The ratings evidence, in particular, is not to the contrary. Most important, ratings simply do not measure the intensity of subscriber demand for a network.[184] As a result, ratings are not typically a material consideration in an MVPD's carriage decisions. Regardless, Golf Channel and Versus have significantly higher ratings, as calculated and published by Nielsen, than Tennis Channel does.[185]

Tennis Channel asks the Presiding Judge to disregard Nielsen ratings (which Tennis Channel's own expert accurately described as "the industry standard for measurement of television audiences"[186]) and instead rely on ratings that Tennis Channel itself calculated (which Tennis Channel's own counsel accurately described as "cobbled together ratings"[187]). But Tennis Channel's ratings, which were calculated by Tennis Channel employees with a financial stake in this litigation, are so-called "coverage area ratings," which inflate Tennis Channel's ratings compared to total market ratings calculated by Nielsen and compared to "coverage area ratings" for Golf Channel and Versus.[188] For these reasons, the "coverage area ratings" calculated by Tennis Channel

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Gaiski Direct, May 2, 2011 Tr. 2352:8-17; Rigdon Cross, Apr. 28, 2011 Tr. 1881:15-1882:8; Rigdon Redirect, Apr. 28, 2011 Tr. 1905:6-1909:1; Rigdon Recross, Apr. 28, 2011 Tr. 1918:2-1919:7, 1920:13-22.

[183] Comcast Findings ¶ 20 n.38 [redacted]

[184] Comcast Findings ¶ 94.

[185] Comcast Findings ¶¶ 95-97. Any comparison of Nielsen ratings for the three networks must use Nielsen local market ratings because of Tennis Channel's deliberate decision not to purchase Nielsen national ratings.

[186] Tennis Channel Exh. 17 (Brooks Written Direct) ¶ 9.

[187] Goldstein Cross, May 2, 2011 Tr. 2747:9-12.

[188] Comcast Findings ¶¶ 96-97. Because it uses the same flawed methodology, Tennis Channel's "license-fee-per-rating-point" analysis is flawed and unreliable as well. (Tennis Channel Findings ¶¶ 226-27).

are not a legitimate basis for comparison and, indeed, Nielsen has warned that coverage area ratings cannot be used to compare different cable networks.[189]

Third, the networks project vastly different images to viewers.[190] As Mr. Egan credibly testified, Tennis Channel projects a "hip," "international" and "young" cosmopolitan image.[191] In contrast, Golf Channel projects a "calm," "mature" and country club persona, and Versus generally projects an "aggressive" and "violent" image.[192] Mr. Egan offered this unrebutted testimony after systematically viewing dozens of hours of programming across the three networks, all of which he selected himself.[193]

Fourth, the evidence shows material differences in how the networks are positioned with respect to viewers, advertisers and programming rights holders.[194] Tennis Channel's own demographic data and marketing presentations demonstrate the clear differences in the networks' "target demographic" groups."[195] Tennis Channel

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[189] Comcast Findings ¶ 97. The evidence cited by Tennis Channel does not show that Comcast uses coverage area ratings to compare cable networks. (Tennis Channel Findings ¶ 114 (citing Tennis Channel Exh. 46)).

[190] Comcast Findings ¶¶ 80-84.

[191] Comcast Findings ¶ 80.

[192] Comcast Findings ¶ 80.

[193] Comcast Exh. 77 (Egan Written Direct) ¶¶ 16.

[194] *See* Comcast Findings ¶¶ 94-97 (viewers); ¶¶ 89-92 (advertisers); ¶¶ 98-102 (programming rights holders).

[195] *WealthTV*, 24 FCC Rcd at 12980-81 ¶¶ 27-29 (ALJ); Comcast Findings ¶¶ 85, 88. Tennis Channel's audience differs from Versus and Golf Channels in a number of ways, including gender composition and age group. Tennis Channel has a relatively [redacted] gender-balanced audience, while Versus and Golf Channel are two of the most [redacted] channels on television. (Comcast Findings ¶ 86). And Tennis Channel's viewers are significantly [redacted] than Golf Channel's and [redacted] than Versus's. (Comcast Findings ¶ 88).

argues that the Presiding Judge should discount its advertising pitches – which, as Mr. Solomon concedes, "point out [Tennis Channel's] differences" from Golf Channel and Versus[196] – because Tennis Channel exaggerated those differences in its advertising materials.[197] But those differences are also proved by candid internal Tennis Channel documents.[198] The demographic differences shown by Tennis Channel's marketing pitches and its internal documents, which are exactly the kinds of documents that the Commission relied on for these purposes in *WealthTV*, prove that Tennis Channel is fundamentally different from Golf Channel and Versus.[199]

Fifth, there is no meaningful competition for programming between Tennis Channel and Golf Channel or Versus. Mr. Solomon implicitly acknowledged this fact when, in December 2009, he sent Comcast a letter repeatedly asserting that Tennis Channel competes against Comcast-affiliated networks for [redacted]}[200] Tellingly, Mr. Solomon – who lists "secur[ing] programming for the network" first among his duties at Tennis Channel – omitted any mention of supposed competition with Versus for programming rights.[201] Mr. Solomon's omission of any reference to competition for tennis programming reflected the reality that Tennis Channel had in the past cooperated, not competed, with Versus to obtain tennis rights, and that

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[196] Solomon Direct, Apr. 25, 2011 Tr. 296:1-16.

[197] Tennis Channel Findings ¶ 106.

[198] Comcast Exhs. 559, 27 at TTCCOM_00017643-17644; Comcast Findings ¶ 89; Comcast Reply Findings ¶ 271.

[199] *WealthTV*, ___ FCC Rcd ___ ¶ 26 (FCC).

[200] Tennis Channel Exh. 88.

[201] Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 1; Tennis Channel Exh. 88.

Versus no longer carried significant tennis programming in 2009.[202] In fact, it was ESPN, not Tennis Channel, that had competed with Versus for U.S. Open rights in 2007.[203] Tennis Channel's internal documents demonstrate that it was planning to partner with whichever competing network, ESPN or Versus, prevailed.[204] Accordingly, after ESPN won those U.S. Open rights, Tennis Channel sublicensed limited early round coverage from ESPN.[205] Moreover, that NBCU in 2011 is pursuing future Wimbledon rights for Versus, does nothing to support Tennis Channel's contention or to show that Comcast had any motive to discriminate against Tennis Channel in May 2009.

Tennis Channel's other assertions that Comcast discriminates in favor of its own networks on the basis of affiliation lack merit.[206] Tennis Channel argues, based on testimony by Comcast's then-COO Stephen Burke in the *NFL v. Comcast* proceeding, that Comcast discriminates in favor of its affiliated networks by treating them as "siblings."[207] In response to WealthTV's attempt to use the same testimony, the Commission held that "there is no evidence that Mr. Burke's testimony in a separate proceeding had any bearing on WealthTV's specific complaint against Comcast or the

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[202] Solomon Direct Apr. 25, 2011 Tr. 264:15-265:4 (describing how Tennis Channel used to "share" Davis Cup coverage with Versus until 2008); Comcast Exh. 253 (Comcast declined to continue broadcasting the Davis Cup after 2008 because it lost money). Indeed, in December 2006, Mr. Solomon suggested to Comcast that Tennis Channel once again cooperate with Versus to obtain rights, this time as part of a "three-way deal" to obtain U.S. Open rights. *See* Comcast Findings ¶ 99.

[203] Comcast Findings ¶ 100.

[204] Comcast Findings ¶ 100; Comcast Exhs. 89, 302; *see also* Comcast Exh. 666.

[205] Comcast Findings ¶¶ 100-01.

[206] Tennis Channel Findings ¶¶ 151-59.

[207] Tennis Channel Findings ¶¶ 123, 141. Tennis Channel even included this quote in the December 10, 2009 letter Mr. Solomon sent to Mr. Burke. (Comcast Exh. 579).

other defendants here."[208] Mr. Burke's testimony likewise has no bearing on Tennis Channel's Complaint in this proceeding.

Tennis Channel relies on the Commission's order approving the Comcast/NBCUniversal transaction ("NBCU Order") as evidence of affiliation-based discrimination. But the NBCU Order has no place in this litigation. The Commission made clear that it did not intend to affect any program carriage proceeding through its order, and expressly disclaimed "reach[ing] any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past."[209] The Commission also indicated that it did not accept the findings set forth in the Technical Appendix to that order.[210] None of the findings in that order are binding in this proceeding.[211]

C. Tennis Channel Has Neither Alleged Nor Proved That Comcast's Carriage of Its Affiliated Networks Results in Any Harm to Tennis Channel

As to its claim that Comcast discriminates on the basis of affiliation in ***favor*** of affiliated networks, Tennis Channel's proposed findings relating to competitive harm are devoid of any alleged harm attributed to Comcast's carriage of its affiliated networks.[212]

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[208] *WealthTV*, ___ FCC Rcd ___ ¶ 35 (FCC).

[209] Tennis Channel Exh. 13 (NBCU Order) at 48 n.276; Tennis Channel Findings ¶ 163.

[210] Tennis Channel Exh. 13 (NBCU Order) at 48 n.276; *see also* Colloquy, Apr. 25, 2011 Tr. 148:18-149:3.

[211] Colloquy, Apr. 25, 2011 Tr. 148:18-149:3.

[212] Tennis Channel Findings ¶¶ 167-213.

Instead, Tennis Channel attributes all alleged harm to "Comcast's refusal to carry Tennis Channel more broadly."[213]

Even if Comcast were hypothetically to cease carrying Golf Channel and Versus (or affiliated Major League networks), Tennis Channel still would have the same number of subscribers, and Tennis Channel's asserted competitive harm – which Tennis Channel ultimately attributes to its "limited distribution" by Comcast[214] – would be unchanged. Tennis Channel's failure to connect Comcast's alleged favorable treatment of affiliated networks with any competitive harm is fatal to Tennis Channel's theory of discrimination based on Comcast's alleged favoritism of affiliated networks.

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

Tennis Channel has not carried its burden of proving its discrimination claim, and thus is not entitled to any relief in this matter.[215] Even if it had, the extraordinary and unprecedented remedy that Tennis Channel is seeking in this matter – mandatory carriage and more than [redacted] in increased license fees – is neither necessary nor proper under Section 616. Tennis Channel has failed to show that it is entitled to mandatory carriage at all, much less the requested mandatory carriage, which goes far

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[213] Tennis Channel Findings ¶ 167; *see also, e.g.*, Tennis Channel Findings ¶ 168 ("Comcast's carriage of Tennis Channel deprives the network of millions of subscribers"); ¶ 170 ("Limited distribution from Comcast, in particular, affects [Tennis Channel's] viability."); ¶ 171 ("[C]omcast's carriage of Tennis Channel has a 'disproportionate effect' on the network's overall growth."); *id.* at 47 ("[T]ennis Channel Has No Value if It Continues to [B]e Distributed on Comcast's Sports Tier") (heading for ¶¶ 172-177; underlining omitted); ¶¶ 178-82 (alleging harms to Tennis Channel as a result of being carried on Comcast's sports tier); ¶¶ 183-213 ("Comcast's limited distribution of Tennis Channel harms the network's ability to compete for programming rights," "advertising revenues," and "viewers.").

[214] Tennis Channel Findings ¶¶ 167-213.

[215] For a full discussion of this issue, see Comcast Findings ¶¶ 197-210.

beyond the network's acceptance by the marketplace generally and beyond any level of carriage that Tennis Channel has previously sought from Comcast. Further, mandatory carriage at increased total fees would constitute an economic windfall to Tennis Channel, not remediation of any competitive harm.[216]

An order of mandatory carriage would not be consistent with the First Amendment. In *MASN*, the Commission held that an MVPD's carriage decision entails the "exercise of editorial discretion,"[217] and courts have recognized that the First Amendment protects cable operators' editorial discretion.[218] Here, the government has no interest – much less a compelling interest – in forcing broader carriage where the parties have an existing deal that grants Comcast the right to carry Tennis Channel on a sports tier, and where Tennis Channel could obtain increased distribution by lowering its

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[216] *See WealthTV*, 24 FCC Rcd at 12994 ¶ 55 (ALJ) ("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.'" (quoting *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 ¶ 147 (1994)).

[217] *MASN*, 25 FCC Rcd at 18106 ¶ 12.

[218] *See, e.g.*, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) ("[W]e are unable to ignore Congress' stern disapproval . . . of negation of the editorial discretion otherwise enjoyed by . . . cable operators . . . ."); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001) ("[W]e cannot see how the word unfair could plausibly apply to . . . legitimate, independent editorial choices . . . ."); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment."); *Kucinich v. Cable News Network*, 23 FCC Rcd 482, 482-83 ¶ 2 (MB 2008) (First Amendment gives "[c]able television operators . . . wide discretion in choosing the programming that is available on a cable system").

price or providing Comcast with other incentives.[219] In particular, the government has no legitimate interest in imposing speech upon Comcast simply to provide economic gain to Tennis Channel.[220]

Moreover, mandatory carriage at the penetration demanded by Tennis Channel – or even at the penetration that Tennis Channel proposed in 2009 – would be especially inappropriate, as it would be contrary to Congress's instruction to "rely on the marketplace to the maximum extent feasible" in implementing Section 616.[221] Tennis Channel's own figures show that distributors (other than Comcast) carry the network at an average penetration of only [redacted] and that number is inflated by the fact that it includes DIRECTV and Dish Network, which carry the network pursuant to equity-for-carriage deals, and does not take into account the large number of distributors that do not carry Tennis Channel at all.[222] If DIRECTV and Dish Network are excluded because of their affiliation with Tennis Channel, then Tennis Channel's average carriage in the marketplace (again not including Comcast or distributors that do not carry it) is only [redacted}.[223] It would be inconsistent with the requirement that the Commission "rely

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[219] Comcast Findings ¶¶ 138-40, 149.

[220] *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988) (First Amendment prohibits the government from compelling speech "absent compelling necessity, and then, only by means precisely tailored"); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 55 (ALJ). Even if intermediate scrutiny is applied, this justification is not "a significant governmental interest." *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted).

[221] 1992 Cable Act § 2(b)(2); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 55 (ALJ).

[222] Comcast Exh. 201.

[223] Comcast Exh. 201.

on the marketplace to the maximum extent feasible" to mandate carriage at any greater level of penetration.

Even if additional carriage were ordered, increasing the total license fee would not be in the public interest, as the increased fee would provide Tennis Channel with an economic windfall at the expense of Comcast and its subscribers.[224] In particular, additional carriage should not, as Tennis Channel requests, be ordered at the per-subscriber license fees set forth in the parties' Affiliation Agreement, as amended.[225] Carriage deals involve numerous interdependent terms, and the Affiliation Agreement is an integrated contract that grants Comcast the right to carry Tennis Channel on a sports tier.[226] The undisputed evidence shows that Tennis Channel justified its rate card by emphasizing the economics of sports tier carriage, and Comcast agreed to those rates only because it intended to carry Tennis Channel on a sports tier.[227] Imposing the per-subscriber license fees set forth in the Affiliation Agreement for broader, non-sports tier carriage – for which Comcast would ***not***, as intended by Comcast when it executed the Affiliation Agreement, be earning sports tier revenue – would deprive Comcast of the benefit of the bargain that the parties struck, while granting an undeserved windfall to Tennis Channel.[228]

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[224] *See* H.R. Rep. 102-628, at 77 ("Fair competition in the delivery of television programming should foster the greatest possible choice of programming and should result in lower prices for consumers.").

[225] Tennis Channel Findings ¶ 315.

[226] Comcast Findings ¶ 149.

[227] Comcast Findings ¶ 16 n.31.

[228] Even if an increase in distribution affects Tennis Channel's ability to compete for advertising revenues or programming rights, Tennis Channel has not proved that it would be unable to compete fairly without the dramatic increase in Comcast's total license fee that it demands, and remedial relief under Section 616 must be limited to what

The appropriate remedy if a violation were found would be, at most, the imposition of a forfeiture pursuant to Section 1.80 of the Commission's rules,[229] even though Comcast has not "willfully or repeatedly failed to comply" with any laws or rules by declining a proposal that would cost Comcast {[redacted]} million with no offsetting benefit.[230]

In any event, no broader carriage of Tennis Channel should be mandated until Comcast's statute of limitations defense is finally resolved,[231] especially in light of evidence – newly discovered since the Media Bureau issued the *HDO*[232] – showing that Tennis Channel [redacted][233]

VI. The Opinions and Analyses of Tennis Channel's Expert Witnesses Raise Serious Questions About Their Independence and Reliability

Federal Rule of Evidence 702 permits the use of expert testimony to the extent that it will "assist the trier of fact to understand the evidence or to determine a fact in issue."[234] Such testimony must also be "reliable," "trustworthy,"[235] and consistent with

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is necessary for an independent programmer to "compete fairly." *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[229] *See* 47 C.F.R. § 1.80(b)(4) n.1.

[230] *See* 47 C.F.R. § 1.80.

[231] The *HDO* expressly provides that Comcast's statute of limitations defense is not before the Presiding Judge to resolve. *HDO,* 25 FCC Rcd at 14150 ¶ 2 n.4.

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

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

[234] Fed. R. Evid. 702.

[235] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 590 n.9 (1993). The standards imposed in *Daubert* apply in both bench and jury trials, *Seaboard*

the facts of the case.[236] These same considerations are relevant to the weight, if any, that should be accorded to expert testimony here.[237] The testimony of Tennis Channel experts Dr. Hal Singer and Mr. Timothy Brooks should be rejected because it is neither independent nor reliable. In addition, Dr. Singer's testimony is fatally biased.

It is well established that an expert's repeated testimony for or against a party can be evidence of bias.[238] Dr. Singer has offered testimony against Comcast in ***six*** different proceedings in the last five years.[239] Tellingly, Dr. Singer's repeated testimony against Comcast is not consistent, but rather, mirrors the respective litigation positions of Dr. Singer's clients. In the *NFL v. Comcast* case,[240] Dr. Singer supported the NFL's litigation position by testifying that NBA TV ***was not*** affiliated with Comcast (and that, as a consequence, Comcast "relegated" NBA TV to its sports tier).[241] In this case, Dr.

Lumber Co. v. United States, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002), and govern expert testimony on all subject matters, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

[236] *See, e.g.*, *Neb. Plastics, Inc. v. Holland Colors Ams., Inc.*, 408 F.3d 410, 416-17 (8th Cir. 2005) (reasoning that "[a]n expert opinion that fails to consider the relevant facts of the case is fundamentally unsupported" and holding that district court did not abuse its discretion where it excluded testimony of an expert who "failed to take into account a plethora of [the case's] specific facts").

[237] *See, e.g.*, *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) (in a bench trial, the court may "disregard" expert evidence that does not "meet the standard of reliability established by Rule 702").

[238] *See, e.g.*, *United States v. Abrams*, 427 F.2d 86, 90 (2d Cir. 1970); *Sanchez v. Esso Standard Oil De P.R., Inc.*, No. 08-2151, 2010 WL 3809990, at *2-4 (D.P.R. Sept. 29, 2010) (finding that "ample evidence of [expert's] bias," including the fact that he was involved "in as many as five cases against [the defendant]" made his "testimony irrelevant and unreliable").

[239] Comcast Findings ¶ 113.

[240] *See NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, MB Docket No. 08-214.

[241] Comcast Findings ¶¶ 104-05.

Singer testified that NBA TV ***was*** affiliated with Comcast (and that Comcast melted the network from the sports tier to D1 as a result of that affiliation),[242] even though Dr. Singer admitted that there has been no change in Comcast's relationship to NBA TV.[243] Dr. Singer's directly contradictory testimony, tailored to conform to the respective litigation positions of his clients, demonstrates that his testimony is biased and unreliable.[244]

Dr. Singer's manipulation of his results also reveals his bias and untrustworthiness. Dr. Singer testified that in computing the average Comcast market share figures that underlie his conclusions, he weighted each Designated Market Area ("DMA") by the number of head ends in that DMA.[245] In a weighted average, each data point "is multiplied by a 'weight' relevant to its importance."[246] Thus, a weighted average is only reasonable "to the extent . . . that the particular weights applied to the data are themselves reasonable."[247] Here, Dr. Singer admitted on cross-examination that there is no evidence that the number of head ends within a DMA is relevant to the importance

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[242] Comcast Findings ¶ 105.

[243] Comcast Findings ¶¶ 104-05; Singer Cross, Apr. 26, 2011 Tr. 942:11-15.

[244] *See, e.g.*, *Kumho Tire*, 526 U.S. at 154-55 (noting that contradiction between expert's trial testimony and earlier report was appropriate ground on which to strike that testimony); *Pluck v. BP Oil Pipeline Co.*, No. 09-4572, 2011 WL 1794293, at *7-8 (6th Cir. May 12, 2011) (holding that district court properly excluded expert testimony, in part, because the testimony was contradictory to the expert's previous opinion); *Black v. Food Lion, Inc.*, 171 F.3d 308, 314 n.5 (5th Cir. 1999) (explaining *Kumho Tire*).

[245] Comcast Findings ¶ 114.

[246] Comcast Findings ¶ 114 (quoting Comcast Exh. 1010); *see also* Joint Glossary of Terms, "Weighted Average."

[247] *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 658 (N.D. Ill. 1991) (three-judge panel).

of that DMA.[248] Thus, his attempt to use weighted averages is flawed, "render[ing] his method unreliable."[249] Significantly, Dr. Singer made, and was criticized for making, precisely this error in his most recent prior testimony against Comcast.[250] In the arbitrator's opinion ruling for Comcast, he rejected Dr. Singer's methodology and concluded that Dr. Singer's analyses, including his weighting of data points, "raised serious questions as to their validity, reliability and bias."[251] Getting caught manipulating his results twice within one year seriously undermines the reliability of Dr. Singer's testimony.[252]

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[248] Comcast Findings ¶ 114. In fact, Dr. Singer initially testified that weighting by head end was appropriate because "the head end is representing . . . a rough measure of the number of homes or people who are served." (*Id.*) Yet, he conceded that he had no basis to make this assertion as he never examined whether the correlation he testified to in fact existed. (*Id.*)

[249] *United States ex rel. Loughren v. UnumProvident Corp.*, 604 F. Supp. 2d 259, 269 (D. Mass. 2009); *see also Monument Builders of Pa., Inc. v. Am. Cemetery Ass'n*, No. 84-3014, 2007 WL 1557106, at *5-6 (E.D. Pa. May 24, 2007) (refusing to "accord [the expert's] calculations any weight" because the methodology he employed for calculating "average overhead" was erroneous and "produce[d] a number that ha[d] no meaning for [present] purposes," and because "[n]either his report nor his testimony offer[ed] specific rationales" for the selections made in calculating the average); *Hastert*, 777 F. Supp. at 658.

[250] Comcast Findings ¶ 113. In a 2010 program access arbitration proceeding in which he testified on behalf of Dish Network, Dr. Singer purported to calculate a median penetration level for all regional sports networks carried by Dish Network. In calculating the median – the point in a data set at which there are the same number of data points above and below – Dr. Singer collapsed a number of data points that were unfavorable to his client (and favorable to Comcast) into a single data point, thereby decreasing their weight and leading to a more favorable result for his client. (Comcast Exh. 1048 at 7-9; Singer Cross, Apr. 27, 2011 Tr. 1148:9-1152:14).

[251] Comcast Findings ¶ 113. The arbitrator also listed seven other "questions . . . identified with Dr. Singer's regression analysis that made it less credible on the issue of fair market value for the programming in question in this proceeding than [Comcast's expert's] testimony." (Comcast Findings ¶ 113 (quoting Comcast Exh. 1047 at 7 & n.17)).

[252] *See United States v. Terry*, 702 F.2d 299, 316 (2d Cir. 1983) (proof that a judge in an earlier case criticized the expert's testimony is "probative of the weight to be

Finally, the conclusions of both Dr. Singer and Mr. Brooks are unreliable because they repeatedly relied on information provided by, as well as analysis conducted by, Tennis Channel and its counsel, without any attempts to verify or confirm their accuracy. For example, Dr. Singer's "anchor event" analysis was prepared entirely by Tennis Channel – he did not investigate this data, but rather relied upon "a document that [Tennis Channel] had already created."[253] In another example, Dr. Singer relied on an advertiser overlap analysis prepared by Tennis Channel as the basis for his opinion that advertisers view Tennis Channel as similar to Golf Channel and Versus. With respect to this analysis, Dr. Singer "confess[ed]" to "taking [Tennis Channel] at their word."[254]

Similarly, Mr. Brooks's ratings comparisons did not rely on ratings calculated and published by Nielsen. Instead, those comparisons relied exclusively on "ratings" calculated by Tennis Channel, including by Tennis Channel employees that Mr. Brooks concedes had a financial stake in the outcome of this litigation.[255] Mr. Brooks admitted that he made little effort to verify Tennis Channel's "ratings," because he had known its internal researcher "for a very long time."[256] Because Dr. Singer's and Mr. Brooks's

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accorded to [the expert's] testimony" in a later case); *Gunn v. Reliance Std. Life Ins. Co.*, 592 F. Supp. 2d 1251, 1257 n.5 (C.D. Cal. 2008) (giving little weight to medical opinion of a doctor who, in an earlier case, "had been criticized by the District of Massachusetts"), *rev'd on other grounds by* 399 Fed. App'x 147 (9th Cir. 2010).

[253] Comcast Findings ¶ 109 (quoting Comcast Exh. 363 (Singer Dep.) 299:8-300:22).

[254] Comcast Findings ¶ 109 (quoting Comcast Exh. 363 (Singer Dep.) 226:5-25).

[255] Comcast Findings ¶ 118.

[256] Comcast Findings ¶ 118 n.319 (quoting Comcast Exh. 349 (Brooks Dep.) 144:16-145:3).

analyses rest on the work performed by Tennis Channel "rather than on [their own] independent evaluation," they should be rejected as unreliable.[257]

[257] *Supply & Bldg. Co. v. Estee Lauder Int'l, Inc.*, No. 95 Civ. 8136, 2001 WL 1602976, at *4 (S.D.N.Y. Dec. 14, 2001); *see also Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 429 (S.D.N.Y. 2009) ("An expert who simply repeats the hearsay of the client who retained him, without any independent investigation or analysis, does not assist the trier of fact in understanding matters that require specialized knowledge."); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272, 2003 WL 22124991, at *3 (S.D.N.Y. Sept. 15, 2003) ("[A]ny expert should be aware that a party and counsel in a litigation have an interest in the outcome and that an expert study should not be dependent on the information they supply.").

CONCLUSION

For the foregoing reasons, and the reasons set forth in Comcast's other submissions, Comcast respectfully requests that the Presiding Judge deny the relief sought by Tennis Channel in this carriage complaint proceeding.

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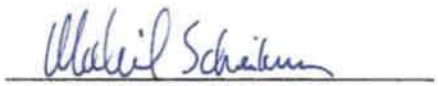

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