

when it shifted Tennis Channel from broad carriage to the sports tier in certain systems that Comcast had acquired from another MVPD in the southern division.⁵⁷ Mr. Bond further testified that he was not aware of any churn analysis indicating that Comcast has lost any subscribers due to its carriage of Tennis Channel, and, indeed, Tennis Channel offered no evidence that Comcast had lost any subscribers to DIRECTV and Dish Network after Comcast declined the MFN offers in 2006 and 2007.⁵⁸ None of this testimony is disputed by Tennis Channel.

Mr. Bond's conclusion that the costs of Tennis Channel's proposal outweighed any putative benefits is independently supported by Mr. Rigdon, who testified that he separately reached the same decision when he was the head of programming acquisition at Charter.⁵⁹ Mr. Bond's conclusion also is consistent with, but independent of, the decisions of other MVPDs such as Time Warner Cable, Charter, Dish Network, and Verizon, each of which similarly declined offers from Tennis Channel for broader carriage during the same period.⁶⁰

**B. Mr. Bond's Testimony That Tennis Channel
Broke Off Negotiations in June 2009 Was Credible**

Mr. Bond testified that, after declining Tennis Channel's May 2009 proposal, he made a counterproposal to Tennis Channel and offered "to get personally involved and

⁵⁷ Comcast Exh. 130; Gaiski Direct, May 2, 2011 Tr. 2365:4-2366:17.

⁵⁸ Bond Direct, Apr. 29, 2011 Tr. 2053:1-2054:4, 2084:15-2085:17.

⁵⁹ Rigdon Direct, Apr. 28, 2011 Tr. 1805:21-1806:22; Rigdon Cross, Apr. 28, 2011 Tr. 1854:10-1855:10.

⁶⁰ Comcast Exhs. 31, 32, 165, 201, 487, 529, 534, 545, 632, 650; Comcast Findings ¶¶ 47-53. Similarly, Cablevision did not carry Tennis Channel at all until August 2009, when it launched the network on a sports tier. (Comcast Findings ¶ 48.)

try to help find more distribution” for Tennis Channel on a regional basis.⁶¹ Mr. Bond explained that Mr. Solomon cut off further discussions and referred to Mr. Bond’s counterproposal as “a waste of time.”⁶² Mr. Bond’s testimony that Mr. Solomon broke off negotiations with Comcast in 2009 was corroborated by Mr. Solomon’s own concession on cross-examination, by Mr. Simon, Tennis Channel’s CFO and COO, and by Ms. Gaiski.⁶³

Mr. Bond’s willingness to continue negotiating in good faith was corroborated by subsequent developments. Within a few months of Mr. Solomon’s breaking off negotiations in June, Mr. Solomon learned that Comcast had agreed to provide Sportsman Channel and Outdoor Channel with broader than sports tier distribution on a regional basis,⁶⁴ which was similar to the counterproposal that Mr. Solomon had rejected as a “waste of time.”

C. Mr. Bond’s Testimony That Comcast Negotiated a “Sports Tier Deal” with Tennis Channel Was Credible

Mr. Bond was the only witness for either party who had been personally involved in the parties’ negotiations over the Affiliation Agreement.⁶⁵ Mr. Bond provided undisputed testimony that he informed Tennis Channel during those negotiations that

⁶¹ Bond Cross, Apr. 29, 2011 Tr. 2215:18-2216:10; Comcast Exh. 75 (Bond Written Direct) ¶ 19.

⁶² Comcast Exh. 75 (Bond Written Direct) ¶ 19; Bond Direct, Apr. 29, 2011 Tr. 2128:9-2129:21.

⁶³ Comcast Findings ¶ 32; Comcast Exh. 75 (Bond Written Direct) ¶ 19; Bond Direct Apr. 29, 2011 Tr. 2128:9-2129:21; Comcast Exh. 78 (Gaiski Written Direct) ¶ 17; Solomon Cross, Apr. 25, 2011 Tr. 348:13-353:5; Comcast Exh. 646 (Simon Dep.) 50:9-17.

⁶⁴ Comcast Exh. 707; Solomon Cross, Apr. 25, 2011 Tr. 481:22-483:1.

⁶⁵ Comcast Exh. 75 (Bond Written Direct) ¶ 4; Bond Direct, Apr. 29, 2011 Tr. 1983:12-1988:13.

Comcast was pursuing a sports tier strategy,⁶⁶ that Comcast specifically negotiated for the right to carry Tennis Channel on the sports tier, and that the discussions between the parties were that this was a “sports tier deal.”⁶⁷

Although Tennis Channel now claims that it agreed to the Affiliation Agreement because of its “understanding and expectation” that Comcast would “adjust” its tiering at some unspecified point in time, Tennis Channel offered no evidence to support that assertion.⁶⁸ Tennis Channel did not call any witness involved in the negotiations over the Affiliation Agreement, and Mr. Solomon admitted he had no role in negotiating it because it was executed before he arrived at Tennis Channel.⁶⁹

ARGUMENT

I. Legal Standards

In this *de novo* proceeding,⁷⁰ 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.⁷¹ Tennis Channel’s argument to the contrary was rejected by the Presiding

⁶⁶ Bond Direct, Apr. 29, 2011 Tr. 1987:16-1988:4.

⁶⁷ Bond Cross, Apr. 29, 2011 Tr. 2159:4-11.

⁶⁸ Tennis Channel Findings ¶ 54.

⁶⁹ Comcast Exh. 517 (Solomon Dep.) Tr. 197:20-198:3. Mr. Solomon is not competent to testify as to Tennis Channel’s intent when negotiating the Affiliation Agreement because he lacks personal knowledge. *See* Fed. R. Evid. 602.

⁷⁰ *The Tennis Channel, Inc., v. Comcast Cable Commc’ns, LLC*, MB Docket No. 10-204, 25 FCC Rcd 14149, 14150 ¶ 2 (MB 2010) (hereinafter “*HDO*”).

⁷¹ *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).

Judge in *WealthTV*.⁷² 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.⁷³

To establish a violation by Comcast of Section 616 and Section 76.1301(c) of the Commission’s rules, Tennis Channel must prove each of two elements. First, Tennis Channel must prove that Comcast discriminated against it in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation.⁷⁴ Second, it must prove that the effect of the alleged affiliation-based discrimination was to unreasonably restrain Tennis Channel’s ability to compete fairly.⁷⁵ As set forth below and in Comcast’s Findings, Tennis Channel has proved neither.

As to the first element of a claim under Section 616, the “relevant inquiry” is whether a vertically integrated MVPD “acted upon” a motive to discriminate on the basis of affiliation or non-affiliation.⁷⁶ “[U]nder this standard, a vertically integrated MVPD may treat unaffiliated [networks] differently from affiliates, so long as . . . such treatment

⁷² *WealthTV*, 24 FCC Rcd at 12995 ¶ 57 (ALJ). Program access proceedings, cited by Tennis Channel as support for shifting the burden in this program carriage proceeding, are an exception to the “usual practice of requiring that the party seeking relief by Commission order . . . bear the burden of proving that the violations occurred.” *Id.* at 12995 ¶ 58 (citing, *inter alia*, *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) and 5 U.S.C. § 556(d)).

⁷³ *See WealthTV*, 24 FCC Rcd at 12997 ¶ 61 (ALJ).

⁷⁴ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 56 (ALJ).

⁷⁵ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 56 (ALJ).

⁷⁶ *MASN*, 25 FCC Rcd at 18115 ¶ 22; *see also WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (ALJ).

did not result from the [network's] status as an unaffiliated entity.”⁷⁷ 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.”⁷⁸

“[R]esolution of Section 616 complaints . . . necessarily focus[es] 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.”⁷⁹ There is no affiliation-based discrimination where the challenged carriage decision was based on legitimate business reasons.⁸⁰ Where – as here – the legitimate business reasons for a challenged carriage decision are memorialized in contemporaneous documentation, that documentation is, according to the Commission, a basis to “truncat[e]” program carriage litigation.⁸¹

Conducting “a cost-benefit analysis and determin[ing] that the benefits of [broader carriage] would not outweigh the substantial costs” is, as a matter of law, a

⁷⁷ *MASN*, 25 FCC Rcd at 18106 ¶ 12 (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.”).

⁷⁸ *See WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (ALJ) (quotation marks and citation omitted).

⁷⁹ *WealthTV*, ___ FCC Rcd ___ ¶ 6 (FCC) (quoting *Second Report & Order*, 2648 ¶ 14 (internal quotation marks omitted)). *Cf.* *Tennis Channel Exh. 13* (NBCU Order) ¶ 124 (“We intend to evaluate the parties’ behavior in the context of the specific facts pertaining to each negotiation.”).

⁸⁰ *MASN*, 25 FCC Rcd at 18099, 18104-06 ¶¶ 1, 10-12; *WealthTV*, 24 FCC Rcd at 12998, 12999 ¶¶ 65, 67 (ALJ).

⁸¹ *MASN*, 25 FCC Rcd at 18114 ¶ 21.

“legitimate and non-discriminatory” basis for deciding against broader carriage.⁸²

Accordingly, the “high cost of carriage” is a legitimate basis for rejecting a programmer’s demand.⁸³ 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.⁸⁴

Evidence of limited demand includes evidence that an MVPD “received no appreciable subscriber complaints regarding” the lack of broader carriage of the unaffiliated network.⁸⁵ 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.⁸⁶

The fact that other cable operators unaffiliated with the network at issue have made similar carriage decisions provides compelling “independent evidence” that an MVPD has not engaged in affiliation-based discrimination because, by definition, the carriage decisions of the other MVPDs could not possibly have been based on affiliation.⁸⁷

As to the second element of a claim under Section 616, a network alleging that its ability to compete fairly is “unreasonably restrain[ed]” must do more than simply show that the challenged carriage decision “adversely affected its competitive position in the

⁸² *Id.* at 18106, 18112 ¶¶ 12, 19.

⁸³ *Id.* at 18112 ¶ 19.

⁸⁴ *Id.* at 18106-07 ¶ 13.

⁸⁵ *Id.* at 18109-10 ¶ 15.

⁸⁶ *Id.*

⁸⁷ *See id.* at 18111-12 ¶ 18.

marketplace.”⁸⁸ 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.”⁸⁹

II. Comcast Did Not Discriminate Against Tennis Channel on the Basis of Affiliation

A. Comcast’s Decision Not to Accept Tennis Channel’s 2009 Proposal Was Based on Legitimate Business Reasons and Not on Affiliation

Tennis Channel claims that this case arises from Comcast’s decision not to accept Tennis Channel’s 2009 proposal for broader carriage.⁹⁰ The credible evidence shows that Tennis Channel’s status as a network unaffiliated with Comcast played no role – much less the required determinative role – in Comcast’s decision to decline Tennis Channel’s 2009 proposal for broader carriage.⁹¹

Mr. Bond testified, as corroborated by Ms. Gaiski and contemporaneous documents, that Comcast’s carriage decision was based on a cost-benefit analysis showing that the proposal would have cost Comcast an additional [REDACTED] million

⁸⁸ *WealthTV*, 24 FCC Rcd at 13002 ¶ 73 (ALJ) (alteration in original). Quoting the Media Bureau’s decision in *MASN*, which the Commission subsequently reversed, Tennis Channel proposes an erroneous formulation of this statutory element. (Tennis Channel Findings ¶ 309 (quoting *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, 23 FCC Rcd 15783 ¶¶ 27-28 (MB 2008)); see also (Tennis Channel Findings ¶ 310). Among other errors, Tennis Channel’s proposed formulation omits the essential requirement the restraint be “unreasonabl[e].” 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c); see *WealthTV*, 24 FCC Rcd at 13002-03 ¶ 73 (ALJ).

⁸⁹ *WealthTV*, 24 FCC Rcd at 13003 ¶ 73.

⁹⁰ See, e.g., Tennis Channel Findings ¶ 263. This is not inconsistent with, and in no way prejudices, Comcast’s statute of limitations defense, which is not a matter designated for the Chief Administrative Law Judge to resolve in this proceeding. *HDO*, 25 FCC Rcd at 14149-50 ¶ 2 n.4.

⁹¹ *WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (ALJ); Comcast Findings ¶¶ 38, 43-46.

without offsetting benefits.⁹² As the Commission ruled in *MASN*, a cost-benefit analysis is, as a matter of law, a legitimate and non-discriminatory business rationale.⁹³

Tennis Channel offered no analysis of its own as to benefits that would offset the increased costs.⁹⁴ Although Mr. Solomon testified, without corroboration, that he believed Comcast would find the proposal “irresistible,” that testimony was not credible.⁹⁵ Tennis Channel’s 2009 proposal failed to address cost, which Mr. Solomon knew to be Mr. Bond’s biggest concern, even though that Comcast had twice declined MFN offers (in 2006 and 2007) that were more economically favorable to Comcast than the 2009 proposal.⁹⁶ Under the circumstances, the proposal’s failure to address costs is one of several indications that it was not meant as a serious starting point for

⁹² Comcast Findings ¶¶ 28, 37-38, 40. Tennis Channel’s own contemporaneous analysis also showed that accepting the 2009 proposal would have increased Comcast’s costs significantly. (Comcast Findings ¶ 28 n.63).

⁹³ *MASN*, 25 FCC Rcd at 18104-06, 18112 ¶¶ 10-12, 19; *WealthTV*, 24 FCC Rcd at 12998, 12999 ¶¶ 65, 67 (ALJ); *see also WealthTV*, ___ FCC Rcd ___ ¶ 32 (FCC).

⁹⁴ Comcast Reply Findings ¶ 222; Comcast Exh. 517 (Solomon Dep.) 300:25-303:7 (admitting that in May 2009 Tennis Channel touted the network to Comcast rather than presenting information about how Comcast could have made back the increased payments to Tennis Channel). Tennis Channel now speculates as to how Comcast could recoup the substantial costs associated with the 2009 offer, such as through possible increases in customer retention or revenue from ad avails. (*See, e.g.*, Tennis Channel Findings ¶ 66). But Tennis Channel provided Comcast with no quantification or analysis of those asserted benefits at the time it made the 2009 proposal. (*See* Comcast Exh. 517 (Solomon Dep.) 300:25-303:7). Moreover, Comcast has presented uncontroverted evidence that even if the 2009 proposal had any benefits to Comcast, they would not have been sufficient to offset Tennis Channel’s proposed price increase. (*See* Comcast Findings ¶¶ 37-39).

⁹⁵ Comcast Findings ¶¶ 28-31, 33-34; *see also supra* Part I [Ken Solomon].

⁹⁶ Comcast Findings ¶¶ 29, 35; Comcast Exh. 75 (Bond Written Direct) ¶¶ 10, 12; *see also* Comcast Exhs. 60, 66, 74, 86, 87, 588.

negotiations, but instead was an improper attempt to circumvent the time bar on the program carriage claim [REDACTED] 97

Lacking any credible evidence that Comcast would have received benefits from the 2009 proposal, Tennis Channel instead argues that the proposal should have been “persuasive” to Comcast because Tennis Channel costs less than Comcast Cable pays to Comcast’s programming group to carry Versus and Golf Channel, and that Comcast would have realized this if it had taken those networks into account when considering the proposal.⁹⁸ Tennis Channel’s newfound position that Comcast discriminated against it by *not* considering Comcast’s affiliated networks in declining Tennis Channel’s proposal⁹⁹ is inconsistent with Section 616. In *WealthTV*, the Commission ruled that evidence a distributor did not consider affiliated networks in making the challenged carriage decision regarding an unaffiliated network demonstrated the absence of affiliation-based

⁹⁷ See Comcast Findings ¶¶ 30-33, 36 (discussing other indications that the 2009 proposal was not a sincere effort to start negotiations, including that, by early 2009, months before making its “irresistible” offer to Comcast, Tennis Channel had already [REDACTED], that Tennis Channel had sent a threatening and aggressive letter to Comcast in April 2009, that its proposal was almost a take-it-or-leave-it offer, and that Mr. Solomon cut off negotiations with Mr. Bond rather than attempt to negotiate a compromise).

⁹⁸ Tennis Channel Findings ¶¶ 65, 74-75, 215-21. Tennis Channel had previously argued to the Commission and to the Presiding Judge that Comcast *did* consider its affiliated networks when deciding to decline the May 2009 proposal. (See Comcast Reply Findings ¶ 305).

⁹⁹ Tennis Channel Findings ¶¶ 65, 74-75, 215-21. Tennis Channel argues that “[i]n rejecting Tennis Channel’s May 2009 proposal, Comcast never compared nor considered how much it pays its own similarly-situated sports networks.” (Tennis Channel Findings ¶ 220). Among its other flaws, that argument ignores that Tennis Channel is fundamentally different from Golf Channel and Versus. (See *infra* Part IV.B; Comcast Findings ¶¶ 73-102; Comcast Reply Findings ¶¶ 261-84).

discrimination.¹⁰⁰ Here, Comcast executives testified credibly and consistently, without rebuttal, that Comcast did not consider its affiliated networks at all in declining Tennis Channel's 2009 proposal, and Tennis Channel admits that it did not bring up Versus or Golf Channel during the 2009 negotiations.¹⁰¹ Contrary to Tennis Channel's new position, this is evidence that there was no discrimination.

Further, it was Tennis Channel, not Comcast, that ended negotiations in June 2009, when Mr. Solomon dismissed Mr. Bond's counterproposal to become personally involved in helping Tennis Channel gain additional distribution as a "waste of time."¹⁰² As in *WealthTV*, Comcast's willingness to continue negotiations demonstrates that it did not act on any discriminatory motive.¹⁰³

B. The History of the Parties' Dealings Confirms That Comcast Has Not Discriminated Against Tennis Channel on the Basis of Affiliation

Comcast was among the first large MVPDs to carry Tennis Channel, and Comcast did so without the equity-for-carriage deals that incentivized DIRECTV and Dish Network to launch Tennis Channel.¹⁰⁴ Instead, Tennis Channel incentivized Comcast to

¹⁰⁰ *WealthTV*, 24 FCC Rcd at 12999 ¶ 67 (ALJ) ("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."); *see also WealthTV*, ___ FCC Rcd ___ ¶ 15 (FCC).

¹⁰¹ Comcast Findings ¶¶ 43-46; Solomon Recross, Apr. 25, 2011 Tr. 533:14-20.

¹⁰² Comcast Findings ¶ 32.

¹⁰³ *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) (stating that despite lack of demand for WealthTV, "TWC continued to negotiate in good faith with WealthTV"). That discussing Mr. Bond's offer would not have been a "waste of time" was confirmed when, shortly after Tennis Channel broke off negotiations, Comcast provided additional distribution to two independent sports networks that were carried on the sports tier. (Comcast Findings ¶ 42).

¹⁰⁴ Comcast Findings ¶¶ 16-23, 134; Comcast Exh. 659.

carry the network, before any of Comcast's principal competitors did, by granting Comcast the right to carry the network on a sports tier.¹⁰⁵ Indeed, during the parties' negotiations leading up to the 2005 Affiliation Agreement, Tennis Channel pitched sports tier carriage as more financially favorable to Comcast than broad carriage.¹⁰⁶ When making its 2009 proposal, Tennis Channel neither offered Comcast an incentive to relinquish its sports tier right nor explained why Comcast should dramatically increase its costs for programming that Comcast already made available to virtually all of its subscribers.¹⁰⁷

Further, Comcast's consideration of Tennis Channel's MFN offers in 2006 and 2007 shows that Comcast did not act based on any motive to discriminate against Tennis Channel.¹⁰⁸ Comcast performed a cost-benefit analysis of each offer, documented its analysis and explained its analysis to Tennis Channel, even though Comcast was carrying Tennis Channel pursuant to the parties' agreement and was under no obligation to increase distribution.¹⁰⁹ There is no evidence that Tennis Channel ever disagreed with or disputed those cost-benefit analyses, which evaluated Tennis Channel as if it were an affiliate, partially owned by Comcast, and Mr. Solomon testified that Comcast's

¹⁰⁵ Comcast Findings ¶¶ 16-23, 40, 134; Comcast Exh. 659.

¹⁰⁶ Comcast Findings ¶ 18; Comcast Exh. 52.

¹⁰⁷ Comcast Findings ¶¶ 28-31, 33-34, 46; Comcast Exh. 517 (Solomon Dep.) 300:25-303:7; *see also supra* Part I [Ken Solomon].

¹⁰⁸ Comcast Findings ¶¶ 24-26. [REDACTED] (Comcast Findings ¶ 26 n.58).

¹⁰⁹ Comcast Findings ¶¶ 24-26.

decisions to decline those offers were not discriminatory.¹¹⁰ Tennis Channel has clarified that it is not claiming that any action prior to June 2009 constituted discrimination.¹¹¹

In its desperation to manufacture evidence of discrimination, Tennis Channel argues that it is discrimination for Comcast to adjust its carriage of Tennis Channel in response to competitive market conditions.¹¹² Tennis Channel's argument shows just how inconsistent its conception of discrimination is with Section 616. In the 1992 Cable Act, Congress directed the Commission to "rely on the marketplace to the maximum extent feasible" in implementing Section 616.¹¹³ Contrary to that directive, Tennis Channel asks the Presiding Judge to consider Comcast's legitimate responses to marketplace forces as evidence of prohibited discrimination.¹¹⁴ Equally contrary to that

¹¹⁰ Comcast Findings ¶ 26. Tennis Channel now argues that Comcast ignored potential benefits from the 2006 and 2007 MFN offers when it performed its cost-benefit analyses. (Tennis Channel Findings ¶ 265). Tennis Channel's argument is undermined by the unrebutted testimony of Mr. Bond that he did consider the benefits of carrying Tennis Channel more broadly in 2006 and 2007, and concluded that the total benefits did not outweigh the cost increase. (Comcast Findings ¶¶ 24-25; Comcast Reply Findings ¶¶ 219).

¹¹¹ Tennis Channel Findings ¶ 293.

¹¹² 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.'" (alterations in original)). Tennis Channel's argument improperly conflates (i) the complex framework proposed by Professor Austan Goolsbee, and used by the FCC staff, which compares a vertically integrated cable company's carriage decisions to the decisions of other cable companies facing the same competitors, to see whether its decisions regarding carriage of affiliated networks are systematically *different from those of other cable companies* in response to differences in the degree of DBS and telco competition across markets, with (ii) the simple fact that Comcast makes carriage decisions involving an unaffiliated network, Tennis Channel, in response to different competitive conditions in different markets. Tennis Channel's argument also disregards that the penetration of Comcast's sports tier varies by market in response to competitive conditions.

¹¹³ 1992 Cable Act § 2(b)(2).

¹¹⁴ Tennis Channel Findings ¶¶ 164-65.

directive is Tennis Channel's argument that it is discrimination for Comcast to carry Tennis Channel less broadly than Golf Channel and Versus¹¹⁵ even though, for example, Tennis Channel launched into radically different market conditions and has a fraction of those networks' overall marketplace acceptance.¹¹⁶

C. Tennis Channel's Carriage by Other Distributors Provides Independent Evidence That Comcast Has Not Discriminated Against Tennis Channel

Comcast's carriage of Tennis Channel is consistent with the carriage of Tennis Channel by other MVPDs, including other cable operators unaffiliated with Golf Channel or Versus, whose carriage decisions provide "independent evidence" that Comcast has not engaged in affiliation-based discrimination.¹¹⁷ 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] one of which (Cablevision) did not carry Tennis Channel at all until August 2009.¹¹⁸ Comcast carries Tennis Channel to a higher percentage of its subscribers than [REDACTED] [REDACTED] }¹¹⁹ Those cable companies are the most relevant market benchmarks for Comcast's carriage decision because they face the same competitive pressures (from satellite providers, telco distributors and cable over-builders), use similar technologies, and face similar bandwidth constraints.¹²⁰

¹¹⁵ See, e.g., Tennis Channel Findings ¶¶ 25-32.

¹¹⁶ Comcast Findings ¶¶ 11-15, 53-60; Comcast Reply Findings ¶ 211; Comcast Exhs. 1102, 1103.

¹¹⁷ Comcast Findings ¶¶ 67-72; *MASN*, 25 FCC Rcd at 18111 ¶ 18.

¹¹⁸ Comcast Findings ¶¶ 48, 69.

¹¹⁹ Comcast Findings ¶ 69 n.168.

¹²⁰ Comcast Findings ¶ 68.

When all of the largest distributors – including satellite providers and telco distributors – are ranked by Tennis Channel’s penetration among their subscribers, Comcast falls in the middle.¹²¹ Tennis Channel places great weight on its broad carriage by DIRECTV and Dish Network – which carry Tennis Channel to the greatest number of subscribers [REDACTED] and [REDACTED] respectively)¹²² – but those distributors carry Tennis Channel pursuant to equity-for-carriage deals.¹²³ Thus, “even assuming that the carriage decisions made by DBS operators are relevant for assessing [an MVPD’s] carriage decisions”¹²⁴ in an ordinary case, they are not appropriate benchmarks here.¹²⁵

Tennis Channel’s own documents also show that Time Warner Cable, Charter, Dish Network and Verizon – like Comcast – all refused Tennis Channel’s requests for broader carriage between 2009 and 2010, many citing Tennis Channel’s [REDACTED] [REDACTED]¹²⁶ Similarly, Cablevision rejected Tennis Channel’s request to be launched broadly in 2009.¹²⁷ Those distributors’ decisions confirm the testimony that Tennis Channel’s programming is not sufficiently compelling to attract new subscribers, and provide “independent evidence”¹²⁸ that Comcast declined Tennis

¹²¹ Comcast Findings ¶ 67; Comcast Exh. 1103.

¹²² Comcast Findings ¶¶ 134, 148 & n.386.

¹²³ Comcast Findings ¶ 70. The evidence shows that prior to acquiring their equity interests, DIRECTV and Dish Network refused to carry Tennis Channel at all. Comcast Exh. 508; Comcast Exh. 517 (Solomon Dep.) 314:23-315:4.

¹²⁴ *MASN*, 25 FCC Rcd at 18112 ¶ 18 n.101.

¹²⁵ Comcast Findings ¶ 70.

¹²⁶ Comcast Findings ¶¶ 48-51, 71; Comcast Exhs. 117, 255, 627.

¹²⁷ Comcast Findings ¶ 48.

¹²⁸ *MASN*, 25 FCC Rcd at 18111-12 ¶ 18.

Channel’s 2009 proposal for legitimate business reasons, and not on the basis of affiliation.¹²⁹

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

Tennis Channel has failed to satisfy its burden of proving the competitive harm element of its Section 616 claim with respect to its claim that Comcast discriminates *against* Tennis Channel, and it does not even attempt to satisfy its burden of proving competitive harm with respect to its alternative claim that Comcast discriminates in *favor* of its affiliated networks.

There is no evidence that Comcast’s carriage of Tennis Channel harms the network competitively. Tennis Channel is a successful network with 26 million subscribers through 130 distributors (including Comcast)¹³⁰ that is well-positioned to compete for additional subscribers. In fact, Tennis Channel has consistently expanded its subscriber base, in line with its past projections.¹³¹ As recognized in internal Tennis Channel documents, Tennis Channel’s equity-for-carriage deals with DIRECTV and Dish Network make the network available in virtually every home in the United States.¹³²

Tennis Channel argues that, merely by declining to distribute the network more broadly, Comcast has “supress[ed] Tennis Channel’s subscriber numbers,”¹³³ and “deprive[s] the network of millions of subscribers,”¹³⁴ thereby unreasonably restraining

¹²⁹ Comcast Findings ¶¶ 53, 72.

¹³⁰ Comcast Findings ¶ 133.

¹³¹ Comcast Findings ¶¶ 133; *see* Tennis Channel Findings ¶¶ 17.

¹³² Comcast Findings ¶¶ 135-36.

¹³³ Tennis Channel Trial Brief at 16-17.

¹³⁴ Tennis Channel Findings ¶ 168.

its ability to compete fairly.¹³⁵ As a matter of fact, 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.¹³⁶ As a matter of law, 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.¹³⁷ 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.

Regardless, the evidence shows that Tennis Channel has failed to meet its burden of proving that Comcast’s denial of Tennis Channel’s 2009 proposal was the proximate cause of the harm that Tennis Channel alleges. As an initial matter, Tennis Channel’s

¹³⁵ Tennis Channel also argues that placement on the sports tier is “not viable” for ad-supported networks like Tennis Channel. (Tennis Channel Findings ¶ 170 (citation omitted)). Nearly every network on the sports tier is ad supported. (Comcast Reply Findings ¶ 294).

¹³⁶ Comcast Findings ¶¶ 134, 136; Comcast Reply Findings ¶ 310. Moreover, in direct contradiction to Tennis Channel’s argument that Comcast acts as a “bottleneck” on its ability to reach subscribers, the D.C. Circuit has found that today’s competitive environment is markedly different and more crowded than it was nearly twenty years ago when the Cable Act was passed because “[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992.” *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); see also *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).

¹³⁷ *WealthTV*, 24 FCC Rcd at 13002-03 ¶ 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))).

current subscriber count results from Tennis Channel's own deliberate decisions,¹³⁸ including its decisions regarding its pricing and investment in programming and its decision to break off negotiations with Comcast in June 2009.¹³⁹

Further, Tennis Channel's theory of competitive harm is premised on not having at least [REDACTED] million subscribers.¹⁴⁰ But it is undisputed that Tennis Channel would not have reached [REDACTED] million subscribers, even if Comcast had accepted the 2009 proposal.¹⁴¹ If Comcast had accepted Tennis Channel's proposal for D1 carriage in May 2009, then Tennis Channel still would have fewer than [REDACTED] million total subscribers.¹⁴² Similarly, if Comcast were to distribute Tennis Channel to every Comcast subscriber, Tennis Channel still would have insufficient distribution to meet the [REDACTED] million subscriber threshold supposedly required by certain tennis rightsholders to telecast their "most desirable matches,"¹⁴³ and it would not come close to approaching

¹³⁸ See, e.g., *Barkan v. Dunkin' Donuts, Inc.*, 627 F.3d 34, 40-42 (1st Cir. 2010) (holding 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).

¹³⁹ Comcast Findings ¶¶ 138-40.

¹⁴⁰ See, e.g., Tennis Channel Trial Brief at 15-17; Tennis Channel Exh. 18 (Complaint) ¶¶ 88-89.

¹⁴¹ Comcast Findings ¶ 141.

¹⁴² Comcast Findings ¶ 141. Tennis Channel could, however, reach [REDACTED] million subscribers through additional carriage on its parent companies – DIRECTV and Dish Network – alone. (Comcast Findings ¶ 144).

¹⁴³ Tennis Channel Findings ¶ 183; Comcast Findings ¶ 142. Tennis Channel argues that if Comcast distributed Tennis Channel to about [REDACTED] of its subscribers, it would trigger [REDACTED]

[REDACTED] (Tennis Channel Findings ¶¶ 22, 291). Even if [REDACTED] Tennis Channel would still have fewer than [REDACTED] million subscribers. (Comcast Exh. 201; Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 8). In any event, this asserted harm is too remote to be attributable to Comcast. See, e.g., *Hemi Group LLC v. City of*

the 100 million subscribers of ESPN2, which Tennis Channel complains was awarded rights to the [REDACTED] [REDACTED] because ESPN2 had more subscribers.¹⁴⁴ Under these circumstances, Tennis Channel has not proved that Comcast's decision to decline the 2009 proposal was the proximate cause of the harm that Tennis Channel alleges.¹⁴⁵

Tennis Channel also argues that it was competitively harmed by Comcast's denial of the 2009 proposal because Tennis Channel is not receiving the additional fees – i.e., [REDACTED] million – that Comcast would have paid under that proposal.¹⁴⁶ By Tennis Channel's flawed logic, if its 2009 proposal were even more overpriced, then it would have incurred even more competitive harm. In fact, the example of the NHL Network – which lowered its license fees in order to make its proposal economically attractive to Comcast – shows that greater distribution does not necessarily require a distributor to pay a network higher total license fees.¹⁴⁷ Thus, Comcast's decision not to

New York, 130 S. Ct. 983, 992 (2010) (under common law causation principles, holding that where multiple steps separate the harm alleged and the injury caused, and the theory of liability rests on the “independent actions of third and even fourth parties,” proximate causation has not been established).

¹⁴⁴ Tennis Channel Findings ¶¶ 186-87.

¹⁴⁵ See *Point Prods. v. Sony Music Entm't Inc.*, 215 F. Supp. 2d 336, 341 (S.D.N.Y. 2002) (holding that plaintiff had not provided sufficient evidence that it would have remained solvent without the defendant's breach of contract, and denying plaintiff post-bankruptcy damages because “the plaintiff must demonstrate more than simply that defendant breached its contract and that the plaintiff suffered damage. Plaintiff cannot recover if it would have suffered the harm regardless of defendant's actions.”); see also Comcast Findings ¶¶ 141-44.

¹⁴⁶ Tennis Channel Findings ¶ 169.

¹⁴⁷ Comcast Reply Findings ¶ 291.

accept the 2009 proposal was not the proximate cause of any lost revenue to Tennis Channel.

As set forth below, Tennis Channel does not seek to identify any competitive harm supposedly resulting from Comcast's alleged discrimination *in favor* of its affiliated networks.¹⁴⁸

IV. Tennis Channel's Arguments That Comcast Favors Its Affiliated Networks Are Inconsistent with Section 616

Because the record evidence shows that Comcast declined Tennis Channel's 2009 proposal for legitimate business reasons, and not based on any discriminatory motive, Tennis Channel has failed to show that Comcast has discriminated *against it* on the basis of affiliation.¹⁴⁹ As a result, Tennis Channel attempts to re-cast its claim by asserting that Comcast has discriminated *in favor of* Golf Channel and Versus (and affiliated Major League networks).¹⁵⁰

Even assuming that theory of liability were cognizable under Section 616, Tennis Channel has failed to prove a claim of affiliation-based discrimination under that theory here, for at least four independent and sufficient reasons. First, Tennis Channel lacks standing to challenge Comcast's decisions to carry Golf Channel and Versus broadly, decisions that were made long before Tennis Channel even existed.¹⁵¹ Second, the un rebutted evidence shows that Comcast's carriage decisions as to those networks were

¹⁴⁸ See *infra* Part IV.C.

¹⁴⁹ *MASN*, 25 FCC Rcd at 18115 ¶ 22 (the "relevant inquiry" under Section 616 is whether the vertically integrated MVPD acted upon a "motive to discriminate" on the basis of affiliation "in reaching its [challenged] carriage decision").

¹⁵⁰ Tennis Channel Findings ¶ 305.

¹⁵¹ Comcast Findings ¶¶ 11-15, 192; Comcast Reply Findings ¶¶ 211, 241, 309.

based on legitimate business reasons.¹⁵² Third, differences in Comcast's carriage of the networks are based on market forces and fundamental differences in the networks, not discrimination.¹⁵³ Fourth, Tennis Channel has not attempted to prove that any of Comcast's carriage decisions as to its affiliated networks have unreasonably restrained Tennis Channel's ability to compete fairly.¹⁵⁴

Under these circumstances, Tennis Channel's argument that Comcast is discriminating on the basis of affiliation by not carrying it at the same level of distribution as Golf Channel and Versus, and Tennis Channel's accompanying demand for an economic windfall,¹⁵⁵ are inconsistent with Section 616.

A. Tennis Channel Lacks Standing to Challenge Comcast's Carriage Decisions as to Affiliated Networks, Which, in Any Event, Were Based on Legitimate Business Reasons

Tennis Channel cannot argue that Comcast discriminated against it by carrying Versus and Golf Channel broadly when they launched because Tennis Channel did not exist at the time.¹⁵⁶ Both networks were launched and achieved wide distribution during different market conditions, years before Tennis Channel's launch.¹⁵⁷ By 2009, both networks were well established in the market, and were not seeking to expand distribution beyond already existing levels during their renewals of their Comcast carriage deals in 2009 and 2011, respectively.¹⁵⁸ Tennis Channel thus lacks legal

¹⁵² Comcast Findings ¶¶ 54-65; Comcast Reply Findings ¶¶ 239-52.

¹⁵³ Comcast Findings ¶¶ 73-102; Comcast Reply Findings ¶¶ 261-84.

¹⁵⁴ *See infra* Part IV.C.

¹⁵⁵ Tennis Channel Findings ¶¶ 314-16.

¹⁵⁶ *WealthTV*, 24 FCC Red at 12998 ¶ 65 (ALJ).

¹⁵⁷ Comcast Findings ¶¶ 55-59.

¹⁵⁸ *See* Comcast Findings ¶ 57; Comcast Reply Findings ¶ 57 & n.134.

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 2009.¹⁵⁹

Even if Tennis Channel could challenge Comcast's carriage of Versus or Golf channel, the consistent and undisputed testimony of Comcast's fact witnesses establishes that Comcast has legitimate and non-discriminatory business reasons for carrying Golf Channel and Versus on broadly distributed tiers.¹⁶⁰ As demonstrated by their broad carriage across the major distributors, both Versus and Golf Channel have long shown their ability to attract and retain subscribers.¹⁶¹

Tennis Channel does not claim that Comcast's carriage decisions as to affiliated networks prior to June 2009 violated Section 616.¹⁶² Instead, Tennis Channel argues that Comcast discriminated in favor of Versus and Golf Channel by not engaging in a cost-benefit analysis when their carriage agreements were renewed in 2009 and 2011, respectively.¹⁶³ But Section 616 does not require that the same cost-benefit analysis that was performed on Tennis Channel's 2009 proposal also have been performed for Golf

¹⁵⁹ 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 omitted)).

¹⁶⁰ Comcast Findings ¶¶ 54-60.

¹⁶¹ Comcast Exh. 78 (Gaiski Written Direct) ¶ 26; Rigdon Recross, Apr. 28, 2011 Tr. 1920:13-22; Comcast Exh. 1102; Comcast Findings ¶ 59.

¹⁶² Tennis Channel Findings ¶ 293. Significantly, Comcast's decisions regarding carriage of the NHL Network and the MLB Network, like its decisions to carry Golf Channel and Versus broadly, were made before June 2009. (Comcast Reply Findings ¶ 247 & n.642).

¹⁶³ Tennis Channel Findings ¶ 229.

Channel and Versus.¹⁶⁴ The carriage decisions regarding Golf Channel and Versus in the 2009-2011 timeframe were contract renewals for those well-established networks that merely involved contract extensions without material increases or decreases to distribution,¹⁶⁵ and thus it was not unlawful discrimination for Comcast to keep the existing distribution in place without performing a full cost-benefit analysis.¹⁶⁶ The evidence is uncontroverted that distributors rarely reposition established, broadly distributed networks because doing so would upset the settled expectations of subscribers and generate subscriber churn.¹⁶⁷ 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.¹⁶⁸ It is not discrimination for MVPDs like Comcast to minimize this type of subscriber discontent by keeping well established networks in place.

¹⁶⁴ See, e.g., *MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 13000 ¶ 69 (ALJ).

¹⁶⁵ Comcast Findings ¶ 56 & n.134.

¹⁶⁶ *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.”). Cases from the employment discrimination context, while implicating different policy concerns, can be instructive as to general principles of discrimination. 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), *rev’d in part on other grounds by Smith v. City of Jackson*, 544 U.S. 228 (2005); *Shah v. Gen. Elec. Co.*, 816 F.2d 264, 271 (6th Cir. 1987) (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).

¹⁶⁷ Comcast Findings ¶¶ 57-58.

¹⁶⁸ Comcast Findings ¶ 59.

Regardless, even if Tennis Channel did have legal standing to challenge the past treatment of Golf Channel and Versus or the consequences of that treatment years later – which, as previously shown, Tennis Channel does not¹⁶⁹ – Tennis Channel has failed to show that any of Comcast’s carriage decisions would have failed a cost-benefit test. To the contrary, 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.¹⁷⁰ Tennis Channel failed to contest that proof. In addition, the cable industry changed dramatically between 1995 and 2009,¹⁷¹ and Section 616 does not require MVPDs such as Comcast to make the same carriage decisions in different market conditions. In fact, the Presiding Judge in *WealthTV* considered the fact that carriage decisions regarding an affiliated network and an unaffiliated network took place in different time period in concluding that there was no discrimination.¹⁷²

As with Golf Channel and Versus, market forces also were the cause of Comcast’s decisions relating to the Major League networks. Mr. Bond and Ms. Gaiski testified that Comcast’s carriage decisions regarding MLB Network, NBA TV and NHL

¹⁶⁹ See *WealthTV*, 24 FCC Rcd at 12998 ¶ 65 (ALJ).

¹⁷⁰ Comcast Findings ¶ 14.

¹⁷¹ Comcast Findings ¶¶ 11-15, 55-56, 74-77.

¹⁷² *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 18015-06 ¶ 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 plaintiff 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).

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.¹⁷³ That consistent and credible evidence is un rebutted.

B. Section 616 Is Not Intended to Eliminate Carriage Differences Among Fundamentally Different Networks Resulting from Natural Competitive Forces

Tennis Channel's attempts to liken itself to Golf Channel and Versus disregard compelling evidence that Tennis Channel is fundamentally different from those networks in numerous significant respects, including undisputed evidence that Golf Channel and Versus launched under materially dissimilar market conditions. These differences, which are summarized below, are reflected in how all three networks are carried throughout the marketplace. Every major MVPD except Dish Network carries Versus and Golf Channel to more than [REDACTED] of its subscribers; all major MVPDs, including DIRECTV and Dish Network, carry Versus and Golf Channel [REDACTED] than Tennis Channel.¹⁷⁴

First, Tennis Channel was launched in 2003, years after Versus and Golf Channel launched and obtained broad carriage from Comcast and other distributors. As a result, the evidence shows that Tennis Channel launched during [REDACTED]

[REDACTED] It was far easier for cable networks to

¹⁷³ Comcast Findings ¶¶ 61-65.

¹⁷⁴ Comcast Findings ¶ 60. The Major League networks were launched more recently, but were granted broader carriage for market-based reasons. (Comcast Findings ¶¶ 61-65).

¹⁷⁵ Comcast Exh. 573; see Comcast Findings ¶¶ 74-77. Mr. Solomon testified that eight years is a "long time" by "the cable business standard." (Solomon Direct, Apr. 25, 2011 Tr. 258:5-11); see also *WealthTV*, 24 FCC Rcd at 12998 ¶ 65 (ALJ) (timing of market entry of two networks is a relevant distinguishing factor). Cf. *Villanueva v. Wellesley College*, 930 F.2d 129, 130-31 (1st Cir. 1991) (court held that denial of tenure

gain broad distribution in the 1990s, before sports tiers were created, than it was in 2003.¹⁷⁶ Also, unlike Tennis Channel, Versus and Golf Channel built their distribution by paying distributors, including Comcast and other distributors that Comcast subsequently acquired, hundreds of millions of dollars in launch incentives to offset the cost of broad carriage.¹⁷⁷ The difference in market conditions is reflected in the carriage agreements that Tennis Channel signed with MVPDs permitting carriage on a sports tier in order to obtain distribution.¹⁷⁸ Although Tennis Channel argues that what it calls a “date test” is not a legitimate factor in carriage decisions,¹⁷⁹ differences in networks’ respective dates of launch were a factor credited as evidence of non-discrimination by the Presiding Judge in *WealthTV*.¹⁸⁰

Second, demand for Tennis Channel is significantly less than demand for Golf Channel or Versus.¹⁸¹ Several Comcast executives testified to this fact, including Mr. Rigdon, based on his experience at Charter,¹⁸² and Tennis Channel produced no contrary evidence. In fact, Tennis Channel’s own documents acknowledged this discrepancy.¹⁸³

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*, 816 F.2d at 271 (length of employment is a relevant distinguishing factor when comparing two employees).

¹⁷⁶ Comcast Findings ¶¶ 74-76.

¹⁷⁷ Comcast Findings ¶ 14.

¹⁷⁸ Comcast Findings ¶¶ 16-19.

¹⁷⁹ Tennis Channel Opening, Apr. 25, 2011 Tr. 125:14-126:17.

¹⁸⁰ *WealthTV*, 24 FCC Rcd 12998 ¶ 65 (ALJ).

¹⁸¹ Comcast Findings ¶¶ 78-79.

¹⁸² Bond Direct, Apr. 29, 2011 Tr. 2052:13-2054:4, 2110:3-2112:19; Comcast Exh. 139 (Bond Dep.) 219:13-220:7; Comcast Exh. 78 (Gaiski Written Direct) ¶ 26;