

JUL - 8 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.)
)
v.)
)
COMCAST CABLE COMMUNICATIONS,)
LLC)
)
Complaint Alleging Program Carriage)
Discrimination)

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

To: Marlene H. Dortch, Secretary
Attn: Chief Administrative Law Judge Richard L. Sippel

ENFORCEMENT BUREAU'S COMMENTS

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Summary

The Presiding Judge directed the Enforcement Bureau (“Bureau”) to submit comments on the Proposed Findings of Fact and Conclusions of Law, Proposed Replies thereto, and Proposed Recommended Decisions filed by The Tennis Channel, Inc. (“Tennis Channel”) and Comcast Cable Communications, LLC (“Comcast”). Based on those filings and the evidence adduced at hearing, the Bureau submits that Tennis Channel has satisfied its burden of demonstrating that (1) Comcast discriminated against Tennis Channel in video programming distribution on the basis of affiliation or non-affiliation in the selection, terms, or conditions for carriage, and (2) Comcast’s discriminatory conduct unreasonably restrained the ability of Tennis Channel to compete fairly. Accordingly, the Bureau respectfully recommends that the Presiding Judge issue a decision concluding that Comcast willfully violated Section 76.1301(c) of the Commission’s Rules. As a consequence of such willful violation, the Bureau believes the Presiding Judge should recommend that the Commission remedy the situation by mandating carriage of Tennis Channel’s programming across Comcast’s cable systems nationwide on a broadly distributed tier within 30 calendar days at a price and at terms and conditions that are commensurate with those that Comcast affords carriage of similarly-situated sports-related channels in which it has a financial interest, *i.e.*, Golf Channel and Versus. In addition, given the gravity of Comcast’s deliberate anticompetitive conduct, the Bureau believes the Presiding Judge should recommend that the Commission sanction Comcast by imposing a forfeiture in the amount of \$375,000, the maximum amount permitted for a continuing violation of this kind.

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I. INTRODUCTION

1. The Presiding Judge directed the Enforcement Bureau (“Bureau”), to submit comments by July 8, 2011, on the Proposed Findings of Fact and Conclusions of Law, Proposed Replies thereto, and Proposed Recommended Decisions filed respectively by The Tennis Channel, Inc. (“Tennis Channel” or “Complainant”) and Comcast Cable Communications, LLC (“Comcast”).¹ The Bureau hereby submits the following comments.²

II. BACKGROUND

2. The Hearing Designation Order in this proceeding³ designated the captioned program carriage complaint case for hearing. The HDO requires the Presiding Judge to submit a recommended decision to the Commission based on his determination of the following issues as to the defendant Comcast:

(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

¹ See *The Tennis Channel, Inc. v Comcast Cable Communications, LLC*, Order, FCC 11M-18 (ALJ, rel. June 30, 2011); see also Complainant’s Proposed Findings of Fact and Conclusions of Law, filed June 7, 2011, by Tennis Channel (“Tennis Channel’s Proposed Findings”); Defendant’s Proposed Findings of Fact and Conclusions of Law, filed June 7, 2011, by Comcast (“Comcast’s Proposed Findings”); Complainant’s Proposed Reply Findings of Fact and Conclusions of Law, filed June 21, 2011, by Tennis Channel (“Tennis Channel’s Proposed Reply Findings”); and Defendant’s Proposed Reply Findings of Fact and Conclusions of Law, filed June 21, 2011, by Comcast (“Comcast’s Proposed Reply Findings”).

² Although the Bureau has, pursuant to Section 0.111(b) of the Commission’s Rules, 47 C.F.R. § 0.111(b), participated fully as a party in this proceeding, the Bureau’s interests in this case differ from those of the captioned parties. Thus, while Tennis Channel and the Comcast have properly sought to serve their respective pecuniary and other *private* interests, the Bureau’s role has been to ensure that the *public* interest is served and that the evidentiary record in this proceeding is full and complete in order that the Presiding Judge may have an adequate basis upon which to render a fair and reasoned recommended decision.

³ *The Tennis Channel, Inc. v Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing For Forfeiture, 25 FCC Rcd 14149 (Media Bur. 2010) (“HDO”).

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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.⁴

3. Hearing sessions were held at the Commission's headquarters in Washington, DC, from April 25, 2011 through May 2, 2011. During the hearing, Tennis Channel presented the testimony of four witnesses in support of its direct case, and Comcast presented seven witnesses.

III. LEGAL STANDARD

4. The Bureau agrees with Comcast that, until the Commission rules otherwise, the burdens of proceeding with the introduction of evidence and of proof are on Tennis Channel.⁵ As a practical matter, however, the Bureau believes it is unnecessary for the Presiding Judge to reach a determination as to which of the captioned parties bears the burdens in this proceeding, as in our view the evidence amply demonstrates that Comcast has engaged in discriminatory conduct, in willful violation of Section 76.1301(c) of the Commission's Rules.⁶

5. With respect to the applicable standard to prove a violation of the Commission's program carriage rules, we must begin with the statute. The Cable Television Consumer Protection and Competition Act of 1992⁷ added Section 616 to the Communications Act of 1934, as amended, which required the Commission to adopt regulations governing program carriage agreements between cable operators and other multichannel video programming distributors and video programming vendors. Among other things, Section 616 ordered the Commission to establish rules that:

⁴ HDO, 25 FCC Rcd at 14163 ¶24.

⁵ See Comcast's Proposed Findings at 77, note 394 and accompanying text.

⁶ See *Herring Broadcasting dba Wealth TV v. Time Warner Cable, Inc.*, Memorandum Opinion and Order, FCC 11-94, 2011 WL 2324320(F.C.C.), ¶ 18 (released June 13, 2011) ("*Wealth TV II*") (agreeing with the ALJ that the placement of the burden of proof was immaterial in that case).

⁷ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("*1992 Cable Act*").

contain provisions designed to 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.⁸

In adopting these provisions, Congress observed “that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.”⁹

6. The Commission recognized that an unaffiliated program vendor that competes with programmers affiliated with vertically integrated multichannel video programming distributors (“MVPDs”)¹⁰ may suffer harm to the extent that it does not receive the same favorable terms and conditions of carriage.¹¹ To deter discriminatory conduct in the carriage of programming, the Commission adopted Section 76.1301(c) of the rules, which closely tracks the statute:

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

7. In adopting Section 76.1301(c), the Commission specifically attempted to strike a balance between proscribing certain anticompetitive activities while preserving the ability of the parties to engage in “legitimate, aggressive negotiations.”¹² The Commission also sought to implement Congress’ stated policy to “rely on the marketplace, to the maximum extent feasible, to

⁸ 47 U.S.C. § 536(a)(3).

⁹ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 9 FCC Rcd 2642, 2643, ¶ 2 (1993) (“1993 Program Carriage Order”).

¹⁰ MVPDs include cable operators (such as Comcast), telephone companies that distribute video programs to subscribers (such as Verizon FIOS and AT&T), and satellite video program distributors (such as DirecTV and DISH Network).

¹¹ See *1993 Program Carriage Order* at 2643, ¶ 2.

¹² *Id* at 2648, ¶ 14.

achieve greater availability' of the relevant programming.”¹³ At no point did Congress or the Commission state an intention to deny vertically-integrated MVPDs the ability to exercise legitimate business and editorial discretion over their carriage decisions.

8. Although Section 76.1301(c) was adopted in 1993, there is a scarcity of guidance and case law on the specific subject of program carriage discrimination. Nevertheless, in evaluating Issue No. 1 in this proceeding, it is reasonable, based on a plain reading of Section 76.1301(c), to employ a two-pronged analysis that essentially tracks the required elements of the rule. First, we suggest that the Presiding Judge look to whether Comcast has engaged in discrimination in the selection, terms, or conditions of carriage on the basis of Tennis Channel's affiliation or non-affiliation. Second, if Comcast is found to have engaged in such discriminatory conduct, we recommend that the Presiding Judge examine whether the effect of such conduct has been to unreasonably restrain the ability of Tennis Channel to compete fairly. Both prongs must be satisfied to make out a violation of Section 76.1301(c) of the Commission's Rules.

9. Under the first prong of the two-prong analysis, in determining whether Comcast engaged in discriminatory conduct, we suggest that the Presiding Judge evaluate whether Comcast: (a) favored its own affiliated programming over Tennis Channel's programming in the selection, terms, and/or conditions of carriage on (b) the basis of affiliation or non-affiliation. The legislative history to Section 616 indicates that “the Commission is to define discrimination with respect to the extensive body of law addressing discrimination in normal business practices.”¹⁴ The Supreme Court has held that discrimination involves “a comparison of substantially similar entities.”¹⁵ Consequently, with respect to part (a) of the first prong, in determining whether Comcast favored its affiliated programming over Tennis Channel's programming, the Presiding Judge initially should consider whether the affiliated and unaffiliated programming at issue is “substantially similar.”

¹³ See *1992 Cable Act*, Section 2(b)(2), cited in *1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 15.

¹⁴ *1993 Program Carriage Order*, 9 FCC Rcd at 2645 n.6, citing House Report at 110.

¹⁵ *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

Relevant considerations should include whether the content, target demographics, focuses, and target advertisers of the affiliated and unaffiliated programming networks are comparable.

10. The Commission has held that a cable operator may treat networks differently as long as it does so based on “legitimate reasons for its carriage decision that are borne out by the record and are not based on the programmer's affiliation or non-affiliation.”¹⁶ In *MASN II*, the Commission found that the cable operator had demonstrated legitimate reasons for its cable carriage decisions, particularly audience appeal, bandwidth limitations, and costs.¹⁷

11. Under the second prong of the two-prong analysis, if there is a finding of discrimination under Section 76.1301(c), we suggest that the Presiding Judge then determine whether the discriminatory conduct had the effect of unreasonably restraining Tennis Channel’s ability to compete fairly. Relevant considerations include the effect of the discriminatory conduct on Tennis Channel’s ability to compete for viewers, advertisers, and programming.¹⁸ The Presiding Judge need not go so far as to find that, without carriage, Tennis Channel would be entirely unable to compete.¹⁹

IV. DISCUSSION

A. Comcast Engaged in Discrimination in the Selection, Terms, and Conditions of Carriage on the Basis of Affiliation and Non-affiliation.

12. Tennis Channel presented substantial evidence that it is similarly situated with two Comcast-owned sports networks, Golf Channel and Versus, for the purposes of Section 76.1301(c). The Bureau also believes that Comcast favored its affiliated networks over Tennis Channel in deciding on the terms, and conditions of carriage.

¹⁶ *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099, 18105, ¶ 11 (2010) (“*MASN I*”).

¹⁷ *See id.* at 18105-06.

¹⁸ *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, 15799 (Media Bur. 2008) (“*MASN I*”), *rev'd on other grounds* 25 FCC Rcd 18099 (2010).

¹⁹ *See id.* at 15798, ¶ 30.

1. Tennis Channel, Golf Channel, and Versus are Similar for Purposes of Section 76.1301(c) of the Commission's Rules.

13. The Bureau agrees with Tennis Channel that it is similarly situated with Comcast-owned Golf Channel and Versus for the purposes of Section 76.1301(c).²⁰ The evidence shows that Tennis Channel is closely aligned with Golf Channel and Versus with respect to programming, advertising, ratings, and audience demographics.

14. While the Golf and Tennis Channels obviously provide programs related to different athletic activities, all three channels offer entertainment related to the broad category characterized as sports programming, showing various sports year round, with varying degrees of live event and non-event programming.²¹ Not only do the three channels telecast programming in the same sport-related genre, but in the case of Versus, Comcast Redacted

Redacted Thus, the evidence presented at hearing shows that Comcast made overtures to Redacted Redacted and other tennis events for its affiliated Versus channel, the Redacted that Tennis Channel was providing.²² Consequently, insofar as similarity in programming is concerned, the Bureau believes that Tennis Channel has made a compelling showing that all three channels are comparable.

15. Despite differences in the type of sports televised, Tennis Channel also established that sports programming occupies a distinct portion of advertisers' spending budgets and that all three channels compete for the same pool of advertising dollars.²³ In addition, Tennis Channel provided reliable evidence through the testimony of its Chief Financial Officer, Gary Herman, corroborated in part by Comcast's own experts, that all potential advertisers tend to group their available advertising dollars by programming categories, and that competition for these dollars is

²⁰ Tennis Channel's Proposed Findings at ¶¶ 79-122.

²¹ Tennis Channel's Proposed Findings at ¶¶ 84-86.

²² Tennis Channel's Proposed Findings at ¶¶ 87-95; Tennis Channel Ex. 41.

²³ Tennis Channel's Proposed Findings at ¶¶ 80, 83, 117-122.

fierce.²⁴ Correspondingly, and not surprisingly, there is Redacted

Redacted.²⁵

16. Tennis Channel also established that the ratings of all three channels are

Redacted

Redacted.²⁶ Comcast offered no contrary ratings evidence. Instead, Comcast relied on the subjective testimony of its expert Mark Egan, who testified that the programming of the three channels gave him different “feelings,” such as “young and international” or “aggressive and violent.” Mr. Egan’s subjective assessments do not refute the compelling quantitative evidence presented by Tennis Channel.²⁷

17. The evidence also demonstrated significant overlap in demographics among the viewing audiences targeted by all three channels.²⁸ Despite what appear to be relatively small differences in metrics, which Comcast stresses,²⁹ it appears clear that all three channels compete for

Redacted.³⁰ The evidence presented also establishes that despite its arguments to the contrary, Comcast itself viewed the three channels as competitors.³¹ In fact, Redacted

Redacted
Redacted
Redacted³²

²⁴ Tennis Channel’s Proposed Findings at ¶¶ 118-122.

²⁵ Tennis Channel’s Proposed Findings at ¶¶ 118-122.

²⁶ Tennis Channel’s Proposed Findings at ¶¶ 109-116; Comcast’s Proposed Findings at ¶ 118.

²⁷ Comcast’s Proposed Findings at ¶ 80.

²⁸ Tennis Channel’s Proposed Findings at ¶¶ 96-98.

²⁹ Comcast’s Proposed Findings at ¶¶ 78-97; Tennis Channel’s Proposed Findings at ¶¶ 96-104.

³⁰ Tennis Channel’s Proposed Findings at ¶¶ 100-108; Comcast’s Proposed Findings at ¶ 86.

³¹ Tennis Channel’s Proposed Findings at ¶ 83.

³² Tennis Channel Ex. 39 at COMTTC_00009011. Comcast, in a note at the bottom of the page listed Lehman Brothers values for Golf and Versus to help evaluate the value of equity in Tennis Channel.

18. Based on the foregoing, the Bureau believes that Tennis Channel amply demonstrated that Tennis Channel and Comcast-owned Versus and Golf Channel are similarly-situated for purposes of analyzing Comcast's compliance with Sections 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules.

2. Comcast Discriminated Against Tennis Channel In Favor of Affiliated Sports Channels.

19. The Bureau believes that Tennis Channel met its burden of establishing that Comcast discriminated against Tennis Channel in favor of affiliated sports networks. In 2009, Tennis Channel proposed wider distribution [Redacted] in return for [Redacted]. Tennis Channel claims that Comcast rejected that proposal to protect its financial interests in the Golf Channel and Versus.³³ Comcast, by contrast, asserts that it rejected the 2009 proposal for legitimate financial reasons unrelated to its vertical integration.³⁴ The Bureau finds Tennis Channel's position more persuasive on this point.

20. Comcast argues that its rejection of the 2009 proposal was based purely on a cost benefit analysis without regard to affiliation or non-affiliation. Comcast offered the "uncontroverted" testimony of Madison Bond, a Comcast manager, who claimed that Tennis Channel's proposal would result in a substantial increase in cost with no additional benefit for the increased distribution.³⁵ According to Mr. Bond, there would be [Redacted]

[Redacted].³⁶ Additionally, Comcast offered testimony that a manager in Mr. Bond's office obtained feedback on the proposal from four division managers,³⁷ and concluded that there was no

³³ Tennis Channel's Proposed Findings at ¶¶ 62-78; Tennis Channel Trial Brief at 4.

³⁴ Comcast's Proposed Findings at ¶¶ 27-42.

³⁵ Comcast Proposed Reply Findings at ¶ 222.

³⁶ Comcast's Proposed Findings at ¶ 28; Comcast Ex. 588.

³⁷ Tennis Channel's Proposed Findings at ¶ 70; Comcast's Proposed Findings at ¶ 37; Comcast Ex. 130.

significant subscriber interest in having Tennis Channel distributed more broadly.³⁸ Comcast avers that its cost benefit analyses were corroborated by contemporaneous documentation.³⁹

21. The Bureau believes that Tennis Channel presented compelling evidence that refutes Comcast's claim that its decision to refrain from carrying the Tennis Channel on a widely distributed tier was motivated by legitimate business reasons. Tennis Channel demonstrated that wider distribution would cost Comcast additional dollars in the aggregate, but Redacted

Redacted.⁴⁰ Tennis Channel also showed that Comcast's "cost benefit analysis" ignored real benefits to Comcast.⁴¹ According to Tennis Channel, its programming has customer appeal, when measured by dollars per rating point and hours of desirable sports programming content, equivalent to or better than Golf Channel and Versus.⁴²

Tennis Channel showed that if its offer had been accepted, Comcast could Redacted

Redacted.⁴³

22. The Bureau believes that Tennis Channel successfully undermines Comcast's argument that there was a lack of interest from the divisions in distributing Tennis Channel more

³⁸ Comcast's Proposed Findings at ¶ 37. Comcast admits this analysis was done with full knowledge that Tennis Channel might bring a cable carriage complaint. Comcast's Proposed Findings at ¶ 30; Comcast Ex. 130 (Ms. Gaiski's note on the telephone call with the division heads indicates in the top margin "Work Product"). This leads the Bureau to question whether the document accurately reflects any interest in broadly distributing Tennis Channel or instead was intended to document the absence of interest regardless of the true facts. Tennis Channel also points out that Mr. Bond apparently knew that asking the question of the division chiefs was not really to assess interest in expanding distribution of the Tennis Channel—his office asked the division chiefs to respond within a day or so, then rejected Tennis Channel's proposal without waiting for the division chiefs to respond. Tennis Channel's Proposed Findings at ¶ 73.

³⁹ Comcast Post Trial Brief at 15.

⁴⁰ Tennis Channel's Proposed Findings at ¶ 64. Tennis Channel notes that the cost is less than Redacted compared with the Comcast cable side's annual gross revenue of approximately \$36 billion. Tennis Channel's Proposed Findings at ¶¶ 24, 75.

⁴¹ Tennis Channel's Proposed Findings at ¶ 76.

⁴² Tennis Channel's Proposed Findings at ¶¶ 5-15, 79-116.

⁴³ Tennis Channel's Proposed Findings at ¶¶ 38, 46, 64. Tennis Channel described the improvements made to the channel since inception: acquiring the rights to a large number of tennis tournaments including at least some programming rights to each of the four grand slam tennis tournaments, and producing ancillary programming featuring tennis luminaries. Tennis Channel's Proposed Findings at ¶¶ 10-15.

broadly. Tennis Channel points out that when Comcast polled its division chiefs to determine if there was significant interest in distributing Tennis Channel more broadly, Comcast's corporate culture influenced the answers.⁴⁴ Comcast directed its divisions [Redacted]

[Redacted]

[Redacted].⁴⁵ [Redacted]

[Redacted]

[Redacted]⁴⁶

23. To bolster its assertion that Comcast's decision was tainted by its affiliation with Golf Channel and Versus, Tennis Channel presented substantial evidence that Comcast historically has made its distribution decisions relating to Tennis Channel in consultation with the Golf Channel and Versus management. In 2007, after the United States Tennis Association invested in the Tennis Channel, Comcast management devised a plan to grant broader distribution to Tennis Channel, but did so only to acquire tennis programming rights for Versus.⁴⁷ [Redacted]

[Redacted]

[Redacted]

[Redacted].⁴⁸ Exhibits related to this plan demonstrate that Comcast executes its distribution decisions regarding Tennis Channel fully aware of the impact those decisions could have on Comcast's affiliated sports channels.⁴⁹

24. Comcast and Tennis Channel both presented expert economists to evaluate whether Comcast's rejection of the 2009 proposal was a legitimate economic decision by Comcast or was

⁴⁴ Tennis Channel Post Trial Brief at 39-41.

⁴⁵ Tennis Channel Post Trial Brief at 39-40. In at least one instance, [Redacted] without substantial justification. Tennis Channel's Proposed Findings at ¶¶ 58-59.

⁴⁶ Tennis Channel's Proposed Findings at ¶¶ 38, 46, 55, 64 and 138.

⁴⁷ Tennis Channel Proposed Findings ¶¶ 154-59.

⁴⁸ Tennis Channel Ex. 35.

⁴⁹ Tennis Channel Proposed Findings ¶¶ 154-59.

driven by competition between Tennis Channel, Versus and Golf Channel. The Bureau believes the preponderance of the evidence favors a finding of discrimination. Comcast's economic expert, Mr. E. Jonathan Orszag, testified that "the most direct and compelling evidence with regard to the reasonableness of an MVPD's carriage of a network are the carriage decisions of other MVPDs."⁵⁰ As elucidated by Mr. Orszag, this "revealed preferences" analysis determines whether there has been discrimination by a vertically integrated cable operator by examining how other MVPDs treat the same carriage decision.⁵¹

25. The Bureau believes that reasonable application of the "revealed preferences" test demonstrates discrimination against Tennis Channel and in favor of Golf Channel and Versus in Comcast's distribution decisions.⁵² Specifically, the evidence shows that Tennis Channel is carried to [Redacted] subscribers on Comcast systems than the average of other MVPD providers in the marketplace.⁵³ In fact, Tennis Channel's average penetration in the market, when all MVPDs are included, is [Redacted] its penetration on Comcast's systems.⁵⁴ The same analysis applied to Golf Channel and Versus reveals that Comcast affords Golf Channel and Versus [Redacted] than market distribution, carrying Golf Channel to [Redacted] more subscribers than the marketplace and Versus to [Redacted] more subscribers than the marketplace.⁵⁵ During the Commission's review of the proposed merger between Comcast and NBC

⁵⁰ Orszag Written Direct at ¶ 17.

⁵¹ Orszag Written Direct at ¶ 17. The analysis eliminates contested variables like the ones in this case, *e.g.*, time of launch, pricing, audience appeal, etc.

⁵² Mr. Orszag reached a contrary conclusion in the application of this analysis, but in order to do so, he excluded other, non-cable, MVPDs without evidence of a valid basis for doing so. Orszag Tr. at 1351. The Bureau disagrees with Comcast's assertion that Dish and Direct TV should be excluded. Comcast's Proposed Reply Findings at ¶ 257. [Redacted]

[Redacted] See *e.g.* Comcast Exhibits 60 and 66.

⁵³ Tennis Channel's Proposed Findings at ¶¶ 249-51.

⁵⁴ Tennis Channel's Proposed Findings at ¶ 251.

⁵⁵ Tennis Channel's Proposed Findings at ¶ 128.

Universal, Commission economists noted similar evidence that Comcast favors its wholly-owned affiliates.⁵⁶

26. The conclusion that Comcast discriminates against Tennis Channel and in favor of Golf Channel and Versus is also corroborated by undisputed evidence that Comcast discriminates in the channel assignments it gives to Golf Channel, Versus and Tennis Channel.⁵⁷ In the *Merger Order*, the Commission placed substantial weight on channel placement as a significant indicia of discrimination.⁵⁸ Evidence presented at hearing reveals that Comcast frequently assigns Golf Channel and Versus channels in the 7-20 number range, but that sports tier channels such as Tennis Channel are typically assigned numbers in the low 700s. Because viewers frequently start at the lowest number and surf up until they find a channel of interest, lower channel assignments are always preferable.⁵⁹ The evidence adduced also indicates that in some instances, favorable channel placement on Comcast's systems for its affiliated channels resulted from pressure exerted by Golf Channel and Versus.⁶⁰ DirectTV, Dish and Verizon FIOS carry Golf Channel, Versus, and Tennis Channel all in the same Sports Neighborhood.⁶¹

B. Tennis Channel Has Shown that Comcast's Conduct Has Resulted in Competitive Harm.

27. Turning to the second prong of the analysis, the Bureau submits that, based on its review of the evidence produced at hearing and the parties' post-hearing filings, Tennis Channel has met its burden of establishing that its ability to compete was unreasonably restrained by Comcast's conduct, in violation of Section 76.1301(c). In its post-hearing filings, Comcast argues that even if

⁵⁶ See *Comcast Merger Order*, 26 FCC Rcd at 4403 Appendix B ¶ 70 (2011). (“[The Commission’s analysis in Table 6] suggests that Comcast currently carries its own networks at a much higher rate relative to other MVPD systems.”)

⁵⁷ Tennis Channel Proposed Findings at ¶ 129-30.

⁵⁸ See *Comcast Merger Order*, 26 FCC Rcd at 4402, Appendix B ¶ 65 *et seq.*; see also *Comcast Merger Order*, 26 FCC Rcd at 4358, Appendix A, Section III (Commission conditioned its approval of the merger on Comcast’s agreement not to discriminate against unaffiliated news channels in its channel placement decisions).

⁵⁹ Tennis Channel’s Proposed Findings at ¶¶ 129, 212.

⁶⁰ Tennis Channel Ex. 55.

⁶¹ Tennis Channel’s Proposed Findings at ¶ 130.

discrimination occurred, there is no resulting economic harm restricting Tennis Channel's ability to compete. Comcast proffers Tennis Channel's overall success with Redacted subscribers and its nationwide distribution through satellite carriage, which makes the programming available across the country.⁶² Comcast further maintains that even if it had accepted Tennis Channel's 2009 proposal, the level of distribution would still not reach the subscriber penetration level the programmer claims it needs to improve its success R [REDACTED]⁶³

28. The Bureau does not find Comcast's arguments persuasive in light of the evidence adduced by Tennis Channel, which has convincingly shown that narrow carriage of its network on the sports tier as well as its channel position unreasonably impairs the programmer's business and programming prospects in a number of ways.⁶⁴ First, notwithstanding Comcast's claim regarding Tennis Channel's current level of success, Tennis Channel has shown that it was harmed by Comcast's restrictive level of carriage. Testimony by Tennis Channel's CFO, Gary Herman, established that Tennis Channel's limited distribution is the "single most prevalent reason" advertisers give for refusing to spend their advertising dollars on Tennis Channel.⁶⁵ Tennis Channel also showed that its limited distribution made it infeasible to purchase Redacted [REDACTED]

[REDACTED]⁶⁶
Moreover, Tennis Channel established that, contrary to its current position, Comcast has in the past admitted that the sports tier is "not viable" for an ad-supported network like Tennis Channel.⁶⁷ Re [REDACTED]

⁶² Comcast's Proposed Findings at ¶ 133.

⁶³ Comcast's Proposed Findings at ¶ 141.

⁶⁴ Tennis Channel's Proposed Findings at ¶¶ 172-177.

⁶⁵ Tennis Channel's Proposed Findings at ¶¶ 200-03, 205-06.

⁶⁶ Tennis Channel's Proposed Findings at ¶¶ 205-206.

⁶⁷ Tennis Channel's Proposed Findings at ¶¶ 170, 194.

Redacted⁶⁸ Comcast, in its own internal analysis, acknowledges that Tennis Channel's prospects are seriously limited by the restricted access to which it is currently subject.⁶⁹

29. Redacted

Redacted⁷⁰ Limited distribution on Comcast, the nations' largest MVPD, acts as a bottleneck on a network's ability to reach one in four U.S. homes and to have a significant presence in critical top media markets.⁷¹

30. Third, the Bureau finds unpersuasive Comcast's argument that even under Tennis Channel's own 2009 proposal, the programmer would not reach its desired penetration level. Redacted The problem with this argument is that any increased distribution, regardless of whether it reached the precise level sought, would still benefit Tennis Channel by increasing license fees and boosting its prospects to promote and market its programming.⁷² Further, increased distribution would enhance Tennis Channel's ability, among other things, to acquire its desired programming by expanding its current limited viewing capability. Tennis Channel demonstrated that many of the rights holders of tennis event programming have refused, in the past, to grant these rights to Tennis Channel based upon its restricted viewership.⁷³ The Bureau considers this a critical issue in this case because Tennis Channel competes with Versus for tennis event programming. By restricting Tennis Channel's distribution, Comcast unreasonably restrains Tennis Channel's ability to compete head-to-head with Versus.

⁶⁸ Tennis Channel Ex. 33.

⁶⁹ Tennis Channel's Proposed Findings at ¶ 172.

⁷⁰ Tennis Channel Proposed Findings at ¶¶ 170-171.

⁷¹ Tennis Channel Proposed Findings at ¶¶ 170-171

⁷² Tennis Channel Proposed Findings at ¶ 169.

⁷³ Tennis Channel's Proposed Findings at ¶¶ 185- 188.

31. Tennis Channel also demonstrated that its undesirable channel assignment on Comcast's system unfairly impairs its ability to compete by limiting its ability to attract casual viewers that are channel surfing, a common method of viewing television.⁷⁴ Indeed, this fact was acknowledged by Comcast's witness Madison Bond, Comcast's former head of programming, who testified that accessibility was an important component of converting casual viewers into regular viewers of a network.⁷⁵ Even subscribers to the sports tier have trouble locating Tennis Channel.⁷⁶ As Mr. Bond testified, it is generally true that networks that are more accessible have more viewership.⁷⁷ In contrast, Golf Channel and Versus, Comcast's affiliated networks, receive broad distribution from Comcast and frequently occupy channel assignments in the same neighborhood of sports channels like ESPN.⁷⁸

C. The Presiding Judge Should Mandate Broader Carriage and Impose the Maximum Forfeiture On Comcast

32. Evidence adduced at hearing demonstrates that Comcast has violated Section 76.1301(c), and the Bureau therefore recommends that the Presiding Judge fashion an appropriate remedy under Section 76.1302(g).⁷⁹ Tennis Channel requests that the Presiding Judge mandate that Comcast carry it on the most highly penetrated tier and on proximate channels to Golf Channel and Versus.⁸⁰ Comcast asserts that if the Presiding Judge were to find that Tennis Channel met its burden and order broader coverage, Tennis Channel's demands are excessive as it seeks distribution completely out of line with what other MVPDs afford it.⁸¹ Comcast notes that carrying Tennis Channel on its analog tier raises bandwidth limitations that would require deleting other channels

⁷⁴ Tennis Channel's Proposed Findings at ¶¶ 207, 212.

⁷⁵ Tennis Channel's Trial Brief at 30; Tennis Channel's Proposed Findings at ¶ 212.

⁷⁶ Tennis Channel's Proposed Findings at ¶¶ 209-213; Tennis Channel's Trial Brief at 30.

⁷⁷ Tennis Channel Proposed Findings at ¶¶ 207, 212.

⁷⁸ Tennis Channel's Proposed Findings at ¶¶ 129-30, 210.

⁷⁹ See 47 C.F.R. § 76.1301(c) and § 76.1302(g).

⁸⁰ Tennis Channel's Proposed Findings at ¶¶ 313-316.

⁸¹ Comcast's Proposed Reply Findings at ¶¶ 297-299.

from the tier.⁸² The Bureau believes that Comcast makes valid arguments and would accordingly tailor the remedy as follows.

33. Based on the fact that Tennis Channel, Golf Channel and Versus are similarly situated for purposes of Section 76.1301(c), the Bureau believes an appropriate remedy would include ordering a level of carriage equivalent to Comcast's affiliates. The Bureau suggests that an appropriate remedy would be to direct Comcast to carry Tennis Channel at an average penetration rate equal to Redacted

Redacted⁸³ The Bureau recommends tailoring the remedy to exclude all analog systems where bandwidth limitations would require the deletion of existing programming to distribute the Tennis Channel on the system. Tennis Channel has offered no evidence justifying elimination of other programming channels to accommodate such expanded carriage on Comcast's system.⁸⁴

34. With respect to the question of per subscriber pricing, the Presiding Judge may decide that the 2009 Tennis Channel proposal to Comcast sets an appropriate price schedule for such a distribution level.⁸⁵ The Tennis Channel 2009 offering Redacted

Redacted⁸⁶ In the alternative, the Presiding Judge may require an additional briefing on the question of the equivalent market rate for distribution at a penetration level Redacted The Bureau recommends that the Presiding Judge should also direct Comcast to end its discrimination in terms of channel placement: the Presiding Judge should either require Tennis Channel to be carried on a channel proximate to

⁸² Comcast's Proposed Reply Findings at ¶ 300.

⁸³ Tennis Channel's Proposed Findings at ¶ 128. Comcast affords Golf carriage at Redacted the level it is carried by other MVPDs. Tennis Channel's Proposed Findings ¶ 128.

⁸⁴ See HDO, note 120 and 47 C.F.R. § 76.1302(g).

⁸⁵ Tennis Channel Ex. 70.

⁸⁶ Tennis Channel Ex. 70.

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Golf Channel or Versus as Tennis Channel requests⁸⁷ or should require Comcast to create a “sports neighborhood” (similar to the “news neighborhood” required by the *Comcast Merger Order*⁸⁸) and require that Tennis Channel be located in the same neighborhood with Golf Channel and Versus.

35. Finally, the Bureau recommends that the Presiding Judge impose a forfeiture for Comcast’s violation of Section 76.1301(c). As a cable operator, the maximum forfeiture is \$37,500 per day of a continuing violation but shall not exceed \$375,000 for a single act or failure to act.⁸⁹ The Bureau agrees with Tennis Channel that a forfeiture at the maximum amount, \$375,000 for a continuing violation, is appropriate in this instance.⁹⁰ The Bureau believes a lesser amount would be unlikely to deter a company as large as Comcast from future violations of our rules in its future cable carriage decisions.

V. CONCLUSION

36. For the foregoing reasons, the Bureau submits that Tennis Channel has satisfied its burden of demonstrating that Comcast engaged in discrimination in the selection, terms, or conditions of carriage on the basis of Tennis Channel’s non-affiliation. Furthermore, the Bureau believes Tennis Channel has demonstrated that Comcast’s discriminatory conduct unreasonably restrained Tennis Channel’s ability to compete fairly. Accordingly, the Bureau suggests that the Presiding Judge should issue a recommended decision finding that Comcast has violated Section 76.1301(c) of the Commission’s Rules⁹¹ in this instance and concluding that Issue No. 1 should be resolved in Tennis Channel’s favor. Furthermore, the Bureau submits that the Presiding Judge should issue a recommended decision finding there is a basis for mandating broader carriage of Tennis Channel on Comcast’s cable systems and concluding that Issue No. 2 is resolved in favor of

⁸⁷ Tennis Channel’s Proposed Findings at ¶ 314.

⁸⁸ See *Comcast Merger Order*, 26 FCC Rcd at 4358.

⁸⁹ 47 C.F.R. § 1.80 (b)(1).

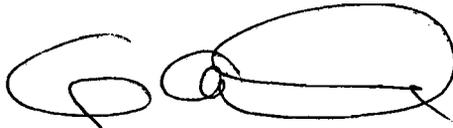
⁹⁰ Tennis Channel’s Proposed Findings at ¶¶ 326, 327.

⁹¹ See 47 C.F.R. § 76.1301(c).

Tennis Channel. Finally, the Bureau recommends that the Presiding Judge impose the maximum forfeiture on Comcast for the violation of the Section 76.1301(c) of the Commission's Rules.

Respectfully submitted,

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July 8, 2011

CERTIFICATE OF SERVICE

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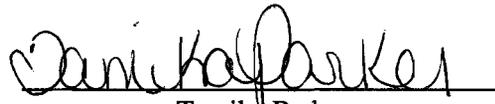
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