TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of:

The Tennis Channel, Inc
v
Comcast Cable Communications, LLC

MB Docket No. 10-204

ORIGINAL

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
THE TENNIS CHANNEL, INC.	)	
	)	MB Docket
	)	No. 10-204
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC	)	File No. CSR-8285-P
	)	
Complaint Alleging Program Carriage Discrimination	)	

Tuesday,
July 12, 2011
Volume 8

Hearing Room TW-A363
445 12th Street, S.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:
THE HONORABLE JUDGE RICHARD L. SIPPEL
Chief Administrative Law Judge

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2 (10:01 a.m.)

3 JUDGE SIPPEL: On the record.

4 Let's go. Anyway, I don't have a time clock.

5 I need a time clock because Justin, my

6 internist clerk has the air conditioner

7 switch.

8 (Laughter.)

9 JUDGE SIPPEL: So we will be okay.

10 Who is going to make the

11 arguments? I should get that on for the

12 record.

13 MR. SCHMIDT: Your Honor, I will

14 be doing it for the Tennis Channel.

15 JUDGE SIPPEL: Okay.

16 MR. SCHMIDT: Mr. Phillips

17 graciously ceded the argument to me.

18 JUDGE SIPPEL: Okay. And does the

19 clerk have your name?

20 MR. SCHMIDT: Yes, Paul Schmidt.

21 JUDGE SIPPEL: Mr. Schmidt. Okay

22 and on behalf of Comcast?

1 MR. CARROLL: Good morning, Your
2 Honor. Michael Carroll on behalf of Comcast.
3 JUDGE SIPPEL: Good morning. Good
4 morning everyone.
5 And the Bureau? Did you intend to
6 say anything?
7 MS. ORLOV: Your Honor, we are
8 going to rest on our submission, unless Your
9 Honor has some specific questions.
10 JUDGE SIPPEL: Fair enough. Fair
11 enough. I just wanted to give you the
12 opportunity if you wanted to sum up at the
13 end. But yes, certainly your comments are
14 very clear and we have got a few questions
15 ourselves up here that might take a little bit
16 of time.
17 So I just ask Mr. Schmidt to get
18 started. You have got the burden of proof.
19 I know that you don't agree with that but that
20 is -- I want to start by just saying that the
21 last decision that the Commission issued on
22 this was is the question and in the context of

1 an administrative law judge hearing was in
2 *Herring*, in the *Herring* case.
3 And although they didn't -- They
4 adopted everything that we found here but they
5 didn't adopt that conclusion, I think it was
6 more of a conclusion than a finding, but they
7 certainly didn't reject it and reverse it.
8 So that, as far as I am concerned,
9 that establishes the law of the case at this
10 point and the Bureau's comments have not taken
11 a different position on that either. So that
12 is the way it is going to be.
13 And having said that, I am going
14 to ask that you -- Your outline is right to
15 the point. I am going to ask that not too
16 much time be spent on giving me the
17 legislative history and whatnot. If we don't
18 know that up here by now, we are all in
19 trouble. And I would just assume that for the
20 purposes of keeping the time down, because it
21 is going to be a warm day.
22 Let me -- Well why don't you begin

1 your comments? I may interrupt with a few
2 questions. My questions are directed toward
3 different sections of your outline but go
4 ahead.
5 MR. SCHMIDT: Yes and I would
6 invite Your Honor -- I do intend to follow my
7 outline. I would invite Your Honor to ask any
8 questions that Your Honor has. I would love
9 the opportunity to address those questions.
10 And following Your Honor's
11 scheduling order, I would like to reserve five
12 minutes or so for rebuttal.
13 Your Honor is correct as to our
14 view on the burden of proof but I think the
15 one place where we agree with Comcast is that
16 I don't think this case is going to be decided
17 by the burden of proof. We think we have
18 clearly met the burden of proof if it rests on
19 us. They think they have clearly met the
20 burden of proof if it rests on them. We think
21 the facts are pretty clear in this case.
22 And let me just start off by

1 talking about the showing that we think we
2 have made. Section 616 presents a very
3 straightforward test. A cable company can't
4 treat independent networks differently from
5 how it treats its own networks, based on
6 ownership. Congress could have outlawed
7 ownership altogether. Instead, it chose
8 Section 616 giving the protection that there
9 would be fair treatment, equal treatment
10 between the networks Comcast owns and the
11 networks it doesn't own; that they can't be
12 treated differently based on affiliation.
13 And what we have in this case are
14 very clear differences between how the
15 networks are treated. There is really no
16 dispute on that question. The Comcast
17 networks receive six times the carriage from
18 Comcast that Tennis Channel receives. Golf
19 Channel, Versus go to six times the number of
20 homes, 16 million extra homes than Tennis
21 Channel does. And Comcast pays its channels
22 twice the amount that it would cost for it to

1 give Tennis Channel that fair carriage, twice
2 as much each.
3 So there is no dispute about
4 whether there is different treatment. The
5 real question is whether that different
6 treatment is based on affiliation or non-
7 affiliation, whether it is discriminatory.
8 And in that regard, we find ourselves in
9 something of a unique position in this case in
10 terms of the background that we come before
11 the Court with. In the 17-year history of
12 Section 616, there has never been an FCC
13 finding before this year of discrimination
14 under Section 616. And to our knowledge, the
15 Enforcement Bureau had never made a statement
16 about discrimination under Section 616 before
17 this year.
18 In January the full FCC, looking
19 at the Comcast merger, relied on a finding
20 from its economist's office that Comcast
21 discriminates in favor of the very Comcast
22 channels at issue in this case, the Tennis

1 Channel and Versus and relying on that finding
2 imposed special carriage conditions on
3 Comcast.
4 On Friday the Enforcement Bureau,
5 acting in its role of ensuring that the public
6 interest is served, found that Tennis Channel,
7 in its view, is a victim of that
8 discrimination and that that discrimination is
9 so serious, it justifies the most severe
10 sanctions allowed, the most severe civil
11 penalties allowed against Comcast.
12 JUDGE SIPPEL: Wait a minute. Not
13 of that discrimination. They found that
14 you've been treated in a discriminatory manner
15 based on the evidence in this case, not on
16 that merger document.
17 MR. SCHMIDT: Absolutely. Based
18 on the evidence in this case, absolutely.
19 JUDGE SIPPEL: It didn't come out
20 that way. Okay.
21 MR. SCHMIDT: We view those, Your
22 Honor, as ground breaking findings in the

1 history of Section 616 and we view them as
2 driven by the unique facts in this case. And
3 that is what I want to spend my time talking
4 about in the argument.
5 And the first point that I would
6 like to --
7 JUDGE SIPPEL: Now are you again
8 back to arguing the findings, if you want to
9 call them that, in the merger document or you
10 are talking about the comments of the Bureau?
11 I'm not sure what you are talking about.
12 MR. SCHMIDT: We think both of
13 those are important, Your Honor. We think
14 that it is important that the FCC in January
15 in the merger document relied on a finding
16 from its economist's office that Comcast
17 discriminates in favor of Golf Channel and
18 Versus. That is really all I plan to say
19 about that but we think that is important.
20 We think it is important that on
21 Friday the Enforcement Bureau looked at this
22 case and said in this case the facts show that

1 Tennis Channel is a victim of discrimination
2 in favor of Golf Channel and Versus. That is
3 all I plan to say about that.
4 What I want to focus on is the
5 facts that we think are unique in this case
6 that support a finding of discrimination but
7 I think it is important to talk about the
8 context, because this is an unusual context
9 and it is a context that hasn't arisen
10 previously before in terms of where we find
11 ourselves.
12 And in talking about the facts, --
13 JUDGE SIPPEL: As I said at the
14 front-end of this case, as an evidentiary
15 matter, those whatever findings, those
16 economic findings in the merger document are
17 not relevant to the issues in this case as a
18 legal matter. Now that is the way it is going
19 to be.
20 MR. SCHMIDT: Yes, and --
21 JUDGE SIPPEL: You have got to
22 prove your case.

1 MR. SCHMIDT: And that is what I
2 want to do, Your Honor.
3 JUDGE SIPPEL: Okay.
4 MR. SCHMIDT: And I raised those
5 just because they are the framework for where
6 we find ourselves, which in our view is a
7 unique framework.
8 But in terms of the proof in our
9 case, let me start first with the different
10 treatment, with how Comcast treats its
11 channels differently than how it treats the
12 Tennis Channel. And what I would like to talk
13 about in that regard is where Tennis Channel
14 began with Comcast.
15 In 2005, Tennis Channel signed its
16 agreement with Comcast. And the tier
17 provision in that agreement was open. The
18 tier provision gave Comcast the ability to
19 treat Tennis Channel fairly by changing its
20 tier as Tennis Channel grew, as Tennis Channel
21 improved itself. And the evidence we think is
22 undisputed that for the next four years

1 between 2005 and 2009, Tennis Channel went out
2 and worked to earn that fair treatment, that
3 equal treatment from Comcast. It invested
4 tens of millions of dollars in programming, in
5 technology, in talent such that in 2009 it was
6 a completely different channel. Most notably,
7 it had acquired rights to every one of the
8 most valuable events that exists in tennis,
9 the grand slam events, rights that Versus, in
10 some instances, wanted to acquire for itself
11 calling them tent pole rights and rights that
12 Golf Channel is not able to match on its side,
13 in terms of the golf majors. It had literally
14 remade itself as a channel to earn better
15 carriage from Comcast and from other carriers.
16 And it was only having taken those steps that
17 in 2009 it went to Comcast and asked for
18 better coverage, for broader coverage that it
19 had earned based on these improvements.
20 JUDGE SIPPEL: At a discount.
21 Right?
22 MR. SCHMIDT: At a discount.

1 Exactly.

2 What Tennis Channel worked to earn
3 and what it offered to Comcast at a discount,
4 the Comcast channels were born with at exactly
5 the time Comcast took equity in them. At
6 exactly the time Comcast took equity in them,
7 they enjoyed the broadest carriage, much
8 broader carriage, much more preferential
9 carriage than Tennis Channel has ever enjoyed.
10 And that is the simple starkest fact in this
11 case, in our view, that no Comcast channel
12 resides exclusively on the sports tier. Every
13 Comcast channel gets preferential -- Every
14 Comcast sports channel gets preferential
15 treatment relative to Tennis Channel. And
16 that is true whether they were launched before
17 with Comcast like Versus and Golf Channel or
18 whether Comcast acquired equity in the
19 channels after it did its deal with Tennis
20 Channel, like the hockey channel and the
21 baseball channel. They all get more favorable
22 carriage than Tennis Channel.

1 JUDGE SIPPEL: Are the baseball
2 channel and the hockey channel, are they
3 Comcast in-house programming or are they
4 similarly situated to you in the sense that
5 you are an independent?
6 MR. SCHMIDT: They are not an
7 independent anymore. They were.
8 JUDGE SIPPEL: They were.
9 MR. SCHMIDT: And at the time
10 Comcast acquired equity in them, it doesn't
11 have 100 percent equity interest, but at the
12 time it acquired equity in them, it gave them
13 more favorable carriage. And essentially,
14 after it had launched Tennis Channel, jumped
15 them ahead of Tennis Channel in terms of the
16 level of carriage that it granted them.
17 To us, that proves the different
18 treatment that when they come along before,
19 like Versus and Golf Channel, they enjoy
20 better carriage if there is equity. When the
21 equity arises after, they enjoy better
22 carriage, if there is equity.

1 To us, that is the simple starkest
2 fact in this case that where there is equity,
3 there is preferential carriage and there is
4 never exclusive sports tier carriage.
5 JUDGE SIPPEL: You were offered
6 equity, too. Didn't you? Didn't Mr. Solomon
7 offer equity?
8 MR. SCHMIDT: We offered equity in
9 2006 and 2007. Correct.
10 JUDGE SIPPEL: But not in 2009?
11 MR. SCHMIDT: But not in 2009.
12 The offer in 2006 and 2007 was pursuant to a
13 contract. We had to offer that because of our
14 agreements with Dish and DirecTV. Between
15 that time and between 2009, the network
16 fundamentally changed and that is what Mr.
17 Solomon testified about. And that is why in
18 2009 he went back to Comcast and said we would
19 like broader carriage. We are willing to give
20 you a discount but we are entitled to broader
21 carriage, based on the improvements we have
22 made in our network, based on our cost

1 proposition.

2 Mr. Bond came back and said you
3 have got to do something more for me on cost.
4 Mr. Solomon said okay, we will do something
5 more. And then that was the end of it. There
6 was no counteroffer from Comcast on price. No
7 counteroffer on anything else, other than to
8 reaffirm what Comcast had previously said,
9 which is we will help you go system to system
10 and get coverage on that basis, which they
11 have never required for their channels.

12 JUDGE SIPPEL: This is kind of a
13 throwaway question but suppose he had offered
14 Mr. Bond some equity in addition to the
15 discount. Do you think there might have been
16 a deal struck?

17 MR. SCHMIDT: It's hard to say,
18 Your Honor. I think it is very possible but
19 it is very hard to say. We don't have that
20 set of facts.

21 JUDGE SIPPEL: All right.

22 MR. SCHMIDT: So --

1 JUDGE SIPPEL: I have got a
2 question to ask you about that.
3 MR. SCHMIDT: Yes.
4 JUDGE SIPPEL: You say that --
5 Well let me ask you this question. Is there
6 any independent program that is used by
7 Comcast that is not on a level at the sports
8 tier or something similar to the sports tier?
9 Putting it the other way, is there an
10 independent program that is running on Comcast
11 on an equal basis with similar Comcast
12 program? Any at all?
13 MR. SCHMIDT: There are,
14 absolutely, but we think they prove the point
15 I am making.
16 The ones that exist are, as I
17 understand it and Dr. Singer testified about
18 this, ESPN, which is a unique program in terms
19 of its market power, is probably the most
20 powerful cable network that exists, in terms
21 of the attractiveness of its programming, in
22 terms of the value it can demand, the money it

1 can demand. It has a unique roll among
2 networks.
3 The NFL Network gets broader
4 carriage. We know why that is. That was a
5 result of our last program carriage lawsuit
6 *MASN*, I believe in some markets, gets broader
7 carriage as a result of a program carriage
8 lawsuit. But the difference is striking, and
9 this is in Dr. Singer's testimony. He talked
10 about how really the rare examples of sports
11 channels that are not on the sports tier and
12 that are not owned by Comcast really confirmed
13 the point he was making. They are either
14 unique channels like ESPN and none of the
15 channels in this case are like ESPN. There is
16 no other channel like ESPN or their channels
17 that went through the program carriage process
18 and going through that were able to get a
19 settlement that earned them broader carriage.
20 JUDGE SIPPEL: Well okay. So it
21 sounds to me what you are saying is that there
22 are three independents that due to certain

1 elements of market power say, they have more
2 market power in the broad sense of that term
3 than Tennis Channel, they were basically able
4 to get close to get what they want, if not
5 all.
6 MR. SCHMIDT: Yes. So that I
7 would say for two of them it wasn't market
8 power. MASN just has broader coverage in
9 local markets I believe here in the D.C. area.
10 JUDGE SIPPEL: That's true.
11 MR. SCHMIDT: It is a local thing.
12 JUDGE SIPPEL: Good baseball team,
13 by the way.
14 MR. SCHMIDT: I saw it a couple
15 weekends ago and it didn't look like it when
16 they were playing the Pirates.
17 But it wasn't market power for the
18 NFL Network or MASN that got them where it
19 was. It certainly was for ESPN and ESPN has
20 market power no one else has. For MASN and
21 the NFL Network, it was having to bring a
22 lawsuit under Section 616 and then settling

1 that lawsuit and as part of that settlement
2 getting broader carriage. That is different
3 than the market working the way it is supposed
4 to. That is the Section 616 process working
5 the way it is supposed to.
6 JUDGE SIPPEL: So you think that
7 the lawsuits were basically a cost of
8 business, as opposed to a matter of principle?
9 MR. SCHMIDT: No, I think they
10 were absolutely a matter of principle. They
11 were an effort to get their carriage. And I
12 think those companies, I suspect those
13 networks came out of those lawsuits feeling
14 like they had done a reasonable deal in terms
15 of getting their networks fair carriage. That
16 is what Section 616 is designed to address.
17 Those differences between the
18 channels that we see between the Tennis
19 Channel and between how Golf Channel and
20 Versus are treated by Comcast are striking.
21 There is a 16 million household difference
22 between the number of households that Comcast

1 makes Golf Channel and Versus available to and
2 the number of households that it makes Tennis
3 Channel available to. That 16 million
4 household difference is bigger than the total
5 universe of any other individual MVPD in
6 America with the exception of one. That
7 speaks to the differential, the level, the
8 magnitude of the different treatment between
9 Golf Channel and Versus on the one hand and
10 Comcast and Tennis Channel on the other hand.
11 We saw different treatment in
12 other regards, different treatment in terms of
13 channel placement, something the Enforcement
14 Bureau talks about in their brief. Different
15 treatment in terms of using Comcast Cable
16 power to get programming for its channels.
17 Different treatment even in terms of how they
18 think about it. In the words of one Comcast
19 witness, applying a different level of
20 scrutiny to their channels.
21 The different treatment between
22 their channels and our channel is striking and