷⁶ Second, many of the so-called programming improvements were not really new in 2009, but either had been implemented before the 2007 MFN offer or were already part of the contract rights that Comcast enjoyed under the parties' 2005 Affiliation Agreement. For example, Tennis Channel had obtained telecast rights to the French Open, the Australian Open and Wimbledon by 2007 and [REDACTED] and the 2005 Affiliation Agreement already required Tennis Channel to provide HD programming to Comcast when it became available.⁷⁷

33. Mr. Solomon's testimony that Tennis Channel's programming should be compelling to Comcast viewers because a "preponderance" of Tennis Channel's "anchor programming" is live also was not credible.⁷⁸ On cross-examination, Mr. Solomon tried to defend this overstatement by claiming that in his view 25% was a "preponderance,"⁷⁹ and in response to questioning by the Presiding Judge, Mr. Solomon admitted that use of

⁷⁴ Comcast Exh. 75 (Bond Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2129:21.

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

⁷⁶ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23; Solomon Cross, Apr. 25, 2011 Tr. 422:21-423:7; Comcast Exh. 201; Comcast Exh. 517 (Solomon Dep.) 154:3-11; 196:9-197:19

[REDACTED] Unwilling to launch Tennis Channel on a broad tier, Cablevision subsequently joined the NCTC and in August 2009 launched Tennis Channel on a sports tier pursuant to Tennis Channel's 2002 contract with the NCTC. (Comcast Exh. 598; *see also* Comcast Exh. 231 (NCTC Affiliation Agreement)). In June 2010, AT&T launched Tennis Channel on a tier with about [REDACTED] penetration. (Comcast Exhs. 201, 250).

⁷⁷ Comcast Exhs. 84, 66, 164, 204.

⁷⁸ Solomon Cross, Apr. 25, 2011 Tr. 464:4-464:9.

⁷⁹ Solomon Cross, Apr. 25, 2011 Tr. 465:13-15.

the term “anchor programming” was not standard in the industry and was Tennis Channel’s term.⁸⁰

34. Mr. Solomon also knew from communications with Mr. Bond before the 2009 proposal was presented that Comcast’s major concern would be the significant increase in costs.⁸¹ Comcast had consistently identified increased costs as a major concern at the time of the 2006 and 2007 MFN offers, and Mr. Bond reiterated that concern in discussions with Mr. Solomon in the months leading up to the 2009 proposal.⁸² Thus, in conversations between the two on March 4 and again on March 30, Mr. Bond explained to Mr. Solomon that increasing distribution beyond the sports tier would impose significant cost increases on Comcast and invited Mr. Solomon to propose ways in which the additional cost burden to Comcast might be reduced or eliminated.⁸³

35. In response, however, Mr. Solomon sent Mr. Bond a letter on April 22, which Mr. Bond credibly characterized as aggressive in that it failed to address the cost issue that Mr. Bond had raised and, instead, threatened that Comcast had not “lived up to” the “spirit and substance” of the 2005 Affiliation Agreement.⁸⁴ Tennis Channel has conceded in this proceeding, however, that Comcast has fully complied with the terms of that agreement.⁸⁵

36. Mr. Bond testified that after receiving the 2009 proposal, Comcast performed another cost-benefit analysis which showed, once again, that the increased costs would be significant, with no offsetting benefit or gain.⁸⁶ Mr. Bond testified that he asked his direct report, Ms. Jennifer Gaiski, to calculate the increased cost of the proposal and also to check with the division heads to determine if there was any indication of subscriber interest in broader distribution of Tennis Channel in any local markets.⁸⁷ Ms. Gaiski testified that she performed both tasks, and her testimony was fully corroborated

⁸⁰ Solomon Cross, Apr. 25, 2011 Tr. 524:9-526:11.

⁸¹ Comcast Exh. 75 (Bond Written Direct) ¶¶ 10, 12; *see also* Comcast Exh. 517 (Solomon Dep.) 300:10-23.

⁸² Comcast Exh. 75 (Bond Written Direct) ¶¶ 10, 12, 25-26.

⁸³ Comcast Exh. 75 (Bond Written Direct) ¶¶ 10, 12; Bond Direct, Apr. 29, 2011 Tr. 2088:21-2089:2; Bond Cross, Apr. 29, 2011 Tr. 2208:1-11.

⁸⁴ Comcast Exh. 592; Comcast Exh. 75 (Bond Written Direct) ¶ 13; Bond Direct, Apr. 29, 2011 Tr. 2107:16-2109:17.

⁸⁵ Tennis Channel Opening, Apr. 25, 2011 Tr. 121:16-19.

⁸⁶ Comcast Exh. 75 (Bond Written Direct) ¶¶ 18-19; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 17-18; Bond Direct, Apr. 29, 2011 Tr. 2122:11-2125:9; Gaiski Direct, May 2, 2011 Tr. 2343:1-2369:5.

⁸⁷ Comcast Exh. 75 (Bond Written Direct) ¶ 16; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 15-16; Bond Direct, Apr. 29, 2011 Tr. 2110:8-2111:9.

by contemporaneous documentation of both tasks.⁸⁸ During her hearing testimony, Ms. Gaiski identified the cost calculation spreadsheet she had prepared shortly after the 2009 offer showing that the increased cost to Comcast would be between [REDACTED] over the remaining contract term,⁸⁹ and Ms. Gaiski also identified the handwritten notes she had made of her conversation in early June with division heads.⁹⁰ Those contemporaneous records completely corroborated Ms. Gaiski's testimony that the 2009 proposal would increase Comcast's costs by roughly [REDACTED] million per year, and that all four regional divisions⁹¹ had reported no significant interest from subscribers that might justify incurring those additional costs.⁹² 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."⁹³ The evidence is uncontroverted that Comcast's customer surveys showed little consumer demand for Tennis Channel.⁹⁴

37. Both Mr. Bond and Ms. Gaiski testified that based on this cost-benefit analysis, it made no economic sense for Comcast to accept Tennis Channel's proposal, and that it was on this basis that the proposal was declined.⁹⁵ Both also testified that

⁸⁸ Comcast Exhs. 130, 588; Comcast Exh. 78 (Gaiski Written Direct) ¶ 14; Gaiski Direct, May 2, 2011 Tr. 2344:1-2347:14. Where – as here – the legitimate business reasons for a carriage decision are memorialized in contemporaneous documentation, that documentation is proof of the absence of affiliation-based discrimination. *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, 18114 ¶ 21 (2010), *appeal docketed*, No. 11-1151 (4th Cir. Feb. 22, 2011) (hereinafter "*MASN*").

⁸⁹ Comcast Exh. 588; Gaiski Direct, May 2, 2011 Tr. 2344:1-2347:14.

⁹⁰ Comcast Exh. 130; Gaiski Direct, May 2, 2011 Tr. 2353:16-21.

⁹¹ Each individual Comcast cable system is run as its own profit center. (Bond Direct, Apr. 29, 2011 Tr. 1999:6-2000:16). In effect, each system is "essentially a cable operator . . . running a business" with associated costs and revenues. (*Id.* 2000:5-16). Systems are charged with managing their costs – which include programming expenditures and employee salaries – and maximizing their revenues. (*Id.*) As Mr. Bond explained, the systems "have various expenses and they have a profit that's generated and they're judged on their performance." (*Id.*) The overall budget for Comcast Cable at the corporate level is "the aggregation of all of those individual profit centers." (*Id.* 2002:6-16).

⁹² Comcast Exhs. 130, 588; Comcast Exh. 78 (Gaiski Written Direct) ¶ 16.

⁹³ Gaiski Cross, May 2, 2011 Tr. 2421:17-19.

⁹⁴ Rigdon Cross, Apr. 28, 2011 Tr. 1881:15-1882:8.

⁹⁵ Comcast Exhs. 130, 588, 638; Comcast Exh. 75 (Bond Written Direct) ¶¶ 18-19; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 17-18; Bond Direct, Apr. 29, 2011 Tr. 2122:11-2125:9; Gaiski Direct, May 2, 2011 Tr. 2343:1-2369:5.

considerations of affiliation or non-affiliation played no role in their decision making.⁹⁶ The testimony of both Mr. Bond and Ms. Gaiski was consistent with the contemporaneous evidence and completely credible.⁹⁷

38. Tennis Channel's counsel raised questions about whether revenues from additional advertising availability (known as "ad avails") might help offset some of this increased cost.⁹⁸ But Mr. Bond and Ms. Gaiski both explained that Comcast had significant excess ad avail inventory which it was unable to use, and that increasing that excess inventory would not have been a benefit.⁹⁹ And although Tennis Channel asked questions about whether wider distribution might lead to increased subscribers, it offered no proof of that, and, in fact, the evidence in the record is to the contrary.¹⁰⁰ Thus, Ms. Gaiski's notes of her June 2009 field check corroborate that, in the southern division, Comcast had suffered no loss of subscribers when it shifted Tennis Channel from broad carriage to the sports tier in some systems it had acquired from another MVPD.¹⁰¹ And in response to questioning by Tennis Channel's counsel, Mr. Bond's successor, Mr. Greg Rigdon, explained that he had independently come to the same conclusion when, prior to joining Comcast, he had been in charge of content acquisition at another cable company, Charter.¹⁰²

39. Comcast's cost-benefit analysis is also supported by other evidence in the record and by the absence of any proof of market fallout from Comcast's decision to continue carrying Tennis Channel on the sports tier. Comcast's decision was consistent with the decisions of other MVPDs such as Time Warner Cable, Charter and Cablevision which also carry Tennis Channel on a sports tier, to decline offers from Tennis Channel for broader carriage.¹⁰³ Tennis Channel has acknowledged that distributors with the contractual right to carry Tennis Channel on the sports tier would rather do so than

⁹⁶ Comcast Exh. 78 (Gaiski Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2127:3-7.

⁹⁷ *See, e.g.*, Comcast Exhs. 130, 588, 638.

⁹⁸ Orszag Cross, Apr. 27, 2011 Tr. 1283:7-14.

⁹⁹ Bond Direct, Apr. 29, 2011 Tr. 2126:3-2127:2; Bond Cross, Apr. 29, 2011 Tr. 2323:2-2324:8; Gaiski Cross, May 2, 2011 Tr. 2414:15-18.

¹⁰⁰ *See* Comcast Exh. 78 (Gaiski Written Direct) ¶ 16; Comcast Exh. 130.

¹⁰¹ Comcast Exh. 130; Gaiski Direct, May 2, 2011 Tr. 2365:4-2366:17.

¹⁰² Rigdon Direct, Apr. 28, 2011 Tr. 1805:21-1806:22; Rigdon Cross, Apr. 28, 2011 Tr. 1854:10-1855:10 (explaining that "there was no real discernible consumer demand" for Tennis Channel).

¹⁰³ Comcast Exhs. 31, 32, 165, 201, 487, 529, 534, 545.

distribute Tennis Channel more broadly.¹⁰⁴ Thus, in July 2009, Cablevision rejected Tennis Channel's request for broad carriage, referring to the service as [REDACTED] and had previously explained that broad carriage would simply [REDACTED] with no benefit to Cablevision. In July 2010, Time Warner – which, like Comcast, has the right to carry Tennis Channel on the sports tier – rejected Tennis Channel's proposal for broader distribution, noting that it [REDACTED] to Tennis Channel's proposal and adding that it [REDACTED].¹⁰⁶ Also in 2010, Tennis Channel proposed that Dish Network distribute Tennis Channel to [REDACTED] additional subscribers, but Dish declined the proposal, and Verizon, which previously had distributed Tennis Channel broadly, negatively repositioned the network to a lower distribution level, [REDACTED].¹⁰⁷ In July 2010, Charter rejected Tennis Channel's proposal for broader distribution due to a lack of consumer demand for Tennis Channel.¹⁰⁸ Importantly, each of the five largest cable companies – Comcast, Time Warner Cable, Cox, Charter and Cablevision – continues to exercise its contractual right to carry Tennis Channel on its sports tier, and Tennis Channel has not alleged that the decisions of any of the other distributors were discriminatory.

40. The parties agree that DIRECTV and Dish Network are competitors of Comcast,¹⁰⁹ yet Tennis Channel offered no evidence that Comcast had lost any subscribers to its competitors after it declined the MFN offers in 2006 and 2007. And because Comcast subscribers already could receive Tennis Channel programming as part of the sports tier for a monthly fee in the range of \$5-8, it was reasonable for Comcast to believe that subscribers who really wanted to see additional tennis programming (subscribers who Tennis Channel itself describes as among the wealthiest viewers in the market) would simply sign up for its sports tier, rather than terminate their cable service and switch to Dish Network or DIRECTV.¹¹⁰ As Tennis Channel itself acknowledged,

¹⁰⁴ Comcast Exh. 121 at TTCCOM 00065126 [REDACTED]

¹⁰⁵ Comcast Exhs. 32, 529, 534.

¹⁰⁶ Comcast Exh. 31.

¹⁰⁷ Comcast Exhs 201, 632, 627, 650.

¹⁰⁸ Comcast Exh. 545; Rigdon Direct, Apr. 28, 2011 Tr. 1798:15-1799:5, 1806:16-22.

¹⁰⁹ Tennis Channel Trial Brief at 3; Bond Cross, Apr. 29, 2011 Tr. 2309:22-2310:4.

¹¹⁰ Comcast Exh. 78 (Gaiski Written Direct) ¶ 4; Comcast Exh. 283; Bond Direct, Apr. 29, 2011 Tr. 1988:11-1989:14, 2052:13-2054:4; Rigdon Direct, Apr. 28, 2011 Tr. 1806:16-22, 1808:21-1810:8.

that logic applies to all cable MVPDs with existing sports tiering rights, not just Comcast. Thus, an internal Tennis Channel distribution update to Mr. Solomon in 2010 regarding the continued refusal of another cable MVPD, Time Warner Cable, to increase distribution beyond its sports tier, states that any distributor with the right to carry Tennis Channel on a sports tier would [REDACTED] }¹¹¹

41. The evidence also shows that had Tennis Channel been willing to negotiate with Comcast on the cost issue, further discussions likely would not have been the “waste of time” that Mr. Solomon claimed. Within four months of Mr. Solomon’s June 2009 discussion with Mr. Bond, Mr. Solomon had discussions with one of his colleagues at Tennis Channel about the fact that two other sports networks not affiliated with Comcast, Sportsman Channel and Outdoor Channel, had signed deals for broader distribution in certain Comcast regions.¹¹² That fact corroborated Mr. Bond’s statements to Mr. Solomon about being willing to find regions to increase distribution. And Mr. Solomon’s reaction to this news corroborated Mr. Bond’s point to him that cost was the major issue. In an e-mail responding to the news, Mr. Solomon observed “Yup . . . \$\$\$\$,” which he agreed during cross-examination meant that there had been some value exchanged by those other networks in order to incentivize Comcast to provide them with more distribution.¹¹³ During his testimony, Mr. Solomon admitted that he had never followed up with Mr. Bond after learning about these other transactions to see whether Tennis Channel might be able to strike a similar deal under which it offered some additional value in exchange for the additional distribution it was seeking.¹¹⁴ That failure to follow up with Mr. Bond is consistent with Mr. Bond’s view that Tennis Channel’s proposal was really an all-or-nothing demand, and not a good-faith attempt at negotiation.¹¹⁵

42. Based on the findings set forth above, Comcast had legitimate and non-discriminatory business reasons for declining to accept Tennis Channel’s 2009 proposal. Moreover, it was Tennis Channel, not Comcast, that broke off further negotiations.

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

43. In its previous filings in this case, Tennis Channel alleged that Comcast’s declining of its 2009 proposal was discriminatory because, in making its decision,

¹¹¹ Comcast Exh. 121 at TTCCOM_00065126.

¹¹² Comcast Exh. 707.

¹¹³ Comcast Exh. 707; Solomon Cross, Apr. 25, 2011 Tr. 482:16-483:1.

¹¹⁴ Solomon Cross, Apr. 25, 2011 Tr. 486:6-487:13.

¹¹⁵ Bond Direct, Apr. 29, 2011 Tr. 2128:9-2129:7.

Comcast took Golf Channel and Versus into account.¹¹⁶ In its post-trial submission, Tennis Channel argues the opposite, contending that Comcast discriminated by *not* considering Golf Channel and Versus in declining Tennis Channel’s 2009 proposal.¹¹⁷ 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 when Comcast reviewed Tennis Channel’s 2009 offer.¹¹⁸

44. In the substantive discussions between the two sides concerning the 2009 proposal, the distribution of Golf Channel and Versus was never mentioned.¹¹⁹ Nor was there any mention of those networks in the discussions that Comcast had internally in deciding how to respond to the proposal.¹²⁰ Nor did Mr. Solomon mention them during the phone call with Mr. Bond when he learned that Comcast had declined the proposal.¹²¹ There was, for example, no moment when Mr. Solomon compared Tennis Channel to Golf Channel and Versus, or requested that Comcast give Tennis Channel the same distribution rights as Golf Channel and Versus.¹²² Mr. Solomon’s testimony that Tennis Channel never discussed or referred to Golf Channel and Versus during the May 2009 negotiations¹²³ undermines Tennis Channel’s proposed finding that Tennis Channel believed its offer “would be ‘persuasive’ to Comcast” { [REDACTED] } than Golf Channel and Versus.¹²⁴

45. No evidence was presented that Comcast’s affiliated networks Golf Channel and Versus benefited in any way from Comcast’s decision to decline Tennis Channel’s 2009 proposal. Golf Channel and Versus already enjoyed wide distribution

¹¹⁶ 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.

¹¹⁷ Tennis Channel Findings ¶¶ 77, 142, 273.

¹¹⁸ Comcast Findings ¶¶ 43-46.

¹¹⁹ Solomon Recross, Apr. 25, 2011 Tr. 533:14-20.

¹²⁰ See, e.g., Comcast Exhs. 130, 588, 638; Comcast Exh. 78 (Gaiski Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2127:3-7.

¹²¹ Gaiski Redirect, May 2, 2011 Tr. 2476:5-9.

¹²² Gaiski Redirect, May 2, 2011 Tr. 2476:5-9.

¹²³ 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.”).

¹²⁴ Tennis Channel Findings ¶ 65 (citing Tennis Channel Exh. 14 (Solomon Written Direct) at ¶ 26).

throughout the industry by 2009 as mature networks launched many years earlier than Tennis Channel.¹²⁵

46. There also was no evidence presented that Comcast ever considered Tennis Channel's programming to be a threat to the continued success of Golf Channel and Versus. Since Tennis Channel was already available to Comcast subscribers on the sports tier, Comcast subscribers would not have had to leave Comcast in order to receive more tennis programming.¹²⁶ The evidence also showed that at the highest levels of the company, Comcast tried to promote Tennis Channel to its subscribers.¹²⁷

Comcast's Carriage of Affiliated Networks Golf Channel And Versus

47. The consistent and undisputed testimony of Comcast's fact witnesses established that Comcast has legitimate and non-discriminatory business reasons for carrying Golf Channel and Versus on broadly distributed tiers.

48. Both Golf Channel and Versus (then the Outdoor Life Network) were broadly distributed on Comcast and other distributors by the late 1990s, years before Tennis Channel was launched in 2003.¹²⁸ Both networks established their wide distribution in an era in which it was far easier to obtain broad carriage.¹²⁹ In addition, both networks paid distributors including Comcast (and other distributors that Comcast subsequently acquired) hundreds of millions of dollars in launch incentives to reduce the cost of broad carriage.¹³⁰ Both Golf Channel and Versus launched before sports tiers were created; Comcast's affiliation agreements with Golf Channel and Versus require broad distribution.¹³¹

¹²⁵ Bond Direct, Apr. 29, 2011 Tr. 1952:9-1954:2; Comcast Exh. 77 (Egan Written Direct) ¶ 12; Orszag Direct, Apr. 27, 2011 Tr. 1224:17-1225:16; Donnelly Direct, May 2, 2011 Tr. 2494:21-2495:8.

¹²⁶ Comcast Exh. 75 (Bond Written Direct) ¶ 18; Comcast Exh. 78 (Gaiski Written Direct) ¶ 4; Bond Direct, Apr. 29, 2011 Tr. 1988:11-1989:14, 2052:13-2054:4.

¹²⁷ Comcast Exh. 604 (June 2007 e-mail from Comcast Chief Executive Officer Brian Roberts to Mr. Bond).

¹²⁸ Bond Direct, Apr. 29, 2011 Tr. 1957:6-17, 1962:1-10, 1964:3-9, 1967:4-9; Bond Cross, Apr. 29, 2011 Tr. 2166:15-21.

¹²⁹ See *supra* ¶ 12.

¹³⁰ See *supra* ¶ 13.

¹³¹ Bond Cross, Apr. 29, 2011 Tr. 2160:10-2161:17; Bond Direct, Apr. 29, 2011 Tr. 1949:9-1950:17; Tennis Channel Exh. 139 (Bond Dep.) 220:8-24. Comcast most recently renewed its affiliation agreements with Versus and Golf Channel in 2009 and 2011, respectively. (Comcast Exh. 458, Tennis Channel Exh. 155). Neither of those renewals involved negotiations over an increase in the network's distribution. (Tennis

49. Once networks gain broad penetration, distributors rarely negatively reposition them because doing so would upset the settled expectations of subscribers and generate subscriber churn.¹³² For example, during Charter’s 2007 negotiations over the renewal of its affiliation agreements with Golf Channel and Versus, Golf Channel viewers “overwhelmed” Charter with demands that it continue to air the network.¹³³ Hundreds of thousands of Charter subscribers called Charter’s customer call centers, and senior programming executives directly received hundreds of e-mail messages from both Golf Channel and Versus viewers.¹³⁴ In response, Charter maintained Golf Channel and Versus on a highly penetrated tier.¹³⁵

50. Mr. Bond offered un rebutted testimony that established networks generally retain their broad distribution level, and that “the vast majority . . . of renewal agreements don’t involve a change in distribution.”¹³⁶ Mr. Bond and Ms. Gaiski consistently and persuasively testified that negatively repositioning broadly distributed networks would generate subscriber churn.¹³⁷ Mr. Bond testified that he could recall only one network that Comcast negatively repositioned as part of a renewal negotiation –

[REDACTED]

Channel Exh. 143 (Shell Dep.) 93:7-94:8; Tennis Channel Exh. 139 (Bond Dep.) 211:12-19, 219:21-220:7).

¹³² Comcast Exh. 75 (Bond Written Direct) ¶ 31; Bond Cross, Apr. 29, 2011 Tr. 2194:19-2195:5, 2235:10-2237:3; Tennis Channel Exh. 139 (Bond Dep.) 219:13-220:7; Comcast Exh. 78 (Gaiski Written Direct) ¶ 26; Comcast Exh. 80 (Orszag Written Direct) ¶ 42 & n.59.

¹³³ Rigdon Redirect, Apr. 28, 2011 Tr. 1905:6-1909:1; Rigdon Recross, Apr. 28, 2011 Tr. 1918:2-1919:7.

¹³⁴ Rigdon Redirect, Apr. 28, 2011 Tr. 1905:6-1909:1; Rigdon Recross, Apr. 28, 2011 Tr. 1918:2-16, 1920:3-12.

¹³⁵ Rigdon Recross, Apr. 28, 2011 Tr. 1920:13-22 (“Frankly, the company was in such a state of panic based on the calls coming in both for Golf and Versus that it no longer mattered.”).

¹³⁶ Bond Cross, Apr. 29, 2011 Tr. 2194:19-2195:21, 2240:21-2241:13; Tennis Channel Exh. 139 (Bond Dep.) 219:13-220:7.

¹³⁷ Comcast Exh. 75 (Bond Written Direct) ¶ 31; Bond Cross, Apr. 29, 2011 Tr. 2194:19-2195:5, 2235:10-2237:3; Comcast Exh. 78 (Gaiski Written Direct) ¶ 26.

¹³⁸ Tennis Channel Exh. 139 (Bond Dep.) 220:5-223:5.

[REDACTED] (*Id.* at 222:13-223:5; Comcast Exh. 77 (Egan Written Direct) ¶¶ 44-45). Tennis Channel also argues that testimony in the NFL program carriage proceeding of Stephen Burke, the former

Comcast’s Carriage of The Major League Networks

51. The consistent and undisputed testimony of Comcast’s fact witnesses establishes that Comcast has legitimate and non-discriminatory business reasons for carrying three Major League networks – NBA TV, NHL Network and MLB Network – on Comcast’s D1 tier.

52. In April 2009, Comcast provided NBA TV with broader distribution

[REDACTED]

53. Comcast provided NHL Network with broader distribution in April 2009 pursuant to an MFN offer that allowed Comcast to move the network from the sports tier to D1 without a material cost increase.¹⁴¹ As a result of this offer, Comcast pays a license fee to NHL Network which is [REDACTED] the rate that Comcast currently pays for Tennis Channel, and is also [REDACTED]

54. Comcast agreed in 2007 to launch MLB Network on D1, and to pay certain guarantees, because these were terms MLB insisted on as part of a package that included the right to distribute MLB’s valuable out of market sports package, Extra

president of Comcast Cable, is relevant to this case. (Tennis Channel Findings ¶ 123). However, it is not. 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. *WealthTV*, ___ FCC Red ___ ¶ 35 (FCC).

¹³⁹ Comcast Exh. 75 (Bond Written Direct) ¶ 23; Bond Direct, Apr. 29, 2011 Tr. 2145:7-2147:11; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Cross, May 2, 2011 Tr. 2430:3-10; Tennis Channel Exh. 133.

¹⁴⁰ Comcast Exh. 75 (Bond Written Direct) ¶ 23.

¹⁴¹ Comcast Exhs. 311, 312; Comcast Exh. 75 (Bond Written Direct) ¶ 24; Bond Direct, Apr. 29, 2011 Tr. 2148:19-2149:4, 2151:5-2152:3; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Redirect, May 2, 2011 Tr. 2456:18-2458:2; Tennis Channel Exh. 177.

¹⁴² Comcast Exhs. 311, 312; Comcast Exh. 75 (Bond Written Direct) ¶ 24; Bond Direct, Apr. 29, 2011 Tr. 2148:19-2149:4, 2151:5-2152:3; Comcast Exh. 78 (Gaiski Written Direct) ¶ 22; Gaiski Redirect, May 2, 2011 Tr. 2456:18-2458:2.

¹⁴³ Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 13-14, 22; Gaiski Redirect, May 2, 2011 Tr. 2456:18-2458:2.

Innings.¹⁴⁴ As part of the deal, Comcast was offered, and accepted, a similar equity interest in MLB Network to that which MLB had granted DIRECTV.¹⁴⁵ Cox, Time Warner Cable and other distributors also were offered and accepted the deal that Comcast accepted, and they also distribute MLB Network broadly.¹⁴⁶

55. Tennis Channel’s economic expert Dr. Hal Singer testified that Comcast’s carriage of the major league networks illustrates that Comcast discriminates on the basis of affiliation. Dr. Singer’s testimony on this point, however, was inconsistent with his prior testimony in the *NFL v. Comcast* case, and was exposed as unreliable on cross-examination and contradicted by unrebutted fact evidence.¹⁴⁷ Therefore, Dr. Singer’s testimony on this point is rejected.

Marketplace Carriage of Tennis Channel, Versus and Golf Channel

56. Fundamental differences between Tennis Channel and both Golf Channel and Versus account for why all major MVPDs carry Golf Channel and Versus more broadly. 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.¹⁴⁸ It is undisputed that all of the large cable companies carry Tennis Channel on some form of a sports tier.¹⁴⁹

¹⁴⁴ Comcast Exh. 75 (Bond Written Direct) ¶ 22; Bond Direct, Apr. 29, 2011 Tr. 2141:6-2144:17; Tennis Channel Exh. 165.

¹⁴⁵ Comcast Exh. 75 (Bond Written Direct) ¶ 22; Bond Direct, Apr. 29, 2011 Tr. 2141:22-2143:3.

¹⁴⁶ Bond Direct, Apr. 29, 2011 Tr. 2141:6-2144:17.

¹⁴⁷ See *NFL Enterprises LLC v. Comcast Cable Commc’ns, LLC*, MB Docket No. 08-214; Comcast Exh. 1048 at ¶ 80 Table 1; Singer Cross, Apr. 26, 2011 Tr. 933:21-940:4.

¹⁴⁸ Comcast Exh. 1103.

¹⁴⁹ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 19, 22-23; Comcast Exh. 659; Comcast Exh. 517 (Solomon Dep.) 154:3-154:11; 196:9-197:19.

¹⁵⁰ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23 & Table 1A (all cable companies other than Comcast carry Tennis Channel, on average, at { } penetration); Comcast Exh. 659. Notably, Dr. Singer’s analysis does not consider all of the MVPDs that do not carry Tennis Channel. (Tennis Channel Exh. 16 (Singer Written Direct) ¶ 54 (counting only “NCTC member systems that carry Tennis Channel through NCTC”); Orszag Direct, Apr. 27, 2011 Tr. 1221:20-1222:7 (“Dr. Singer . . . ignores every single MVPD in the country that does not carry the Tennis Channel.”)).

57. On the other hand, all major MVPDs, except Dish Network, carry both Golf Channel and Versus to more than {REDACTED} of their subscribers,¹⁵¹ and every major MVPD – including Tennis Channel’s parent companies Dish Network and DIRECTV – carries both Golf Channel and Versus to {REDACTED} than Tennis Channel.¹⁵² Verizon carries Versus to a {REDACTED} of its subscribers than Comcast does.¹⁵³

58. Although the networks have some superficial similarities, particularly Tennis Channel and Golf Channel, there are fundamental differences between Tennis Channel and both Golf Channel and Versus that account for the differences in carriage. These differences were demonstrated by, among other evidence, the credible testimony of independent industry experts with decades of experience – Mike Egan (cable industry) and Marc Goldstein (advertising industry) – and by candid descriptions of the networks and their audiences in internal Tennis Channel documents that contradict its own experts’ testimony.

59. *First*, Golf Channel and Versus were launched in a different era than Tennis Channel. When Golf Channel and Versus launched in 1995, neither Tennis Channel nor sports tiers existed,¹⁵⁴ and it was far easier for a cable network to gain broad distribution than when Tennis Channel launched in 2003.¹⁵⁵ By then, as a result of the influx of new cable networks in the 1990s, distributors’ programming costs – and, as a result, retail rates to subscribers – had increased significantly.¹⁵⁶ At the same time, heightened competition from satellite companies and new entrants AT&T and Verizon restrained distributors’ ability to continue to add programming and to pass those increased costs along to subscribers.¹⁵⁷ Sports tiers were developed as a response to

¹⁵¹ Comcast Exhs. 259, 260, 1102.

¹⁵² Comcast Exhs. 201, 260, 1102, 1103.

¹⁵³ Comcast Exh. 1102 (listing Versus’s penetration on Verizon at {REDACTED})

¹⁵⁴ Bond Direct, Apr. 29, 2011 Tr. 1949:9-1950:17, 1969:5-1971:9; Egan Direct, Apr. 28, 2011 Tr. 1595:1-9.

¹⁵⁵ Comcast Exh. 75 (Bond Written Direct) ¶¶ 29-30; Bond Direct, Apr. 29, 2011 Tr. 1952:9-1954:2, 1969:5-1970:4; Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-15. Strong incentives for cable companies to add programming in the mid-1990s resulted from the relaxation of cable rate regulations and new competition from satellite providers. (Comcast Exh. 77 (Egan Written Direct) ¶¶ 12-14; Bond Direct, Apr. 29, 2011 Tr. 1951:1-1952:22).

¹⁵⁶ Comcast Exh. 77 (Egan Written Direct) ¶ 14; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15; *see supra* ¶¶ 12-14; *see also* Solomon Direct, Apr. 25, 2011 Tr. 258:5-11 (testifying that eight years is a “long time” by the “cable business standard”).

¹⁵⁷ Comcast Exh. 77 (Egan Written Direct) ¶ 14; Egan Direct, Apr. 28, 2011 Tr. 1591:14-1595:15.

these changes,¹⁵⁸ and Tennis Channel took advantage of the development of sports tiers to gain distribution by Comcast and other large cable companies.¹⁵⁹

60. *Second*, Tennis Channel is not similar to Golf Channel or Versus in terms of subscriber demand. As Comcast’s fact witnesses testified – and its expert witnesses corroborated – MVPDs consider, when making carriage decisions, the extent to which carriage of a network can retain existing subscribers or attract new subscribers.¹⁶⁰ Tennis Channel’s distribution reflects lower demand, and thus lower cost, for its programming. Many of the matches it broadcasts have no licensing fees because there is no demand in the market to request fees for them.¹⁶¹ Golf Channel and Versus, by contrast, have much higher programming costs reflecting much stronger market demand for their programming.¹⁶² Tennis Channel’s own head of advertising sales summarized this distinction well: [REDACTED]

61. As previously found, the uncontroverted evidence shows that there is not significant subscriber demand for Tennis Channel¹⁶⁴ whereas, in contrast, there is significant subscriber demand for Golf Channel and Versus.¹⁶⁵

62. *Third*, Tennis Channel’s programming content differs significantly from that of Golf Channel and Versus. Mr. Egan¹⁶⁶ testified on behalf of Comcast as an expert

¹⁵⁸ A number of distributors, including Comcast and Time Warner Cable, created sports tiers (and other specialized tiers of service) which allowed networks that might not be carried at all to be distributed to those customers that wanted them most. (Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9). Sports tiers allow distributors to add incremental programming without having to pass along increased programming costs to all subscribers. (Bond Direct, Apr. 29, 2011 Tr. 1969:5-1971:9).

¹⁵⁹ See *supra* ¶¶ 15-16.

¹⁶⁰ Comcast Exh. 75 (Bond Written Direct) ¶ 32; Rigdon Direct, Apr. 28, 2011 Tr. 1806:3-8; Comcast Exh. 77 (Egan Written Direct) ¶ 8; Egan Cross, Apr. 28, 2011 Tr. 1768:2-1770:9; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 26, 73.

¹⁶¹ Comcast Exhs. 127, 624, 342 (Tennis Channel broadcasts “the tournaments the major networks don’t want to cover – which is to say, almost all of them.”).

¹⁶² Comcast Exh. 80 (Orszag Written Direct) ¶ 40; Comcast Exh. 77 (Egan Written Direct) ¶¶ 53, 65; Comcast Exh. 1101.

¹⁶³ Comcast Exh. 572.

¹⁶⁴ See *supra* ¶ 39.

¹⁶⁵ See *supra* ¶¶ 48-49, 57.

¹⁶⁶ Mr. Egan served as senior vice president of programming and new product development for Cablevision Industries, then the eighth largest cable company in the United States. (Comcast Exh. 77 (Egan Written Direct) ¶ 4; Comcast Exh. 274; Egan

in cable television programming, offering un rebutted testimony – based on systematically viewing hours of each network’s programming that he independently selected – that Tennis Channel projects a demonstrably different image, from the perspective of a viewer, than either Golf Channel or Versus projects.¹⁶⁷

63. Mr. Egan also testified that Tennis Channel’s programming mix is different from Golf Channel’s programming mix and Versus’s programming mix. For example, Golf Channel offers more live event coverage than does Tennis Channel,¹⁶⁸ and virtually all of Golf Channel’s event coverage is exclusive to Golf Channel.¹⁶⁹ In contrast, much of Tennis Channel’s high profile tournament coverage is not exclusive to Tennis Channel, as most of its Grand Slam coverage is either broadcast first on another network, streamed live on the Internet or both.¹⁷⁰ Mr. Egan’s testimony regarding the

Direct, Apr. 28, 2011 Tr. 1485:15-1486:16). Mr. Egan also founded and led programming for Renaissance Media Holdings, a cable company that was ultimately sold to Charter. (Comcast Exh. 77 (Egan Written Direct) ¶¶ 5-6; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1486:15-1487:3). In addition to his work for distributors, Mr. Egan has worked for programmers, including independent networks, in his current position as an industry consultant. Mr. Egan has worked with Celtic Vision in connection with its national launch, GoodlifeTV, and Rainbow Programming, which owns American Movie Classics, IFC, and Sundance. (Comcast Exh. 77 (Egan Written Direct) ¶ 6; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1487:4-13). Mr. Egan previously testified as an expert on behalf of Time Warner Cable in the *WealthTV* proceeding, and the Presiding Judge determined that Mr. Egan’s testimony was “consistent, convincing, and well organized” and credible. *WealthTV*, 24 FCC Rcd at 12979 ¶ 25 & n.91 (ALJ).

¹⁶⁷ Mr. Egan opined that Tennis Channel projects a “hip,” “international,” and “young” image, with younger, sophisticated, diverse, and often female on-air personalities, while Golf Channel’s on-air look is decidedly not “hip” or “risque,” citing the example of Golf Channel announcers sitting in front of a fireplace. Mr. Egan also contrasted Tennis Channel with Versus, testifying that Versus is a “kaleidoscope” covering more than twenty different sports, including the National Hockey League, the Tour de France, cagefighting, hunting and fishing, college football, and skiing and snowboarding. As a general matter, Versus projects a “violent” and “aggressive” image through, among other things, its extensive extreme hunting programming and “wacky, almost MTVish” extreme sports shows, targeting a “younger, male audience,” and rural viewers. (Egan Direct, Apr. 28, 2011 Tr. 1534:17-1546:19).

¹⁶⁸ Comcast Exh. 77 (Egan Written Direct) ¶ 51; Egan Direct, Apr. 28, 2011 Tr. 1560:4-13.

¹⁶⁹ Comcast Exh. 77 (Egan Written Direct) ¶¶ 40-41.

¹⁷⁰ Comcast Exh. 77 (Egan Written Direct) ¶¶ 42-44; *see, e.g.*, Comcast Exh. 647 (over ██████████ of Tennis Channel’s hours in the week of September 13, 2010 consisted of events previously or simultaneously aired on CBS, ESPN2, ESPN3, or USOpen.org).

narrowness of Tennis Channel’s appeal is corroborated by Tennis Channel’s own research, which found that its viewers tend to be [REDACTED]¹⁷¹

64. With respect to Versus, Mr. Egan testified that, unlike Tennis Channel, Versus covers nearly two dozen sports, including hundreds of live NHL game broadcasts, both regular season and postseason (including two games of the Stanley Cup Finals), college football, professional basketball, IndyCar racing, cagefighting and the Tour de France.¹⁷² As demonstrated by its 2010 programming schedule, Versus airs no tennis.¹⁷³ Notably, Versus devotes nearly [REDACTED] of its schedule to outdoor programming alone. Its “hooks and bullets” outdoor sports programming includes shows like *Elk Fever*, *Jimmy Houston’s Outdoors* and the extreme hunting show *Federal Premium Dangerous Game*.¹⁷⁴

65. *Fourth*, Tennis Channel’s audience is materially different from Golf Channel’s and Versus’s audiences. The weight of the evidence, including the credible expert testimony and Tennis Channel’s own documents, establishes that there are material differences between Tennis Channel viewers and Golf Channel and Versus viewers. As an initial matter, Tennis Channel’s own research indicates that less than [REDACTED] of Tennis Channel viewers watch the Golf Channel.¹⁷⁵ Although Tennis Channel argues that it compares itself to Golf Channel only because they are similar, the record evidence establishes otherwise.

66. Unlike Tennis Channel, Golf Channel and Versus have overwhelmingly male audiences. Nearly [REDACTED] of Versus viewers are men – the most of any cable network – and nearly [REDACTED] Golf Channel viewers are men, among the highest of all cable networks.¹⁷⁶ In contrast, only a [REDACTED] of Tennis Channel viewers are men – by far the lowest of any sports network – placing Tennis Channel in the company of “general appeal” networks like [REDACTED] and [REDACTED].¹⁷⁷ Tennis Channel

¹⁷¹ Comcast Exh. 184 at TTCCOM_00061856.

¹⁷² Comcast Exh. 77 (Egan Written Direct) ¶¶ 57-59.

¹⁷³ Tennis Channel Exh. 129.

¹⁷⁴ Comcast Exh. 77 (Egan Written Direct) ¶¶ 57-59; Egan Direct, Apr. 28, 2011 Tr. 1535:7-1536:15, 1537:8-1538:8, 1539:2-13.

¹⁷⁵ Comcast Exh. 11 at TTCCOM_00027627; Comcast Exh. 186 at TTCCOM_00062216; Comcast Exh. 230 at TTCCOM_00062364; Comcast Exh. 368 (Herman Dep.) 317:21-319:3.

¹⁷⁶ Comcast Exh. 77 (Egan Written Direct) ¶¶ 86, 89-90; Comcast Exh. 51 at TTCCOM_00051436; *see also* Comcast Exh. 215 at TTCCOM_00021827; Comcast Exh. 800 at TTCCOM_00070616-17.

¹⁷⁷ Comcast Exh. 77 (Egan Written Direct) ¶¶ 86, 89-90; Comcast Exh. 349 (Brooks Dep.) 318:11-16.

documents show that it regularly cited its [REDACTED] in pitches to MVPDs and other companies, including in its 2009 proposal to Comcast. 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 targets different audiences than Golf Channel and Versus.¹⁷⁹ Tennis Channel’s litigation arguments are thus not credible as they are inconsistent with its “marketing presentations to MVPDs and prospective advertisers.”¹⁸⁰

67. Tennis Channel’s argument that the three networks are similar because each is a sports network¹⁸¹ conflicts 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,¹⁸² many of which, like Tennis Channel, are “single-sport networks . . . revolving around a single participatory sport.”¹⁸³

68. Nor does the weight of the reliable evidence support Tennis Channel’s claim that its viewers are similar to Golf Channel and Versus viewers in terms of income. Experian Simmons data for the last four quarters for which data is available (fall 2009 through summer 2010) consistently shows that Tennis Channel’s viewers have a [REDACTED] than viewers of Golf Channel and

¹⁷⁸ Comcast Exh. 180 at TTCCOM 00020724, 20727; Comcast Exh. 21 at TTCCOM 00035272 [REDACTED] (emphasis supplied); Comcast Exh. 24 at TTCCOM 00002270 (noting that networks on the sports tier [REDACTED] Comcast Exh. 127 at TTCCOM_00019131 [REDACTED] Comcast Exh. 181 at TTCCOM_00022484 [REDACTED] Comcast Exh. 217 at TTCCOM 00003380 [REDACTED] (emphasis supplied); Comcast Exh. 268 (Ken Solomon explaining that [REDACTED]); Comcast Exh. 290 at TTCCOM_00033319 [REDACTED] Comcast Exh. 589 at TTCCOM 00086182 [REDACTED] (Tennis Channel has [REDACTED] Comcast Exh. 562 [REDACTED] see also Comcast Exh. 517 (Solomon Dep.) 270:21-271:15; Herman Cross, Apr. 26, 2011 623:20-624:12.

¹⁷⁹ *WealthTV*, ___ FCC Rcd ___ ¶ 25 (FCC).

¹⁸⁰ *WealthTV*, ___ FCC Rcd ___ ¶ 26 (FCC).

¹⁸¹ Tennis Channel Findings ¶¶ 80-82, 118.

¹⁸² 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.”).

¹⁸³ Tennis Channel Findings ¶ 81 (quotation marks omitted); Comcast Exh. 203 at 291 (Fox Soccer Channel), 315 (GoTV), 450 (Outdoor Channel), 498 (SPEED), 546 (The Sportsman Channel); Comcast Exhs. 153, 154, 155.

Versus.¹⁸⁴ In fall 2009, for example, the median household income for Tennis Channel viewers was [REDACTED] that of Golf Channel and Versus [REDACTED].¹⁸⁵ Tennis Channel's own expert, Timothy Brooks, has acknowledged that Experian Simmons is "widely accepted by the industry,"¹⁸⁶ and Tennis Channel relied on older Experian Simmons median household income data in its pleadings,¹⁸⁷ its experts' written testimony¹⁸⁸ and its presentations to MVPDs and advertisers (including in its 2009 proposal to Comcast).¹⁸⁹ Given Tennis Channel's history of relying on Experian Simmons and the consistency of Experian Simmons data over the last four quarters, this evidence is credited.

69. Although Tennis Channel claims that all three networks appeal to the same age demographic, the record evidence establishes that Tennis Channel's viewers are older than those of Versus and approximately ten years younger than those of Golf Channel, which, with a median viewer age of [REDACTED] has one of the oldest audiences in cable television.¹⁹⁰

70. *Fifth*, advertisers do not view Tennis Channel as being substantially similar to Golf Channel or Versus. Comcast's advertising expert, Marc Goldstein, credibly opined based on his decades of experience in the advertising industry that advertisers view networks telecasting different sports differently because each sport delivers a unique audience.¹⁹¹ Since most advertisers use sports programming as a way

¹⁸⁴ Comcast Exh. 3; Comcast Exh. 77 (Egan Written Direct) ¶ 87.

¹⁸⁵ Comcast Exh. 3; Comcast Exh. 77 (Egan Written Direct) ¶¶ 88-90; Egan Cross, Apr. 28, 2011 Tr. 1749:1-18.

¹⁸⁶ Comcast Exh. 349 (Brooks Dep.) 331:10-13.

¹⁸⁷ Tennis Channel Exh. 18 (Complaint) ¶ 58.

¹⁸⁸ Tennis Channel Exh. 16 (Singer Written Direct) ¶ 28 n. 46; Tennis Channel Exh. 17 (Brooks Written Direct) ¶ 33 n.24.

¹⁸⁹ Comcast Exh. 180 at TTCCOM_00020725; *see also* Comcast Exhs. 11 at TTCCOM_00027628, 292.

¹⁹⁰ Comcast Exh. 77 (Egan Written Direct) ¶¶ 86-87, 89-90; Comcast Exh. 11 at TTCCOM_00027627 [REDACTED]; Goldstein Direct, May 2, 2011 Tr. 2756:10-2757:4 ("Versus and, in fact, the NHL is one of the youngest skewing male oriented networks that we've got."); *see also* Comcast Exh. 230 at TTCCOM_00062366 [REDACTED]; Comcast Exh. 216 at TTCCOM_00019368; Comcast Exh. 589 at TTCCOM_00086182).

¹⁹¹ Comcast Exh. 79 (Goldstein Written Direct) ¶ 19; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 53-54, 63-64.

to reach male viewers, Tennis Channel's [REDACTED]¹⁹² makes the network fundamentally different from the male-skewing Golf Channel and Versus networks from the perspective of advertisers.¹⁹³ Tennis Channel's own documents corroborate that testimony. An internal Tennis Channel document shows that the network's former head of advertising sales realized, soon after starting at Tennis Channel, that the significant [REDACTED] of Tennis Channel's audience was a [REDACTED]. Other Tennis Channel documents show that the network pitches itself as a [REDACTED] and as [REDACTED] because of its female viewership.

71. Advertising overlap between networks does not demonstrate that advertisers view the networks as being similar, since advertisers often purchase time on different networks to reach entirely different audiences.¹⁹⁶ In any event, Tennis Channel shares only a small number of actual advertisers with Golf Channel and Versus.¹⁹⁷ Among each network's top fifty advertisers in 2010, only { [REDACTED] } advertisers overlapped between Tennis Channel and Golf Channel, and only { [REDACTED] } overlapped between Tennis Channel and Versus.¹⁹⁸ Even if advertiser overlap were meaningful, Tennis Channel shares more common advertisers with news and lifestyle networks than it shares with Golf Channel, Versus and other sports networks.¹⁹⁹

72. *Sixth*, Tennis Channel's programming costs are substantially less than Golf Channel's or Versus's programming costs. Comcast's economic expert, Mr. Jonathan Orszag, opined that programming cost is a proxy, albeit imperfect, for the

¹⁹² See *supra* ¶ 66.

¹⁹³ Comcast Exh. 79 (Goldstein Written Direct) ¶ 34; Goldstein Direct, May 2, 2011 Tr. 2685:9-18.

¹⁹⁴ Comcast Exh. 559 at TTCCOM_00087674.

¹⁹⁵ Comcast Exh. 186 at TTCCOM_00062216; Comcast Exh. 351 at TTCCOM_00042505; Comcast Exh. 352 at TCCOM_00035238; Comcast Exh. 476 at TTCCOM_00024295.

¹⁹⁶ Comcast Exh. 79 (Goldstein Written Direct) ¶ 40.

¹⁹⁷ Herman Cross, Apr. 26, 2011 Tr. 667:8-15, 669:4-11.

¹⁹⁸ Comcast Exhs. 211, 212, 213, 665.

¹⁹⁹ For example, more of Tennis Channel's top thirty advertisers in 2010 advertised on [REDACTED] than they did on Golf Channel. (Comcast Exh. 801). Similarly, more of those same top thirty advertisers advertised on [REDACTED] than on Versus. (Comcast Exh. 801; Herman Cross, Apr. 26, 2011 Tr. 650:4-651:8, 652:3-653:13).

viewer appeal and quality of sports content.²⁰⁰ Mr. Orszag testified that programming costs consist primarily of the cost of acquiring rights to programming, and that the market price of those programming rights will reflect the value of the programming to interested networks.²⁰¹ In 2010, according to Kagan, Golf Channel spent \$167 million on its programming, while Versus spent \$289 million,²⁰² and Tennis Channel spent \$39 million – less than almost any other national sports network.²⁰³ In internal documents, Tennis Channel has characterized its Grand Slam coverage as [REDACTED] [REDACTED] }²⁰⁴ Tennis Channel pays [REDACTED] for the Australian Open – one of the four premier tennis events²⁰⁵ – and pays [REDACTED] [REDACTED] } for any of the non-Grand Slam tournaments it airs.²⁰⁶

73. *Seventh*, Golf Channel and Versus have significantly higher ratings than Tennis Channel. The Nielsen local market ratings (i.e., ratings calculated and reported by Nielsen) for Golf Channel and Versus are significantly higher than for Tennis Channel.²⁰⁷ The non-Nielsen ratings used by Tennis Channel’s expert, Timothy Brooks, are an unreliable basis for comparison. Mr. Brooks did not rely on ratings calculated or reported by Nielsen, but instead relied exclusively on ratings calculated by Tennis Channel, including by Tennis Channel employees with a financial stake in this litigation.²⁰⁸

74. Tennis Channel’s method for calculating the “coverage area” rating inflated Tennis Channel’s rating relative to total market ratings calculated and published

²⁰⁰ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 39.

²⁰¹ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 36-40; Orszag Cross, Apr. 27, 2011 Tr. 1452:16-1453:18.

²⁰² Comcast Exh. 80 (Orszag Written Direct) ¶ 40; Comcast Exh. 1101; Comcast Exh. 77 (Egan Written Direct) ¶¶ 53, 65.

²⁰³ Comcast Exh. 80 (Orszag Written Direct) ¶ 40; Comcast Exh. 1101; Comcast Exh. 77 (Egan Written Direct) ¶¶ 53, 65.

²⁰⁴ Comcast Exh. 127; Solomon Cross, Apr. 25, 2011 Tr. 441:5-21.

²⁰⁵ Comcast Exh. 127.

²⁰⁶ Comcast Exh. 127; *see also* Comcast Exh. 624, Comcast Exh. 517 (Solomon Dep.) 79:23-80:7; Solomon Cross, Apr. 25, 2011 Tr. 440:8-14.

²⁰⁷ Comcast Ex. 152; Comcast Exh. 77 (Egan Written Direct) ¶ 69 n.58. The three networks’ ratings cannot be compared using Nielsen national ratings, because Tennis Channel does not purchase them. (Brooks Cross, Apr. 26, 2011 Tr. 724:12-18).

²⁰⁸ Brooks Cross, Apr. 26, 2011 Tr. 726:2-13; Comcast Exh. 349 (Brooks Dep.) 13:8-14:5, 14:23-15:13 (testifying that he relied on Tennis Channel to “pull the [ratings] data for each separate market . . . put all of that information onto spreadsheets, weight it properly by market and market size and distribution by market, and combine it into a single number”).

by Nielsen and also relative to ratings for Golf Channel and Versus.²⁰⁹ Nielsen has warned that “the Coverage Area Rating for one cable network cannot be compared to another cable network’s coverage area rating.”²¹⁰ Under these circumstances, Mr. Brooks’s use of “coverage area ratings” calculated by Tennis Channel to compare the three networks is unreliable.

75. *Finally*, at the time that Comcast considered Tennis Channel’s 2009 proposal, there was no meaningful competition between Tennis Channel and Golf Channel or Versus for programming rights. It is undisputed that there is no competition for programming rights and no programming overlap between Golf Channel and Tennis Channel.²¹¹ There is also no programming overlap between Tennis Channel and Versus, as Versus does not air any tennis programming.²¹² Although Versus at one time carried a small amount of tennis, it had stopped airing tennis programming because it lost money on tennis.²¹³

CONCLUSIONS OF LAW

I. Burden of Proof

²⁰⁹ Brooks Cross, Apr. 26, 2011 Tr. 732:6-733:20; Comcast Exh. 349 (Brooks Dep.) 190:12-22 (testifying that the local market ratings for Tennis Channel calculated and reported by Nielsen on a total market basis are “much lower” than ratings for Tennis Channel calculated by Tennis Channel on a “coverage area” basis). As Mr. Brooks testified, Nielsen does not calculate “coverage area ratings” on “a local market basis,” “[s]o if you want a coverage area rating for a local market, you would never turn to Nielsen to do it. I’ve never heard of anybody who did.” (Comcast Exh. 349 (Brooks Dep.) 184:19-185:18).

²¹⁰ Comcast Exh. 911; *see also* Brooks Cross, Apr. 26, 2011 Tr. 740:6-745:12.

²¹¹ Comcast Exh. 363 (Singer Dep.) 241:16-242:18.

²¹² Comcast Exh. 517 (Solomon Dep.) 162:3-10; Tennis Channel Exh. 143 (Shell Dep.) 142:15-143:3; Comcast Exhs. 192, 193, 194.

²¹³ Comcast Exh. 253; Tennis Channel Exh. 143 (Shell Dep.) 142:19-143:7. Versus considered acquiring rights to the U.S. Open in late 2006 at the urging of Ken Solomon, Tennis Channel’s Chairman and Chief Executive Officer. (Comcast Exh. 666). But Comcast did not pursue Mr. Solomon’s proposal – which called for Comcast and Tennis Channel to bid for the rights ██████████ and not as competitors – with the tournament’s rights-holder, the United States Tennis Association. (Comcast Exh. 666). More recently, following the NBCU merger, Versus has emerged as a possible joint bidder for tennis programming, but that does not help Tennis Channel’s case, which is focused on the events of 2009.

76. In this *de novo* proceeding,²¹⁴ 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.²¹⁵ In any event, the allocation of the burden of proof is immaterial to the ultimate outcome of this proceeding. The preponderance of the evidence, viewed in its entirety, demonstrates that Comcast did not violate Section 616 of the 1992 Cable Act.²¹⁶

II. Statutory Scheme

77. Section 616, added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”),²¹⁷ directs the Commission to promulgate regulations which “prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”²¹⁸

78. In accordance with that Congressional directive, the Commission adopted an implementing regulation that closely tracks the operative language of section 616 of the 1992 Cable Act. Regulation section 76.1301(c) provides:

No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the

²¹⁴ *HDO*, 25 FCC Rcd at 14150 ¶ 2.

²¹⁵ *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) (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)).

²¹⁶ 47 U.S.C. § 536(a)(3).

²¹⁷ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

²¹⁸ 47 U.S.C. § 536(a)(3).

selection, terms, or conditions for carriage of video programming provided by such vendors.²¹⁹

79. Sections 616 and 76.1301(c) were designed to safeguard programming vendors against discrimination that arises from their non-affiliation with cable operators. That discrimination must be proven to exist and must be shown to have an anti-competitive effect.²²⁰

80. At the same time, Congress wanted to ensure that its bar against discrimination not have an unintended consequence of “restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.”²²¹ Indeed, in the Cable Act of 1992 Congress expressly directed that the Commission “rely on the marketplace, to the maximum extent feasible” in implementing Section 616.²²² As the Commission has explained, Sections 616 and 76.1301(c) are designed to “strike a balance that not only proscribe[s] the behavior prohibited by the specific language of the statute, but also preserve[s] the ability of affected parties to engage in legitimate negotiations.”²²³

81. Accordingly, under the statutory and regulatory language, two discrete elements must be proven by Tennis Channel in order to establish a violation by Comcast of Section 616 and 76.1301(c). First, Comcast must have discriminated against Tennis Channel in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation. Second, if discrimination by Comcast occurred, the effect must be to unreasonably restrain the ability of Tennis Channel to compete fairly.

III. Discrimination on the Basis of Affiliation or Non-Affiliation

²¹⁹ 47 C.F.R. § 76.1301(c).

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

²²¹ *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report & Order*, MM Docket No. 92-265, 9 FCC Rcd 2642, 2648 ¶ 15 (1992) (hereinafter “*Second Report & Order*”).

²²² *Second Report & Order*, 9 FCC Rcd at 2648 ¶ 15 (quoting 1992 Cable Act, § 2(b)(2)). See *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order*, 8 FCC Rcd 3359, 3402 ¶ 145 (1993).

²²³ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion & Order*, MM Docket No. 92-265, 9 FCC Rcd 4415, 4416 ¶ 7 (1994). See *Second Report & Order*, 9 FCC Rcd at 2648-49 ¶ 15.

82. The “relevant inquiry” in a program carriage case is whether an MVPD “acted upon” a motive to discriminate on the basis of affiliation or non-affiliation.²²⁴ “The plain language of Section 616(a)(3) permits a finding of program carriage discrimination only in cases where such discrimination is carried out ‘on the basis of an unaffiliated programming vendor’s affiliation or nonaffiliation.’”²²⁵ “[U]nder this standard, 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.”²²⁶ In order to prove affiliation-based discrimination, an unaffiliated network must prove that its status as an unaffiliated entity “actually played a role” in the challenged carriage decision and “had a determinative influence on the outcome.”²²⁷

83. The Commission has recognized that “resolution of Section 616 complaints . . . necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred.”²²⁸

84. There is no affiliation-based discrimination where the challenged carriage decision was based on legitimate business reasons.²²⁹ Where – as here – the legitimate business reasons for a carriage decision are memorialized in contemporaneous documentation, that documentation is, according to the Commission, a basis to “truncat[e]” program carriage litigation.²³⁰

²²⁴ *MASN*, 25 FCC Rcd at 18115 ¶ 22; *see also WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (ALJ).

²²⁵ *MASN*, 25 FCC Rcd at 18106 ¶ 12 (quoting 47 U.S.C. § 536 (a)(3) (brackets omitted)).

²²⁶ *Id.* ((brackets and internal quotation marks omitted); *see id.* at 18108 ¶ 13 n.68 (“We find no basis in the record to conclude that TWC’s carriage of its affiliated RSNs on basic or expanded basic tiers while refusing such carriage to MASN was motivated by considerations of affiliation rather than by the demand, cost, and bandwidth considerations presented by each network.”). In *MASN*, the Commission ruled that the complainant bears the burden of proving its claim by a preponderance of the evidence. *See supra* ¶ 76 & n.215.

²²⁷ *WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (ALJ) (quotation marks and citation omitted).

²²⁸ *WealthTV*, ___ FCC Rcd ___ ¶ 6 (FCC).

²²⁹ *MASN*, 25 FCC Rcd at 18099, 18104-06 ¶¶ 1, 10-12; *WealthTV*, 24 FCC Rcd at 12998, 12999 ¶¶ 65, 67 (ALJ).

²³⁰ *MASN*, 25 FCC Rcd at 18114 ¶ 21.

85. Conducting “a cost-benefit analysis and determin[ing] that the benefits of [broader carriage] would not outweigh the substantial costs” is a “legitimate and non-discriminatory” basis for deciding against broader carriage.²³¹ Accordingly, the “high cost of carriage” is a legitimate basis for rejecting a programmer’s demand.²³² In assessing whether the potential benefits of broader carriage of an unaffiliated network outweigh the costs, evidence of limited demand for the network is a legitimate and non-discriminatory reason counseling against broader carriage.²³³ Evidence of limited demand includes evidence that an MVPD “received no appreciable subscriber complaints” regarding the lack of broader carriage of the unaffiliated network.²³⁴ Other evidence of limited demand includes the absence of customer defection to competitor MVPDs that do carry the programming more broadly, and the lack of advertising by competing MVPDs of the programming discrepancy.²³⁵

86. The uncontroverted evidence establishes that Tennis Channel’s status as a network unaffiliated with Comcast played no role – much less the required determinative role²³⁶ – in Comcast’s decision not to accept Tennis Channel’s 2009 proposal for broader carriage.²³⁷ The evidence shows that Comcast’s carriage decision in 2009 was based not on discrimination, but on a cost-benefit analysis, the same type of analysis that the Commission ruled in *MASN* is a legitimate and non-discriminatory business rationale.²³⁸ The evidence includes credible, uncontroverted testimony from two Comcast executives, corroborated by contemporaneous documentation, that Comcast conducted a cost-benefit analysis and determined that the [REDACTED] } million of additional costs

²³¹ *Id.* at 18106, 18112 ¶¶ 12, 19. While Tennis Channel takes the position that “incremental cost [is] not a valid justification for . . . discrimination,” citing a 1978 U.S. Supreme Court decision involving a claim of sex discrimination under Title VII of the Civil Rights Act of 1964, Tennis Channel Findings ¶ 312 (citing *City of L.A. Dep’t of Water v. Manhart*, 435 U.S. 702, 716-17 (1978)), that decision is not persuasive authority for interpreting Section 616 in light of the Commission’s recent ruling in *MASN v. Time Warner Cable* that “a cost-benefit analysis” is a “legitimate and non-discriminatory” basis for declining carriage. *See, e.g., MASN*, 25 FCC Rcd at 18106, 18112 ¶¶ 12, 19.

²³² *Id.* at 18112 ¶ 19.

²³³ *Id.* at 18106-07 ¶ 13.

²³⁴ *Id.* at 18109-10 ¶ 15.

²³⁵ *Id.*

²³⁶ *WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (ALJ).

²³⁷ *See supra* ¶¶ 36-38; *cf. WealthTV*, 24 FCC Rcd at 12989-90 ¶ 45 (ALJ) (network’s peremptory termination of negotiations was not evidence that Comcast failed to negotiate in good faith).

²³⁸ *MASN*, 25 FCC Rcd at 18104-06, 18112 ¶¶ 10-12, 19; *WealthTV*, 24 FCC Rcd at 12998, 12999 ¶¶ 65, 67 (ALJ).

greatly outweighed any anticipated benefits.²³⁹ Tennis Channel’s own contemporaneous analysis also shows that accepting the 2009 proposal would have increased Comcast’s costs considerably.²⁴⁰

87. Tennis Channel offered no analysis of its own as to benefits that would offset these increased costs in order to rebut Comcast’s analysis. It is not discrimination for corporations, such as Comcast, in the business of earning profits for shareholders, to decline proposals that appear likely to produce losses.²⁴¹ There is no legal requirement under Section 616 that corporations in the business of distributing video programming either incur losses or increase subscriber fees merely to increase distribution of programming to consumers who can already purchase that programming.²⁴²

88. Tennis Channel advances the position that Comcast discriminates by adjusting its carriage of Tennis Channel in response to competitive market conditions.²⁴³ 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.²⁴⁴ Responding to competition in the marketplace is a legitimate and non-discriminatory business reason for a carriage decision.²⁴⁵ The undisputed evidence that Comcast adjusts its carriage of Tennis Channel in response to competitive conditions is inconsistent with Tennis Channel’s claim of discrimination.²⁴⁶

89. Tennis Channel now argues, in a reversal of its position in its Complaint, that Comcast discriminated by *not* considering Golf Channel and Versus in declining its

²³⁹ See *supra* ¶¶ 36-42.

²⁴⁰ See *supra* ¶ 27 n.62.

²⁴¹ See *MASN*, 25 FCC Rcd at 18106 ¶ 12; see also *Second Report & Order*, 9 FCC at 2648-49 ¶¶ 15, 17.

²⁴² See *MASN*, 25 FCC Rcd at 18106 ¶ 12; see also *Second Report & Order*, 9 FCC at 2648-49 ¶¶ 15, 17.

²⁴³ 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.’”).

²⁴⁴ 1992 Cable Act § 2(b)(2).

²⁴⁵ *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-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”).

²⁴⁶ Tennis Channel Findings ¶ 165.

2009 proposal.²⁴⁷ However, as the Commission confirmed in its recent decision in *WealthTV*, evidence that a distributor did not take affiliated networks into account in making the challenged carriage decision regarding an unaffiliated network demonstrates the absence of discrimination.²⁴⁸

90. Comcast’s prior carriage decisions provide further evidence that it has not discriminated against Tennis Channel. The undisputed evidence shows that Comcast was among the first large MVPDs to carry Tennis Channel, and that Tennis Channel’s distribution on Comcast has grown significantly.²⁴⁹ These facts are not consistent with Tennis Channel’s discrimination claim.

91. The evidence relating to Comcast’s consideration of Tennis Channel’s MFN offers in 2006 and 2007 also shows that Comcast did not act based on any motive to discriminate against Tennis Channel because of its non-affiliation.²⁵⁰ Comcast performed a cost-benefit analysis of each offer, documented its analysis and explained its analysis to Tennis Channel.²⁵¹ There is no evidence that Tennis Channel ever disagreed with or disputed those cost-benefit analyses, which evaluated Tennis Channel as if it were

²⁴⁷ Tennis Channel Findings ¶¶ 77, 142, 273.

²⁴⁸ *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.”).

²⁴⁹ Tennis Channel has benefited from carriage on Comcast. Comcast launched Tennis Channel without an equity-for-carriage deal at a time when none of its principal competitors carried Tennis Channel. (Comcast Exh. 75 (Bond Written Direct) ¶¶ 4-5; Comcast Exhs. 84, 85, 659). Tennis Channel has benefited from the “excellent growth” of Comcast’s sports tier, from fewer than [REDACTED] subscribers in December 2005 to approximately [REDACTED] subscribers in December 2010. (Comcast Exhs. 156, 578; Comcast Exh. 77 (Egan Written Direct) ¶ 103). In addition, Comcast has launched Tennis Channel on tiers more broadly distributed than its sports tier in approximately [REDACTED] Comcast systems, including top tennis markets such as Jacksonville, Florida. (Bond Direct, Apr. 29, 2011 Tr. 1989:15-1990:5; Comcast Exh. 75 (Bond Written Direct) ¶ 7; Comcast Exh. 78 (Gaiski Written Direct) ¶ 21; Comcast Exh. 80 (Orszag Written Direct) ¶ 28; Comcast Exhs. 205, 206). As a result, at the end of 2010, Comcast distributed Tennis Channel to approximately [REDACTED] subscribers, [REDACTED] [REDACTED] (Comcast Exhs. 201, 206). The number of Tennis Channel subscribers increased from fewer than [REDACTED] in December 2005 to more than [REDACTED] at the end of 2010. (Comcast Exh. 206).

²⁵⁰ See *supra* ¶¶ 23-25. [REDACTED]

[REDACTED] See *supra* ¶ 24.

²⁵¹ See *supra* ¶¶ 23-25; Comcast Exh. 106.

an affiliate, partially owned by Comcast, and Tennis Channel conceded at trial that Comcast's decisions to decline these offers were not discriminatory.²⁵²

92. Moreover, the evidence establishes that it was Tennis Channel, not Comcast, that ended negotiations in June 2009, when Tennis Channel's CEO declared that he was not interested in "half measures," and that further negotiations would be a "waste of time."²⁵³ As in *WealthTV*, Comcast's willingness to continue negotiations demonstrates that it did not act on any discriminatory motive.²⁵⁴ The fact that shortly after Tennis Channel ended negotiations, Comcast successfully negotiated broader carriage deals with two other unaffiliated sports networks that were carried on the sports tier is further evidence of non-discrimination.²⁵⁵

93. Tennis Channel's own documents show that – like Comcast – Time Warner Cable, Charter, Dish Network and Verizon all declined Tennis Channel's requests for broader carriage between 2009 and 2010, and that Cablevision declined Tennis Channel's request to launch the network broadly in 2009; many of those distributors [REDACTED]²⁵⁶ Those distributors' decisions confirm the testimony that Tennis Channel's programming is not sufficiently compelling to attract new subscribers, and provide independent evidence that Comcast declined Tennis Channel's 2009 proposal for legitimate business reasons, not because of affiliation.²⁵⁷

94. Comcast's carriage of Tennis Channel is in line with the carriage of Tennis Channel by other MVPDs,²⁵⁸ including other cable operators unaffiliated with Golf Channel and Versus, whose carriage decisions provide "independent evidence" that Comcast has not engaged in discrimination on the basis of affiliation.²⁵⁹

95. All other major cable operators carry Tennis Channel on a sports tier, and Comcast distributes Tennis Channel to a higher percentage of its subscribers than [REDACTED]

²⁵² Solomon Cross, Apr. 25, 2011 Tr. 457:11-16.

²⁵³ See *supra* ¶ 31.

²⁵⁴ *WealthTV*, 24 FCC Rcd at 12990 ¶ 45 (ALJ) ("Even though carriage of WealthTV was a low priority for Comcast, the preponderance of evidence thus shows that Comcast was willing to negotiate in good faith."); see also *WealthTV*, ___ FCC Rcd ___ ¶ 28 (FCC).

²⁵⁵ See *supra* ¶ 41.

²⁵⁶ Comcast Exhs. 31, 32, 165, 201, 529, 534, 545, 627, 650; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23.

²⁵⁷ See *supra* ¶ 39.

²⁵⁸ See Comcast Exh. 659.

²⁵⁹ *MASN*, 25 FCC Rcd at 18111 ¶ 18.

[REDACTED] one of which (Cablevision) did not carry Tennis Channel at all until late 2009. Comcast carries Tennis Channel to a higher percentage of its subscribers than [REDACTED].²⁶¹ Those cable companies provide important context for Comcast's carriage decisions because they face the same competitive pressures (from satellite, telco distributors and cable over-builders), use similar technologies and face similar bandwidth constraints. No cable company owns equity in Tennis Channel.²⁶²

96. Tennis Channel was carried on only one of the two major telco providers as of May 2009. AT&T did not carry Tennis Channel at all until 2010, when – not offered the opportunity to carry Tennis Channel on a sports tier – it agreed to a [REDACTED] distribution level.²⁶³ In January 2010, Tennis Channel was negatively repositioned by Verizon to a lower distribution level, [REDACTED]. Verizon's negative repositioning of Tennis Channel and AT&T's carriage of Tennis Channel to the minimum number of subscribers permitted under its agreement show the legitimacy of Comcast's decision not to give up its right to carry Tennis Channel on a sports tier.²⁶⁵

97. Comcast's satellite competitors, DIRECTV and Dish Network, carry Tennis Channel to the greatest number of subscribers [REDACTED] and [REDACTED], respectively).²⁶⁶ But Tennis Channel offered substantial equity in itself in order to obtain those deals and they are thus not comparable to transactions with distributors, such as Comcast, which are not part owners. The evidence shows that [REDACTED]

This further belies the suggestion that Comcast had any

²⁶⁰ Comcast Exh. 659.

²⁶¹ Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23 & Table 1A (all cable companies other than Comcast carry Tennis Channel, on average, at [REDACTED] penetration); Comcast Exh. 659.

²⁶² Mr. Orszag persuasively opined that other cable companies provide the most relevant benchmarks for Comcast's carriage decisions because they face the same competitive pressures (primarily from satellite and telco distributors), use similar technologies, and confront similar bandwidth constraints, and because no cable company distributes Tennis Channel pursuant to an equity-for-carriage deal. (Comcast Exh. 80 (Orszag Written Direct) ¶¶ 20-23; Comcast Exh. 659; Solomon Cross, Apr. 25, 2011 Tr. 423:15-424:5).

²⁶³ Comcast Exhs. 201, 250.

²⁶⁴ Comcast Exhs. 627, 650.

²⁶⁵ Comcast Exhs. 231, 552, 627, 650.

²⁶⁶ Comcast Exh. 80 (Orszag Written Directory) ¶21 & Table 1A.

²⁶⁷ Comcast Exh. 508; Comcast Exh. 517 (Solomon Dep.) 314:23-315:5.

intent to discriminate against Tennis Channel – in fact, Comcast was favoring Tennis Channel by carrying it when all of Comcast’s principal competitors were refusing to do so.

98. Section 616 is not intended to eliminate carriage differences among networks resulting from natural competitive forces. The evidence shows that Tennis Channel differs from Versus and Golf Channel in numerous significant respects that are reflected in how those networks are carried throughout the marketplace.²⁶⁸

99. Tennis Channel was launched in 2003, years after Versus and Golf Channel launched and obtained broad carriage. The evidence shows that, as a result, Tennis Channel launched into materially different market conditions.²⁶⁹ As set forth above, it was far easier for cable networks to gain broad distribution in the 1990s, before sports tiers were created, than it was in 2003.²⁷⁰ Unlike Tennis Channel, Versus and Golf Channel also built their distribution by paying distributors, including Comcast (and distributors that Comcast subsequently acquired), hundreds of millions of dollars in launch incentives to offset the cost of broad carriage.²⁷¹ The difference in market conditions is reflected in the carriage agreements that Tennis Channel signed with MVPDs, including Comcast, that permitted carriage on a sports tier in order to obtain distribution.²⁷²

100. Moreover, Comcast executives, including Mr. Rigdon, based on his independent experience at Charter, testified that demand for Tennis Channel is significantly less than demand for Golf Channel or Versus.²⁷³ Tennis Channel produced

²⁶⁸ See *supra* ¶¶ 56-75.

²⁶⁹ See *supra* ¶ 59. Mr. Solomon testified that eight years is a “long time” by “the cable business standard.” *Supra* ¶ 59 n.156; see also *WealthTV*, 24 FCC Rcd at 13000 ¶ 65 (ALJ) (timing of market entry of two networks is a relevant distinguishing factor). Cases from the employment discrimination context, while implicating different policy concerns, can be instructive as to general principles of discrimination. *Cf. Villanueva v. Wellesley College*, 930 F.2d 129, 130-31 (1st Cir. 1991) (court held that denial of tenure was not discriminatory and found that “[t]wo of the professors with whom Villanueva compared himself received tenure six to eight years before he became eligible. Comparisons over such a length of time are simply not probative, especially where, as here, the structure of the relevant department had changed quite dramatically during the intervening years.”); *Shah v. Gen. Elec. Co.*, 816 F.2d 264, 271 (6th Cir. 1987) (length of employment is a relevant distinguishing factor when comparing two employees).

²⁷⁰ See *supra* ¶ 59.

²⁷¹ See *supra* ¶ 13.

²⁷² See *supra* ¶¶ 15-16.

²⁷³ See *supra* ¶¶ 60-61.

no evidence to the contrary; in fact, Tennis Channel’s own documents acknowledged this discrepancy.²⁷⁴ The difference in the demand for the programming broadcast on Tennis Channel compared to the programming on Golf Channel and Versus is also reflected in vast cost differences for the programming that they respectively acquire and in their different ability to attract or retain subscribers.²⁷⁵

101. The evidence also shows material differences in how the networks are positioned with respect to viewers, advertisers and programming rights holders. Tennis Channel’s own demographic data and marketing presentations demonstrate the clear differences in the networks’ “target demographic group[s].”²⁷⁶ Golf Channel and Versus viewers are two of the most male-skewing channels on television, whereas Tennis Channel – as it regularly emphasizes in pitches to advertisers and distributors – has an audience with a [REDACTED]²⁷⁷ In addition, Tennis Channel’s viewers are significantly [REDACTED] } than Golf Channel’s and [REDACTED] than Versus’s.²⁷⁸ As a result of these disparities, advertisers view the networks very differently.²⁷⁹

102. Perhaps the most compelling evidence that market forces, and not discrimination, dictate how these three networks are carried is that every major MVPD except Dish Network carries Versus and Golf Channel to more than [REDACTED] percent of its subscribers, and all major MVPDs, including DIRECTV and Dish Network, carry Versus and Golf Channel [REDACTED] than they carry Tennis Channel.²⁸⁰

103. The evidence shows that market forces, not discrimination, shaped Comcast’s business agreements with the Major League networks. The un rebutted testimony of Mr. Bond and Ms. Gaiski demonstrates that Comcast’s carriage decisions regarding MLB Network, NBA TV and NHL Network were based on legitimate business reasons, including the negotiating strength of the Major Leagues and the popularity of their out-of-market packages, as well as the networks’ programming and the price reductions they offered.²⁸¹ Tennis Channel offered no credible contrary fact evidence.

²⁷⁴ See supra ¶ 60 [REDACTED]

²⁷⁵ See supra ¶¶ 61, 72.

²⁷⁶ *WealthTV*, 24 FCC Rcd at 12980-83 ¶¶ 27-34 (ALJ); see supra ¶¶ 65-69.

²⁷⁷ See supra ¶ 66.

²⁷⁸ See supra ¶ 69.

²⁷⁹ See supra ¶ 70.

²⁸⁰ See supra ¶ 57.

²⁸¹ See supra ¶¶ 51-55].

104. Contrary to Tennis Channel’s argument, Section 616 does not require that the same cost-benefit analysis calculated on Tennis Channel’s 2009 proposal also have been administered to Golf Channel and Versus.²⁸² Both networks were well established in the market by 2009 and were not seeking to expand distribution beyond already existing levels.²⁸³ Both networks were launched and achieved wide distribution during different market conditions when Tennis Channel did not yet exist.²⁸⁴ Tennis Channel lacks legal standing to claim discrimination as to how Versus and Golf Channel were treated in that earlier period, or to the consequences of that treatment years later in 2009.²⁸⁵

105. Even if Tennis Channel did have legal standing to challenge the past treatment of Golf Channel or Versus, Tennis Channel has failed to show that any of Comcast’s carriage decisions would not have passed a cost-benefit test. In fact, Comcast presented evidence that Golf Channel and Versus together paid hundreds of millions of dollars in launch incentives to distributors including Comcast to earn broad distribution.²⁸⁶ Tennis Channel failed to contest that proof. In addition, the cable industry changed dramatically between 1995 and 2009,²⁸⁷ and Section 616 does not require MVPDs such as Comcast to make the same carriage decisions in different market conditions.²⁸⁸

²⁸² See, e.g., *MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 13000 ¶ 69 (ALJ).

²⁸³ See *supra* ¶ 48.

²⁸⁴ See *supra* ¶ 48 & n.131.

²⁸⁵ See *WealthTV*, 24 FCC Rcd at 12998 ¶ 65 (ALJ) (defendants could not have favored INHD over WealthTV in their 2003 decision to carry INHD “***because WealthTV had not yet launched at the time the defendants decided to carry INHD***” (emphasis in original)).

²⁸⁶ See *supra* ¶ 12-13.

²⁸⁷ See *supra* ¶¶ 10-14.

²⁸⁸ *WealthTV*, 24 FCC Rcd at 12998-99 ¶ 64-65, 67 (ALJ) (recognizing that substantially different market conditions in different time periods resulted in different carriage objectives and decisions); see also *MASN*, 25 FCC Rcd at 18016-08 ¶ 13 & n.68 (finding that TWC legitimately considered the characteristics of different markets when making its carriage decisions for MASN and for its affiliated RSNs); cf. *Lim v. Tr. of Ind. Univ.*, 297 F.3d 575, 581 (7th Cir. 2002) (finding that denial of tenure to Lim was not discriminatory even though she had a similar or better publishing record as males who had been granted tenure years earlier because tenure standards had become “more stringent” over time); *Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995) (holding that defendant employer’s shift over time from seniority-based to skills-based layoff criteria was not evidence of its discriminatory intent).

106. The fact that carriage contracts periodically come up for renewal does not change the legal analysis. When a renewal merely involves extending a contract without material increases or decreases to distribution, it is not unlawful discrimination for an MVPD to keep the existing distribution in place without performing a full cost-benefit analysis.²⁸⁹ Such was the case at Comcast when the Versus and Golf Channel contracts were renewed in 2009 and 2011, respectively.²⁹⁰

107. The evidence also was uncontroverted that distributors rarely reposition established, broadly distributed networks such as Golf Channel and Versus because doing so would upset the settled expectations of subscribers and generate subscriber churn.²⁹¹ There was testimony, for example, that when Charter threatened to negatively reposition Golf Channel and Versus in 2007, it received so many calls and e-mails from disgruntled subscribers that its call center was overwhelmed.²⁹² It is not discrimination for MVPDs, such as Comcast, to seek to minimize this type of subscriber discontent by keeping well established networks in place.

108. Because Tennis Channel has presented no evidence that Comcast’s carriage decisions as to Golf Channel and Versus were not justified on a cost-benefit basis, and has failed to controvert the evidence that the decisions were justified on that basis, Tennis Channel has failed to show that Comcast’s cost-benefit analysis of the 2009 proposal was discriminatory.

IV. Unreasonable Restraint on Tennis Channel’s Ability to Compete Fairly

109. A network alleging that its ability to compete fairly is “unreasonably restrain[ed]” must do more than simply show that the challenged carriage decision

²⁸⁹ *MASN*, 25 FCC Rcd at 18106 ¶ 12 (“[A] vertically-integrated MVPD “[may treat] unaffiliated programmers differently from affiliates, so long as it can demonstrate that such treatment did not result from the programmer’s status as an unaffiliated entity.”); *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.”); *cf. Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006 (10th Cir. 1996) (finding that defendants had a legitimate business reason for not hiring plaintiffs because it was permissible to use different criteria to assess existing employees and new employees), *overruled in part on other grounds by Smith v. City of Jackson*, 544 U.S. 228 (2005); *Shah*, 816 F.2d at 271 (differential treatment of two employees did not raise inference of discrimination because one employee had worked at the company for more than twenty years while the other had worked at the company less than twenty months).

²⁹⁰ *See supra* ¶ 48 n.131.

²⁹¹ *See supra* ¶¶ 48-50.

²⁹² *See supra* ¶ 49.

“adversely affected its competitive position in the marketplace.”²⁹³ At a minimum, the network must show that any adverse effect was caused by something other than “a decision . . . on the basis of reasonable and legitimate business reasons that were within the bounds of fair competition.”²⁹⁴

110. Unlike in 1992, when the Cable Act was enacted, networks now have multiple avenues – including cable companies, satellite operators (e.g., DIRECTV and Dish Network), telcos (e.g., Verizon FiOS and AT&T U-Verse) and Internet streaming – for reaching paying subscribers.²⁹⁵ Indeed, the D.C. Circuit has held that “[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992.”²⁹⁶ Thus, if a network invests in sufficiently compelling content, it need not rely on a single MVPD to meet its distribution goals. Accordingly, the program carriage rules should not be a lever for a network to force a distributor to, in effect, function as an investor or banker by providing the funds that the network needs to buy more valuable programming, which, in turn, may lead to increased distribution.²⁹⁷

111. With 26 million subscribers, Tennis Channel is a successful network.²⁹⁸ And as one of the first large distributors to launch Tennis Channel, Comcast has contributed significantly to that success.²⁹⁹ Tennis Channel has benefited from a [REDACTED] increase in Comcast subscribers since the end of 2005, including through broad distribution on approximately { [REDACTED] } Comcast systems.³⁰⁰ As of the end of 2010, Comcast carried Tennis Channel to more subscribers than any distributor not affiliated with Tennis Channel.³⁰¹

112. The evidence shows that Tennis Channel is able to compete fairly for subscribers, including substantially all Comcast subscribers, across the country. With 130 distributors, including Comcast, Tennis Channel is well positioned to compete for

²⁹³ *WealthTV*, 24 FCC Rcd at 13002 ¶ 73 (ALJ) (alteration in original).

²⁹⁴ *Id.* at 13003 ¶ 73.

²⁹⁵ Comcast Findings ¶ 143.

²⁹⁶ *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

²⁹⁷ *Cf.* 1992 Cable Act § 2(b)(2) (Congress instructed the Commission to “rely on the marketplace to the maximum extent feasible.”); *WealthTV*, 24 FCC Rcd at 12994 ¶ 55 (ALJ).

²⁹⁸ Solomon Direct, Apr. 25, 2011 Tr. 247:13-19; Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 8.

²⁹⁹ Comcast Exh. 75 (Bond Written Direct) ¶¶ 4-5; Comcast Exhs. 84, 85, 659.

³⁰⁰ Comcast Exhs. 156, 578, 205, 206.

³⁰¹ Comcast Exhs. 201, 206.

additional subscribers.³⁰² Tennis Channel’s equity-for-carriage deals with DIRECTV and Dish Network give the network access to potential subscribers in every U.S. market.³⁰³ In every Comcast market, Comcast subscribers who do not wish to purchase Tennis Channel on the sports tier can switch to DIRECTV or Dish Network or, in some markets, to Verizon FiOS, AT&T U-Verse or a cable over-builder.³⁰⁴

113. Tennis Channel argues that merely by declining to distribute the network to additional subscribers, Comcast has “supress[ed] Tennis Channel’s subscriber numbers,” thereby unreasonably restraining its ability to compete fairly.³⁰⁵ However, Comcast cannot be accurately described as “suppressing” Tennis Channel’s distribution when Comcast distributes the network to more than [REDACTED] million subscribers and makes it available on a sports tier to substantially all of the rest of its subscribers.³⁰⁶ Section 616 is intended to enable non-affiliated programmers to compete fairly, not to insulate them from the need to compete at all for subscribers.³⁰⁷ The requirement of an unreasonable restraint on the ability to compete fairly would be meaningless if it could be satisfied by any decision not to distribute a network to additional subscribers – particularly where, as here, those subscribers already have access to the network on a sports tier and on competing MVPDs.

114. Comcast decided to carry Tennis Channel at a time when few other distributors did, and its distribution of the network has grown consistently and significantly to the point where Comcast now distributes Tennis Channel to more subscribers than any distributor not affiliated with the network.³⁰⁸ As a result, there is no evidence that Comcast’s carriage of Tennis Channel harms the network competitively.³⁰⁹

115. Further, having enjoyed the benefits of carriage by Comcast for more than six years, it is unfair of Tennis Channel to seek to deprive Comcast of the sports tier right that gained Tennis Channel distribution in March 2005. To hold otherwise would be

³⁰² Comcast Findings ¶ 133.

³⁰³ Comcast Exh. 435 at TTCCOM_00019691; Solomon Direct, Apr. 25, 2011 Tr. 247:13-248:9.

³⁰⁴ Comcast Findings ¶ 136; *Comcast Corp.*, 579 F.3d at 8; *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, 24 FCC Rcd 4401, 4403 ¶ 4 (2009).

³⁰⁵ Tennis Channel Trial Brief at 16-17.

³⁰⁶ *See supra* ¶ 90 n.249.

³⁰⁷ *WealthTV*, 24 FCC Rcd at 13002 ¶ 73 (ALJ) (“[T]he only restraints proscribed by sections 616 and 76.1301(c) are those that are ‘unreasonabl[e].’” (quoting 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c))).

³⁰⁸ Comcast Exhs. 201, 206.

³⁰⁹ Tennis Channel Findings ¶ 167.

contrary to Congress’s mandate to “rely on the marketplace to the maximum extent feasible,”³¹⁰ and to the Commission’s aim to serve that mandate without “precluding legitimate business practices common to a competitive marketplace.”³¹¹ It also would be contrary to the Commission’s holding that Section 616 claims should be focused “on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred.”³¹²

116. The evidence shows that Tennis Channel’s current distribution level results from its own deliberate decisions, including decisions regarding pricing and investment in programming. Tennis Channel has, according to its internal documents, long resisted price reductions sufficient to broaden its carriage, and spends less on its programming than nearly every other national sports network.³¹³ Further, Tennis Channel broke off negotiations between the parties after rejecting Comcast’s counteroffer.³¹⁴ Thus, Tennis Channel has failed to satisfy its burden of proving that Comcast’s decision to decline the 2009 proposal is the proximate cause of any harm to Tennis Channel’s ability to compete fairly.³¹⁵

117. The evidence also shows that Tennis Channel has failed to meet its burden to prove that Comcast’s denial of Tennis Channel’s 2009 proposal was the proximate cause of the harm that Tennis Channel alleges. Tennis Channel’s theory of competitive harm is premised on not having at least [REDACTED] million subscribers.³¹⁶ But the evidence shows that Tennis Channel would not reach at least [REDACTED] million subscribers, even if Comcast had accepted the 2009 proposal.³¹⁷ According to Tennis Channel, carriage on Comcast’s sports tier results in the network’s total distribution of

³¹⁰ 1992 Cable Act § 2(b)(2) (instructing the Commission to “rely on the market to the maximum extent feasible”).

³¹¹ *Second Report & Order*, 9 FCC at 2643 ¶ 1; *see also MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 12994 ¶ 55 (ALJ).

³¹² *WealthTV*, ___ FCC Rcd ___ ¶ 6 (FCC).

³¹³ Comcast Exh. 707 at TTCCOM_00018552; Comcast Exh. 709; Comcast Exh. 80 (Orszag Written Direct) ¶ 40; Comcast Exh. 77 (Egan Written Direct) ¶¶ 53, 65.

³¹⁴ *See supra* ¶ 31.

³¹⁵ *See Barkan v. Dunkin’ Donuts, Inc.*, 627 F.3d 34, 40-42 (1st Cir. 2010) (finding that plaintiff had not established proximate cause 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).

³¹⁶ *See, e.g.*, Tennis Channel Trial Brief at 15-17; Tennis Channel Exh. 18 (Complaint) ¶¶ 88-89.

³¹⁷ Comcast Exhs. 201, 588, 638.

120. With respect to Tennis Channel’s claim that Comcast discriminates on the basis of affiliation in *favor* of affiliated networks, Tennis Channel has not alleged that Comcast’s carriage of its affiliated networks causes any harm to Tennis Channel.³²³ Instead, Tennis Channel attributes all alleged harm to “Comcast’s refusal to carry Tennis Channel more broadly.”³²⁴ Even if Comcast were hypothetically to cease carrying Golf Channel and Versus (or the Major League networks), Tennis Channel still would have the same number of subscribers, and Tennis Channel’s asserted competitive harm – all of which Tennis Channel attributes to its “limited distribution” by Comcast³²⁵ – would be unchanged. Tennis Channel’s failure to connect Comcast’s alleged favorable treatment of affiliated networks with any alleged competitive harm is fatal to Tennis Channel’s theory of discrimination based on Comcast’s alleged favoritism of affiliated networks.

V. Remedies

121. Because the Presiding Judge finds that Tennis Channel has failed to prove affiliation-based discrimination by Comcast and failed to prove any unreasonable restraint on its ability to compete fairly by Comcast, and Comcast has proved that its decision to decline Tennis Channel’s 2009 proposal was based on non-discriminatory reasons, there is no need to consider whether the remedies Tennis Channel is seeking are appropriate. However, the issue of remedies was briefed and argued, and in the event that there is an appeal, the Commission and the parties may find it helpful to have the Presiding Judge’s ruling on the remedies issue.

122. The remedies that Tennis Channel has requested are neither necessary nor proper based on the hearing record. The distribution level which Tennis Channel now seeks, expanded basic, is greater than both of the options which Tennis Channel proposed to Comcast in 2009, and greater than the distribution that Tennis Channel is receiving from any other MVPD in the market, including DIRECTV and Dish Network, which

harm alleged and the injury caused, and the theory of liability rests on the “independent actions of third and even fourth parties,” causation has not been established).

³²³ See, e.g., Tennis Channel Findings ¶¶ 168-71 (“Comcast’s carriage of Tennis Channel deprives the network of millions of subscribers” and “[l]imited distribution from Comcast . . . affects [Tennis Channel’s] viability.”); ¶¶ 172-177 (Tennis Channel has “no value” if it is carried on the sports tier, and “deprives Tennis Channel of economies of scale.”); ¶¶ 178-82 (“Comcast has used banishment to its narrowly-distributed Sports Tier as a threat to ensure it achieves favorable price and content terms with unaffiliated networks.”); ¶¶ 183-213 (“Comcast’s limited distribution of Tennis Channel harms the network’s ability to compete for programming rights,” “advertising revenues,” and “viewers.”).

³²⁴ Tennis Channel Findings ¶ 167.

³²⁵ Tennis Channel Findings ¶¶ 167-213.

received substantial equity as part of their agreements with Tennis Channel.³²⁶ In addition, the significant increase of more than [REDACTED] in carriage fees which Tennis Channel seeks is inconsistent with the sports tier contract which Tennis Channel itself presented and agreed to in 2005.³²⁷ For these reasons, even if some remedy were appropriate, the Presiding Judge would reject Tennis Channel's request for expanded basic carriage and for any increase in license fees from the level Comcast currently pays. Further, the Presiding Judge would not grant Tennis Channel any carriage broader than the average penetration that the network has in the marketplace (without taking into account distribution by DIRECTV and Dish Network, which carry Tennis Channel pursuant to equity-for-carriage deals).

ULTIMATE CONCLUSIONS

123. Based on the foregoing findings of fact and conclusions of law, it is concluded that Tennis Channel has not satisfied its burden of proving that Comcast engaged in discrimination in the selection, terms or conditions of carriage on the basis of Tennis Channel's non-affiliation.

124. Based on the foregoing findings of fact and conclusions of law, it is further concluded that Tennis Channel has not satisfied its burden of proving that Comcast unreasonably restrained Tennis Channel's ability to compete fairly.

125. In light of the ultimate conclusions reached in paragraphs 108 and 109, above, *HDO* Issue No. 1 is resolved in Comcast's favor and *HDO* Issues No. 2 and 3 are moot.

RECOMMENDED DECISION

126. IT IS RECOMMENDED that the complaint filed by Tennis Channel, Inc., in MB Docket No. 10-204 BE DENIED.

³²⁶ Comcast Findings ¶¶ 148, 204.

³²⁷ *Supra* ¶ 16.

CERTIFICATE OF SERVICE

I, Michael Scheinkman, hereby certify that on June 21, 2011, I served a true and correct copy of the foregoing Proposed Recommended Decision submitted by Defendant Comcast Cable Communications, LLC on the following individuals by electronic mail:

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*Courtesy copy