

direct and more accurate measure of viewer appeal than programming expenditures. And, as shown in the previous section, Tennis Channel, Golf Channel and Versus have remarkably similar coverage area ratings showing that the three networks are similar in viewer appeal notwithstanding differences in program expenditures.¹⁸¹ Dr. Hal Singer, Tennis Channel's economic expert, testified persuasively that programming expenditures are *not* a proxy for the value or quality of network programming.¹⁸² As an example, Dr. Singer pointed out that "reality television shows and talent competitions are extremely popular—that is, are highly valued by viewers, advertisers, and distributors—yet often cost relatively little to make."¹⁸³ Dr. Singer's testimony on this point is creditable.

52. Notwithstanding differences in programming expenditures, the weight of the more convincing evidence, considered in its entirety, shows that Tennis Channel is similarly situated to Golf Channel and Versus. The record evidence shows that Comcast Cable did not consider Tennis Channel's programming expenditures in deciding the level of Tennis Channel's carriage.¹⁸⁴ Also, as noted above, programming expenditures are not a valid proxy for the popularity or value of a network's programming. The criteria relevant to the issues in this case — audience demographics, advertising, and ratings — establishes that Tennis Channel is similarly situated to Golf Channel and Versus.

E. Comcast Discriminates Against Tennis Channel in Favor of Golf Channel and Versus Solely on the Basis of Affiliation.

53. It is undisputed that Comcast gives more favorable channel placement¹⁸⁵ to Golf Channel and Versus than it does to Tennis Channel. Comcast's Washington D.C. system, for example, carries Versus on Channel 7 and Golf Channel on Channel 11, both are low numbers just two channels away from ESPN. In contrast, Comcast's same system carries Tennis Channel on Channel 735, which is located 726 channels above ESPN, and thereby is placed in an unfavorable position to capture viewers that "surf" the network.¹⁸⁶

54. It is also undisputed that Comcast Cable carries Golf Channel and Versus far more broadly than it carries Tennis Channel. As noted above, Comcast Cable carries Golf Channel and Versus on the highly penetrated Expanded Basic or Digital Starter tiers reaching

¹⁸¹ Comcast Cable's claim that Tennis Channel programming is inferior to Golf Channel and Versus also is undermined by the similarity in three networks' ratings, which indicate that viewers do not place less value on Tennis Channel's programming.

¹⁸² See Tennis Channel Exh. 16 (Testimony of Hal Singer) at 55 (¶ 79).

¹⁸³ *Id.*

¹⁸⁴ See Tr. at 1884 (Gregory Rigdon); Tr. at 2255 (Madison Bond).

¹⁸⁵ Channel placement denotes the channel number that is assigned to a network. Networks favor the low numbers which attract viewers that surf the network, *i.e.*, viewers that select a network by starting at Channel 1 and pushing the Channel Up button. Sports networks also generally prefer placement in close proximity to ESPN. Tr. at 2265-66 (Madison Bond). See Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 33 (¶ 66).

¹⁸⁶ Tennis Channel Exh. 100. See Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 34 (¶ 66).

approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of its subscribers.¹⁸⁷ In contrast, Comcast Cable generally carries Tennis Channel on the narrowly-distributed Sports Tier that reaches only about [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of Comcast's subscribers.¹⁸⁸

55. As shown below, the weight of reliable record evidence demonstrates that the differences in channel placement and penetration level are based upon affiliation.¹⁸⁹ Top executives in Comcast Cable have acknowledged that Comcast Cable gives preferential treatment to its affiliated networks. Mr. Steven Burke, then President of Comcast Cable and Chief Operating Officer of Comcast Corporation, acknowledged that Comcast's affiliated networks such as Golf Channel and Versus "get treated like siblings as opposed to like strangers."¹⁹⁰ According to Mr. Burke, Comcast's affiliates receive a "different level of scrutiny" than unaffiliated providers.¹⁹¹ Mr. Bond, the previous Comcast Cable executive responsible for distribution decisions, testified that Comcast Cable has a "sibling relationship" with its affiliated networks that "probably [affords those companies] greater access."¹⁹²

56. Comcast Cable has affiliation agreements that effectively require Comcast systems to carry Golf Channel and Versus on highly distributed tiers.¹⁹³ In contrast, Comcast Cable does not require any of its cable systems to carry Tennis Channel — a network shown to be similarly

¹⁸⁷ See Tennis Channel Exh. 16 (Testimony of Hal Singer) at 7-8 (¶ 18).

¹⁸⁸ *Id.* at 8 (¶ 18).

¹⁸⁹ In the Commission's order of conditional approval of the recent merger between Comcast Corp. and NBC Universal, the Commission stated that "Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons." Tennis Channel Exh. 13, *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order*, 26 FCC Rcd 4238, 4285 (¶ 117) (2011) ("*MO&O*"). The Technical Appendix to the *MO&O* states that an "analysis of Comcast's data on carriage and channel placement shows (1) that Comcast currently favors its affiliated programming in making such decisions and that (2) this behavior stems from anticompetitive motives rather than due to reasons that arise from vertical efficiencies." *Id.* at ¶ 65. Notwithstanding those statements, however, the Commission did "not reach any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past." *Id.* at n.163. Comcast Cable correctly notes that findings in the merger *MO&O* are not binding in this proceeding. See Comcast Cable Reply Findings of Fact and Conclusions of Law at 22 (¶ 252). It is noted that this formal hearing is *de novo*. Therefore, all findings contained in this *Initial Decision*, including those concerning Comcast Cable's preferential treatment of its affiliates, are based solely on the record evidence compiled in this proceeding, not on any comments made or conclusions reached or suggested in the *MO&O* in its Technical Appendix.

¹⁹⁰ Tennis Channel Exh 7 at 3.

¹⁹¹ *Id.*

¹⁹² Tr. at 2249 (Madison Bond). Comcast also has admitted that its investment in Golf Channel "brought with it one of the most important keys to a fledgling cable network's success — distribution." Tennis Channel Exh. 61. See also Tennis Channel Exh. 21.

¹⁹³ Tr. at 2160-61 (Madison Bond). See Comcast Cable Exh. 75 (Testimony of Madison Bond) at 11 (¶ 31).

situated with Golf Channel and Versus — on a broadly distributed tier.¹⁹⁴ Ms. Gaiski, Comcast Cable’s Senior Vice President, communicated to “the field” (*i.e.*, Comcast cable systems across the country), that Tennis Channel is one of the networks that should be placed on the Sports Tier.¹⁹⁵ A Comcast Cable system can reposition Tennis Channel to a more highly distributed tier only if it obtains the approval of Mr. Rigdon, Comcast Cable’s Executive Vice-President of Content Acquisition.¹⁹⁶ Mr. Rigdon has testified that he “would not grant that approval.”¹⁹⁷

57. Comcast Cable’s practice is to transmit affiliated sports networks more broadly than unaffiliated sports networks. In general, the larger the interest that Comcast has in a network, the greater the distribution provided by Comcast Cable. Thus, Comcast Cable’s majority-owned sports networks, Golf Channel and Versus, are carried on the very highly penetrating Expanded Basic or Digital Starter tiers. Comcast Cable carries NHL Network, MLB Network, and NBA TV — sports networks in which it has minority or indirect ownership — on the less highly penetrating Digital Preferred Tier that reaches approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of its subscribers.¹⁹⁸ Every one of Comcast Cable’s affiliated networks is carried on more widely distributed tiers than the Sports tiers. In fact, Comcast Cable carries only unaffiliated sports networks exclusively on the narrowly penetrated Sports Tier.¹⁹⁹

58. The weight of record evidence further shows that affiliation by itself generally is sufficient to ensure that a sports network is widely distributed on Comcast systems. For example, in 2010, Comcast Cable planned to launch the U.S. Olympic Network, a new affiliated network featuring Olympics programming, “as part of its digital basic offerings” which would “giv[e] it more exposure than competing premium sports cable channels,”²⁰⁰ despite the fact that

¹⁹⁴ Tr. at 2160 (Madison Bond).

¹⁹⁵ Tr. at 2407-08, 2482-84 (Jennifer Gaiski).

¹⁹⁶ Tr. at 1877 (Gregory Rigdon).

¹⁹⁷ *Id.* The record evidence shows that Comcast’s corporate headquarters prevented one local Comcast cable system from carrying Tennis Channel on a broader tier. Tennis Channel and Comcast’s San Francisco system had reached an agreement for dual illumination, whereby Tennis Channel would be carried simultaneously on the Sports Tier and D2, a more widely distributed tier, whereas Tennis Channel, *inter alia*, would provide a tennis racket to new digital subscribers to D2 or the Sports Tier. Tennis Channel Exhs. 24, 30. The agreement was approved by Comcast Cable’s Denver regional office, but Comcast Cable officials at corporate headquarters refused to authorize it. Tennis Channel Exh. 31, 48. Tr. at 2293 (Madison Bond).

¹⁹⁸ See Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20).

¹⁹⁹ *Id.* Tr. at 2198 (Madison Bond). Comcast Cable does not carry the unaffiliated ESPN networks, on the Sports Tier. As Dr. Singer testified, ESPN I treated as a “special case among all sports networks nationwide” because they “have some of the most valuable sports programming.” Tr. at 847 (Hal Singer). Comcast Cable also does not currently carry the unaffiliated NFL Network on the Sports Tier. Comcast Cable had repositioned the NFL Network from the Sports Tier to Digital Preferred in accordance with settlement of a litigated carriage discrimination complaint. Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20); Tr. at 846 (Hal Singer); Tr. at 2243-44 (Madison Bond).

²⁰⁰ Tennis Channel Exh. 77; Tr. at 2189 (Madison Bond).

the U.S. Olympic Network had no rights to air any of the Olympic games.²⁰¹ Before it acquired hockey programming, Mr. Jeff Shell, head of Comcast's programming division, characterized OLN, the network subsequently renamed Versus, as "a crappy channel that was dead in the water."²⁰² Notwithstanding that low estimation of OLN's worth by a top Comcast executive, Comcast Cable maintained its broad distribution of that "crappy channel" and did not consider repositioning that network to the Sports Tier.²⁰³

59. Moreover, the record evidence demonstrates that Comcast Cable gives a network greater distribution when it acquires equity in such sports network. In 2009, Comcast Cable repositioned the NHL Network from the Sports Tier to the more highly penetrated Digital Preferred Tier pursuant to an agreement in which Comcast obtained equity in the network. That agreement directly tied the amount of equity that Comcast would receive in the network to the level of distribution provided by Comcast Cable.²⁰⁴ In addition, Comcast Cable originally had planned to place a new MLB Network on the Sports Tier, but upon receiving equity in the network, launched the network in 2009 on the more highly distributed Digital Preferred Tier.²⁰⁵

60. Comcast Cable gives special assistance or favorable treatment to its affiliated networks in a variety of ways. For example, Versus had a contract with the National Hockey League for the rights to telecast professional hockey games that required the network to maintain a penetration level of at least [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]. In order to ensure that Versus was in compliance with this commitment, Comcast Cable Vice-President Jennifer Gaiski in 2009 directed her staff to ensure that all Comcast cable systems provided Versus at a minimum with the specified level of carriage.²⁰⁶ Comcast Cable's expert Michael Egan testified that it is "unusual" for a cable distributor such as Comcast Cable to ensure that a network has sufficient distribution to fulfill a contract for programming rights.²⁰⁷ Moreover, in 2009, Mr. Bond assisted Versus in its negotiations with DIRECTV relating to level of distribution and other terms and conditions of Versus's carriage.²⁰⁸

²⁰¹ Tr. at 2184, 2186-89 (Madison Bond). Tennis Channel Exh. 76-77. The U.S. Olympic Network was never launched. Tr. at 2184 (Madison Bond).

²⁰² Tennis Channel Exh. 26; Tennis Channel Exh. 143 (Jeffrey Shell Deposition) at 39.

²⁰³ Tr. at 2297 (Madison Bond); Tr. at 2410 (Jennifer Gaiski).

²⁰⁴ Tr. at 21179-82 (Madison Bond). See Tr. at 853 (Hal Singer).

²⁰⁵ See Tennis Channel Exh. 16 (Testimony of Hal Singer) at 10 n.18. See Tr. at 855 (Hal Singer). Approximately 100 Comcast systems serving [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent of Comcast's Tennis Channel subscribers receive Tennis Channel on a broadly distributed tier. Comcast Cable Exh. 80 (Testimony of Jonathan Orszag) at 18 (¶ 28); Tr. at 1989-90, 1994 (Madison Bond). The record evidence shows that Comcast Cable is more likely to carry Tennis Channel [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] in markets in which it faces significant competition from another distributor. Tennis Channel Exh. 16 (Testimony of Hal Singer) at 11 (¶ 22).

²⁰⁶ Tennis Channel Exh. 84; Tr. at 2393-98 (Jennifer Gaiski).

²⁰⁷ Tr. at 1705 (Michael Egan).

²⁰⁸ Tr. at 2230-34 (Madison Bond). See also Tennis Channel Exhs. 89, 92-98.

Even though he was then Comcast Cable's Executive Vice-President of Content Acquisition, Mr. Bond freely acknowledged that he was "representing the programming side in these negotiations."²⁰⁹

61. Comcast Cable also has taken an active role in ensuring that its affiliated networks obtain favorable channel placement. In 2008, Ms. Gaiski reported that she had successfully persuaded a number of Comcast local systems to give Versus favorable channel placement, *i.e.*, "adjacent to or within 2-3 channels slots of ESPN and/or ESPN 2" or "within 2 channel slots of the local RSN[regional sports network]."²¹⁰

F. The Distribution Decisions of Other MVPDs Do Not Justify Comcast Cable's Carriage of Tennis Channel on a Narrowly Penetrated Tier.

62. Comcast Cable argues that the distribution decisions of other MVPDs show that its decision to carry Tennis Channel on the Sports Tier while carrying Golf Channel and Versus on broadly distributed tiers has a legitimate, non-discriminatory basis. Comcast Cable states that all major MVPDs carry Golf Channel and Versus broadly whereas most major MVPDs carry Tennis Channel on sports tiers. Comcast Cable asserts that every major MVPD carries Golf Channel and Versus to more subscribers than Tennis Channel. It claims that the record evidence shows that the distribution levels of the three networks on Comcast systems is in line with the market generally and that such evidence demonstrates that its carriage decisions are non-discriminatory business decisions.²¹¹ For two reasons, those arguments are rejected.

63. First, the distribution decisions of other MVPDs do not establish that Comcast Cable's carriage of Tennis Channel on the Sports Tier is a result of a legitimate, non-discriminatory business decision because Comcast Cable's distribution of Tennis Channel has an influence on the distribution decisions of other MVPDs.²¹² Substantial record evidence shows that MVPDs are influenced by the carriage decisions of other MVPDs.²¹³ Thus, when one MVPD carries a network at a particular level of distribution, it has a **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** that makes it more likely that other MVPDs will carry the network at the same level of distribution.²¹⁴ Because Comcast Cable is the largest MVPD in the United States, its carriage decisions have a strong influence on other MVPDs.²¹⁵

²⁰⁹ Tr. at 2234 (Madison Bond).

²¹⁰ See Tennis Channel Exh. 55. See Tr. at 2270-74 (Madison Bond).

²¹¹ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 29, 33 (¶ 60, 69).

²¹² See Tr. at 722 (Timothy Brooks); Tr. at 1903-04 (Gregory Rigdon); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 41, 62-63, 70 (¶ 55, 89, 101).

²¹³ See Tr. at 722 (Timothy Brooks); Tr. at 1903-04 (Gregory Rigdon); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 41, 62-63, 70 (¶ 55, 89, 101).

²¹⁴ Tennis Channel Exh. 38, at COMTTC_00052319.

²¹⁵ See Tr. at 722 (Timothy Brooks).

Cablevision.²²² Mr. Orszag acknowledged that Comcast Cable's penetration rate for Golf Channel was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the rest of the market.²²³ Similarly, Mr. Orszag testified that Versus's [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] penetration rate on Comcast Cable in 2010²²⁴ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the rest of the market²²⁵ and exceeded Versus's penetration rate on DIRECTV, Cox, Dish Network, AT&T, Time Warner, Bright House, Charter, and Cablevision.²²⁶

67. Substantial record evidence also shows that Comcast Cable carries Tennis Channel at a lower penetration rate than other MVPDs. Tennis Channel's average penetration rate on all MVPDs in 2010 was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL], over twice Tennis Channel's [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] penetration rate on Comcast Cable.²²⁷ And when Tennis Channel's penetration rate on Comcast is compared with Tennis Channel's combined penetration rate on other large MVPDs, the differential is even greater. In the third quarter of 2010, for example, Tennis Channel's average penetration rate among MVPDs with at least two million subscribers other than Comcast Cable was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL], a penetration rate [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] higher than Tennis Channel's [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] penetration rate on Comcast.²²⁸

68. Comcast Cable argues that other cable companies provide the most relevant benchmarks for Comcast Cable's carriage decisions.²²⁹ It points out that Tennis Channel's penetration rate on Comcast Cable is higher than Tennis Channel's average penetration rate of all other cable companies.²³⁰ Comparing Comcast Cable's penetration rate with the penetration rate of only cable MVPDs, however, ignores a sizable segment of the industry, *e.g.*, telephone companies and satellite MVPDs — indeed, the very MVPDs that Comcast has recognized to be

²²²Comcast Exh. 80 (Testimony of Jonathan Orszag) at 14 (¶ 23).

²²³ Tr. at 1299-1300 (Jonathan Orszag).

²²⁴ Comcast Exh. 80 (Testimony of Jonathan Orszag) at 14 (¶ 23).

²²⁵ Tr. at 1300 (Jonathan Orszag).

²²⁶ See Comcast Exh.80 (Testimony of Jonathan Orszag) at 14 (¶ 23). Verizon was the only MVPD identified by Mr. Orszag that had a higher penetration rate for Versus in 2010 than Comcast Cable. *Id.*

²²⁷ Comcast Exh. 80 (Testimony of Jonathan Orszag) at 40 (¶ 29, Table 2B); Tr. at 1376-77 (Jonathan Orszag).

²²⁸ Tennis Channel Exh. 16 (Testimony of Hal Singer) at 40 (¶ 54).

²²⁹ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 33 (¶ 68).

²³⁰ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 34 (¶ 69). Comcast relies upon record evidence showing that Tennis Channel's penetration rate on Comcast Cable — [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] whereas Tennis Channel's average penetration rate on all other cable companies is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]. Comcast Cable Exh.80 (Testimony of Jonathan Orszag) at 13 (¶ 23, Table 1A).

chief competitors.²³¹ As Comcast Cable has pointed out in this case, “one should review the carriage decisions of all MVPDs.”²³²

69. On September 12, 2011, after the record in this case had been closed, Comcast Cable filed a supplemental notice, with attached press reports, to advise the Presiding Judge that certain evidence in the hearing record is no longer accurate.”²³³ The record evidence referenced in the Supplemental Notice specified that as of 2009 or 2010 Verizon and Cablevision carried Tennis Channel at distribution levels of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].²³⁴ The press reports attached to the Supplemental Notice stated that Verizon and Cablevision had decided to opt out of the contract negotiated between Tennis Channel and the National Cable Television Cooperative and thus no longer carried Tennis Channel. The press reports also stated that Tennis Channel and Verizon were continuing to negotiate a new deal and Tennis Channel subscribers on Verizon were told the drop was temporary.²³⁵

70. As set forth in an order dated September 26, 2011, the supplemental material will not be considered in this Initial Decision.²³⁶ Comcast Cable filed the Supplemental Notice after the record had closed but did not file a motion requesting the Presiding Judge to reopen the record to include that material. The Supplemental Notice thus is not evidence and is not a part of the record. The Notice and the attached hearsay press reports are of questionable reliability untested by the formal adversarial process. Contrary to Comcast Cable’s contention, the Supplemental Notice and its attachments do not show that the record exhibits are not “accurate.”²³⁷ The exhibits referenced in the Supplemental Notice provide Tennis Channel’s distribution levels on Verizon and Cablevision as of 2009 or 2010. The Supplemental Notice and accompanying press reports do not address Tennis Channel’s distribution levels in the time period covered by those exhibits, let alone purport to show that the specific data contained in the exhibits are incorrect.²³⁸

²³¹ See Tr. at 2309-10 (Madison Bond).

²³² Comcast Cable’s Proposed Findings of Fact and Conclusions of Law at 62 (¶ 116). Comcast Cable also contends that the distribution decisions of DIRECTV and Dish Network are not probative because they carry Tennis Channel pursuant to equity-for-carriage deals. Comcast Cable’s Proposed Findings of Fact and Conclusions of Law at 35 (¶ 70). As noted above, however, Tennis Channel gave equity to Dish and DIRECTV in exchange for those distributors’ relinquishment of the “free period” of service at the beginning of the contract term rather than as an exchange for a specified level of carriage. See Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 5 n.3; Tr. at 506-08 (Ken Solomon).

²³³ Comcast’s Supplemental Notice to Update Certain Record Evidence” (Sept. 12, 2011) at 1.

²³⁴ Tennis Channel Exhs. 110 & 192; Comcast Cable Exhs. 659 & 1103.

²³⁵ *Id.* at App.

²³⁶ Order, FCC 11M-26 (released September 26, 2011).

²³⁷ Supplemental Notice at 1.

²³⁸ Supplemental Notice at 1.

G. Comcast Cable's Justifications for its Disparate Treatment Do Not Persuade.

71. Comcast Cable claims that there are legitimate, non-discriminatory reasons that explain and justify it awarding Golf Channel and Versus much broader distribution than Tennis Channel. First, Comcast Cable attributes the different levels of distribution to the fact that its affiliated networks sought broad carriage in an earlier time period than Tennis Channel. Second, Comcast Cable claims that its decision to decline Tennis Channel's 2009 offer was based on results of a cost-benefit analysis unrelated to Tennis Channel's status as unaffiliated network. As shown below, these arguments are not persuasive.

1. The Different Time Period that the Networks Sought Carriage

72. Comcast Cable points out that Golf Channel and Versus (then named OLN) achieved wide distribution by the late 1990s, before the advent of sports tiers when it was easier for networks to obtain broad carriage. Once networks gain broad penetration, according to Comcast Cable, MVPDs rarely reposition networks to less widely penetrated tiers because such action would upset the settled expectations of subscribers and generate "subscriber churn." Comcast Cable asserts that it provides Tennis Channel with narrower distribution than Golf Channel and Versus because Tennis Channel sought distribution in a later time period.²³⁹

73. The weight of record evidence shows, however, that Comcast Cable provided its affiliated sports networks broad distribution in the same time period that it provided Tennis Channel with narrow coverage. For example, in 2009 Comcast Cable placed its affiliated MLB network on the broadly distributed Digital Preferred Tier.²⁴⁰ In the same year, Comcast Cable acquired equity in the NHL network and gave that network broader distribution by moving it to the Digital Preferred Tier.²⁴¹ In 2009, Comcast Cable also moved NBA TV, a network in which it has an indirect ownership interest, from the Sports Tier to the Digital Preferred Tier. And in 2010, Comcast Cable made plans to launch its affiliated U.S. Olympic network on a broadly distributed tier.²⁴² As noted above, Comcast Cable does not carry *any* affiliated network exclusively on the Sports Tier, even affiliated networks that were launched at the same time or later than Tennis Channel. Clearly, the weight of record evidence shows that it is difficult for a network to obtain wide distribution from Comcast Cable only if the network is not affiliated with Comcast.²⁴³

²³⁹ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 27-28 (¶¶ 55-57).

²⁴⁰ See Tennis Channel Exh. 16 (Testimony of Hal Singer) at 10 n.18. See Tr. at 855 (Hal Singer).

²⁴¹ Tr. at 2179 (Madison Bond). See Tr. at 853 (Hal Singer).

²⁴² Tennis Channel Exh. 77; Tr. at 2189 (Madison Bond). Comcast Cable also has recently launched other types of affiliated networks on broadly penetrated tiers. For example, in 2008 Comcast Cable launched Retirement Living TV, an affiliated network, on its Digital Preferred Tier. Tr. at 2190 (Madison Bond).

²⁴³ Comcast Cable points out that Golf Channel and Versus paid substantial sums to Comcast Cable and other distributors in launch initiatives to reduce the cost of broad carriage. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 6, 27 (¶¶ 14, 57). However, Tennis Channel also provided [BEGIN CONFIDENTIAL] [REDACTED]

2. Comcast Cable's "Cost-Benefit Analysis"

75. Comcast Cable argues that it declined Tennis Channel's 2009 offer after conducting a cost-benefit analysis showing that Comcast would incur substantial costs if it were to grant Tennis Channel broader carriage. Claiming that conclusion was based on business reasons unrelated to affiliation, Comcast Cable contends that its retention of Tennis Channel on the Sports Tier does not show discrimination, and does not violate sections 616 and 76.1301(c).²⁴⁹ That argument is unpersuasive for two reasons.

76. First, Comcast Cable in its so-called "cost-benefit analysis" did not evaluate the benefits of carrying Tennis Channel on a more widely penetrated tier. Ms. Gaiski, in her written financial cost analysis of Tennis Channel's proposal, only analyzed increased costs to Comcast Cable of carrying Tennis Channel on Digital Preferred or Digital Starter tiers *vis-à-vis* retaining that network on the Sports Tier.²⁵⁰ Ms. Gaiski made no attempt to quantify benefits to Comcast Cable in carrying Tennis Channel on more widely penetrated tiers.²⁵¹ Ms. Gaiski did not even make a written analysis of additional subscribers or upgrades that might result from the acceptance of Tennis Channel's offer.²⁵² Nor did she request, or receive, any such written analyses from division representatives.²⁵³

²⁴⁹ Contrary to Comcast Cable's assertion, the case is not merely about whether Comcast Cable was justified in declining Tennis Channel's 2009 proposal to modify the affiliation agreement. The issue designated for hearing is broader: whether Comcast Cable "unreasonably restrained the ability of 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 Tennis Channel." *HDO*, 25 FCC Rcd at 14163 (¶ 24). To be sure, Tennis Channel alleges that Comcast Cable unlawfully rejected its 2009 proposal. Tennis Channel also claims, however, that Comcast Cable's refusal to carry it at the same level of distribution that it accords to Golf Channel and Versus constitutes a violation of sections 616 and 76.1301(c) that continues to the present. *See* Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 77 (¶ 293); Tr. at 1412-1414 (Paul Schmidt, Tennis Channel attorney).

²⁵⁰ Comcast Cable Exh. 588; Tr. at 2437 (Jennifer Gaiski).

²⁵¹ Tr. at 2439 (Jennifer Gaiski) (testifying that she gave "no thought to preparing an analysis of what Comcast [Cable] might gain by moving Tennis Channel to a more widely distributed tier.").

²⁵² Tr. at 2414 (Jennifer Gaiski). "Advertising Availabilities" or "ad avails" are "[a]dvertising units during the programming of a network . . . that are made available for the distributor to sell under a standard term of an affiliation agreement. Glossary at 2. Comcast Cable argues that it would not have derived a benefit from an increase in ad avails resulting from an acceptance of Tennis Channel's proposal due to its excess inventory in ad avails. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 19-20 (¶ 39). Ms. Gaiski testified, however, that Comcast Cable in declining Tennis Channel's offer "never gave any consideration" to whether or not acceptance of Tennis Channel's offer would generate additional revenues to Comcast Cable through the sale of ad avails on Tennis Channel. *Id*

²⁵³ Tr. at 2439 (Jennifer Gaiski). As shown by her handwritten notes labeled "work product," Ms. Gaiski in a June 8 teleconference with the four regional executives received initial negative feedback as to consumer interest in repositioning Tennis Channel. She requested the division representatives to confer with the local systems and to report in "a day or two" whether Tennis Channel's offer had engendered any interest. Comcast Cable Exh. 130; Tr. at 2367 (Jennifer Gaiski). Comcast Cable, however, declined

77. Second, Tennis Channel is the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] nationally rated sports network carried by Comcast Cable.²⁵⁴ The costs to Comcast Cable in repositioning Tennis Channel to a broadly penetrated tier are far less than costs to Comcast Cable in broadly distributing Golf Channel and Versus.²⁵⁵ The per-subscriber license fees that Comcast Cable pays to Golf Channel and Versus are substantially higher than per-subscriber license fees paid to Tennis Channel.²⁵⁶ As a consequence, Comcast Cable pays substantially more for carrying Golf Channel and Versus than it would if it were to carry Tennis Channel at the same level of distribution. For example, Comcast Cable in 2010 paid [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] to carry Golf Channel.²⁵⁷ Under discounts offered in Tennis Channel's 2009 proposal, Comcast Cable in 2010 would have paid Tennis Channel [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL], for the same expanded level of distribution.²⁵⁸

78. An established method for determining the value of a network is to compare its license fee to its rating by applying a license-fee-per-rating point metric.²⁵⁹ Based upon 2009 figures, Tennis Channel's license-fee-per-rating point, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] is substantially lower than the license-fee-per-rating points for either Golf Channel [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] or Versus [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].²⁶⁰ Had Comcast Cable

Tennis Channel's offer the next day, before the division representatives had a chance to respond with the requested input. For the reasons set forth in *paragraphs 21, supra*, the weight of record evidence shows that Comcast Cable convened the teleconference to shore up its defense of possible future litigation rather than to truly gauge the interest of its local systems.

²⁵⁴ Tennis Channel Exh. 16 (Testimony of Hal Singer) at 32 (¶ 46).

²⁵⁵ Ms. Gaiski did not undertake any analysis comparing Comcast Cable's cost of broadly carrying Tennis Channel vis-à-vis its cost of broadly carrying Golf Channel and Versus. Tr. at 2433 (Jennifer Gaiski).

²⁵⁶ The license fees that Comcast Cable paid Golf Channel in 2010 were [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per subscriber. Tr. at 2218 (Madison Bond); Tr. at 2376 (Jennifer Gaiski). Comcast Cable executives provided inconsistent testimony as to Versus's per subscriber license fees. According to Mr. Bond, Comcast Cable pays [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per subscriber to carry Versus, Tr. at 220 (Madison Bond) whereas Ms. Gaiski testified Versus charged [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per subscriber, Tr. at 2377 (Jennifer Gaiski). The license fees that Comcast Cable in 2010 paid Tennis Channel in 2010 were [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per subscriber. Comcast Exh. 588. Thus, the weight of record evidence shows Golf Channel and Versus charge substantially higher per subscriber license fees than Tennis Channel.

²⁵⁷ Tr. at 2218 (Madison Bond); Tr. at 2376 (Jennifer Gaiski). According to Mr. Bond, in 2010 Comcast Cable's license fees to carry Versus amounted to approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Tr. at 2221 (Madison Bond).

²⁵⁸ Comcast Cable Exh. 588.

²⁵⁹ Comcast Cable has utilized the license-fee-per-rating-point metric in carriage negotiations to compare the value of Versus to other networks. See Tennis Channel Exh. 82, at COMTTC_00010949.

²⁶⁰ Tennis Channel Exh. 16 (Testimony of Hal Singer) at 32-33 (¶ 46).

accepted Tennis Channel's 2009 proposal, with its substantial discounts, Tennis Channel's license-fee-per-rating point would have been even more favorable. Tennis Channel's license-fee-per-rating point thus further undermines Comcast Cable's claim that its refusal to grant Tennis Channel broader distribution is based upon cost rather than upon affiliation.

H. Economic Benefits in Favoring Affiliated Networks

79. There is an economic benefit realized by Comcast in retaining a dual distribution system that involves carrying Tennis Channel (and other unaffiliated sports networks) exclusively on the Sports Tier, while carrying affiliated sports networks on widely penetrated tiers. Networks on the Sports Tier in the aggregate charge Comcast between [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] in license fees to distribute their programming.²⁶¹ Comcast in turn charges subscribers to the Sports Tier an additional fee of \$5 to \$8 a month to receive those networks' programming.²⁶² Apart from some incremental marketing costs, the net difference — which amounts to approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] — is pure profit to the Comcast enterprise.²⁶³ Comcast Cable therefore has a clear economic incentive to retain popular *unaffiliated* networks on the Sports Tier to ensure that the Sports Tier continues to be profitable. Mr. Rigdon, the Comcast executive responsible for determining how networks are carried on Comcast systems, stated that “[t]he Tennis Channel helps bolster the value proposition of the [S]ports [T]ier.”²⁶⁴ Mr. Rigdon acknowledged that one reason he would not grant approval to repositioning Tennis Channel from the Sports Tier is because that action would “take value out of the [S]ports [T]ier and threaten those revenues.”²⁶⁵

80. Networks placed on the Sports Tier, are disadvantaged *vis-à-vis* the affiliation networks distributed on widely penetrated tiers. That is because license fees are calculated on a per subscriber basis and as a result, those networks receive less in license fees than if carried on broadly distributed tiers. Limited distribution also makes it more difficult for those networks to attract advertisers and compete for programming rights.²⁶⁶ Thus, Comcast has an economic incentive to protect its affiliated sports networks from these disadvantages by carrying them on broadly penetrated tiers, while leaving only unaffiliated networks disadvantaged on the least penetrated Sports Tier. This disparate treatment in distribution clearly is monetarily advantageous for Comcast Cable, but it also clearly is affiliation-based discrimination which Congress has outlawed.

²⁶¹ Tr. at 2301 (Madison Bond).

²⁶² Comcast Cable Exh.78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

²⁶³ Tr. at 2301-02 (Madison Bond).

²⁶⁴ Tennis Channel Exh. 140 (Gregory Rigdon Deposition) at 146. Mr. Bond in an internal Comcast Cable memorandum identified one of his major business objectives for 2008 as “enhanc[ing] the sports tier.” Tennis Channel Exh. 51 at COMTTC_00012811; Tr. at 2292 (Madison Bond).

²⁶⁵ Tr. at 1879 (Gregory Rigdon).

²⁶⁶ See paragraphs 82-91, *infra*.

I. Comcast Cable's Disparate Treatment Unreasonably Restrains Tennis Channel's Ability to Compete Fairly.

81. As shown in this section, Comcast Cable's unequal treatment of Tennis Channel *vis-à-vis* its sports affiliates has adversely affected the ability of Tennis Channel to compete fairly in the video programming marketplace. Through its discriminatory actions as described herein, Comcast Cable has depressed the number of Tennis Channel's subscribers, diminished the amount of its license fees, reduced its ability to procure valuable programming rights, and made it more difficult for Tennis Channel to sell advertising.

1. Subscribers and License Fees

82. Comcast Cable's decision to retain Tennis Channel on the Sports Tier greatly diminishes the number of Tennis Channel subscribers which in turn reduces the amount of its earnings derived from license fees. Tennis Channel has [BEGIN CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] subscribers than it would have if Comcast Cable gave it the same level of distribution as Golf Channel and Versus.²⁶⁷ Had Comcast Cable provided Tennis Channel with the same level of distribution given to its two similarly situated sports affiliates, Tennis Channel's aggregate subscribership would have increased from nearly [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁶⁸ to approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]. And given the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] that Comcast Cable's carriage decisions have on other MVPDs,²⁶⁹ and the existence of affiliation agreements with other MVPDs that tie carriage on highly distributed tiers to Tennis Channel's aggregate subscriber count,²⁷⁰ the actual increase in the number of subscribers would have been even greater.

83. License fees that Comcast Cable and other MVPDs pay Tennis Channel for its programming are calculated on a per subscriber basis.²⁷¹ Because only [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of Comcast's customer base subscribe to the Sports Tier, Tennis Channel's licensing revenues are [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the licensing revenues it would have earned had it been placed on broader distributed tiers.²⁷³ License fees are the largest source of revenue for networks such as Tennis Channel.²⁷⁴ Smaller licensing revenues make it

²⁶⁷ Tr. at 2096 (Madison Bond); Comcast Cable Exh. 588.

²⁶⁸ Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 3 (¶ 8).

²⁶⁹ See paragraph 63, *supra* & paragraph 110, *infra*.

²⁷⁰ See paragraph 64, *supra*.

²⁷¹ Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 17 (¶ 38).

²⁷² Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

²⁷³ *Id.*

²⁷⁴ Tr. at 299-300 (Ken Solomon).

more difficult for Tennis Channel to make investments (*e.g.*, procuring sports programming rights) that are necessary for Tennis Channel to remain competitive with other sports networks.²⁷⁵ In addition, its smaller subscribership precludes Tennis Channel from taking advantage of economies of scale that would reduce costs of providing service on a per-subscriber basis.²⁷⁶

84. Comcast Cable argues that Tennis Channel is not unreasonably restrained in its ability to compete for subscribers because any Comcast subscriber who wants to view Tennis Channel can subscribe to the Sports Tier or switch to DIRECTV, Dish Network, or another distributor.²⁷⁷ That argument is unpersuasive as a defense to network discrimination. Comcast subscribers pay an additional fee of approximately \$5 to \$8 a month for the Sports Tier²⁷⁸ to view Tennis Channel whereas those subscribers need not pay any additional fee to view Golf Channel and Versus. The fact that only about [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of customers pay that additional fee²⁷⁹ demonstrates that this added cost in fact is a significant impediment to Tennis Channel's ability to attract the one in four viewers in the United States that subscribe to Comcast.²⁸⁰ Comcast Cable points out that it is possible for a customer that does not want to pay the additional Sports Tier fee to cancel his or her Comcast subscription, subscribe to a different MVPD, and view Tennis Channel as a non-Comcast subscriber. That possibility, however, does not diminish Tennis Channel's showing that its status as an unaffiliated network impedes in its ability to compete for Comcast subscribers, who need not pay an additional fee or switch to another MVPD in order to view Golf Channel or Versus.

85. Unfavorable channel placement makes it less likely that persons who locate networks through "channel surfing" will select Tennis Channel. Thus, Tennis Channel's poor channel placement on Comcast systems also hinders the ability of Tennis Channel to attract viewers. And surfers fortuitously reaching an inconveniently placed Tennis Channel are less likely to revisit and become regular viewers through exposure to the network over time.²⁸¹

2. Reduced Distribution Impacts Programming Rights

86. Tennis Channel's limited distribution on Comcast Cable hinders the network's ability to compete for valuable programming rights in two ways. First, as noted above, the level

²⁷⁵ Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 17 (¶ 38).

²⁷⁶ Tennis Channel Exh. 16 (Testimony of Hal Singer) at 63 (¶ 90).

²⁷⁷ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 71 (¶ 136); Comcast Cable's Proposed Reply Findings of Fact and Conclusions of Law at 41 (¶ 289).

²⁷⁸ Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

²⁷⁹ Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4); Comcast Exh. 75 (Testimony of Madison Bond) at 2 (¶ 6).

²⁸⁰ See generally Tennis Channel Exh. 16 (Testimony of Hal Singer) at 69-70 (¶ 101).

²⁸¹ See Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 33 (¶ 66); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 61 (¶ 87).

of distribution affects the amount a network earns in license fees. Consequently, with limited distribution, Tennis Channel receives lower license fees and therefore has less money to spend on valuable programming rights.²⁸² Second, those holding broadcast rights to high-profile events “want the widest exposure possible,” and therefore favor networks having wider distribution.²⁸³

87. Tennis Channel has been unable to secure certain valuable programming rights due to its limited distribution. For example, rights holders of the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] declined to give Tennis Channel the right to telecast live coverage of each tournament’s last match of singles because of the network’s limited distribution.²⁸⁴ Limited distribution also prevented Tennis Channel from securing rights to air the semi-final and final matches of the [BEGIN CONFIDENTIAL] [REDACTED]²⁸⁵ [END CONFIDENTIAL]

88. Comcast itself recognizes that limited distribution impedes Tennis Channel’s ability to obtain valuable programming rights. A top Comcast executive stated that it would be a [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED]²⁸⁶ [END CONFIDENTIAL] Ironically, had it ever occurred to this perceptive executive that Tennis Channel’s insufficient distribution was a result of Comcast Cable’s placement discrimination?

3. Advertising

89. Advertisers insist that their commercials be viewed by as many persons as possible. Therefore, a network’s distribution is the most important factor in a network’s ability to sell advertising and to receive advertising revenues.²⁸⁷ The record evidence shows that Tennis Channel’s placement on Comcast’s Sports Tier substantially reduces the number of its potential viewers and thus makes it more difficult for the network to sell advertising.

²⁸² Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 17 (¶ 38).

²⁸³ Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 33 (¶ 65). *See* Tr. at 718 (Timothy Brooks).

²⁸⁴ Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 18 (¶ 40).

²⁸⁵ *Id.* The rights holder to the U.S. Open, the United States Tennis Association, [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL]

Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 18 (¶ 40). Tennis Channel was awarded programming rights to the [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 18-19 (¶ 41).

²⁸⁶ Tennis Channel Exh. 143 (Jeffrey Shell Deposition) at 53-54.

²⁸⁷ Tr. at 592-93 (Gary Herman).

90. Mr. Gary Herman, Tennis Channel's Senior Vice President of Advertising Sales, testified that the network's limited distribution is "the single most prevalent reason" given by advertisers for not placing advertisements on Tennis Channel.²⁸⁸ Many advertisers are hesitant to purchase national advertising on networks with less than 40 million subscribers.²⁸⁹ With its unfavorable placement on the Sports Tier, Tennis Channel reaches [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] subscribers,²⁹⁰ a subscriber count substantially below the 40 million subscriber threshold. A number of advertisers, including [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] in recent years have declined to purchase national television advertising on Tennis Channel due to its limited distribution.²⁹¹ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] purchased advertising time on Tennis Channel only during a freeview period²⁹² — a period in which Tennis Channel's distribution temporarily exceeded the 40 million subscriber threshold — but decided against purchasing advertising on Tennis Channel in other periods due to its narrow distribution.²⁹³ Similarly, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] purchased almost all its advertising on Tennis Channel during freeview periods.²⁹⁴ The company informed Tennis Channel that it has "attractive content and demographics outside of the freeview period, [but its] distribution is not large enough for [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] to consider a significant advertising purchase other than what [it has] purchased in connection with [the] freeviews."²⁹⁵

91. Tennis Channel also receives less advertising revenues from the advertisements that it is able to sell. That is because with its limited distribution, the "network receives lower prices per unit of advertising time and lower total advertising revenues than it otherwise would command."²⁹⁶

²⁸⁸ Tr. at 592 (Gary Herman).

²⁸⁹ Tennis Channel Exh. 15 (Testimony of Gary Herman) at 5 (¶ 11).

²⁹⁰ Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 3 (¶ 8).

²⁹¹ *Id.* at 6-7, 8 (¶ 16, 20).

²⁹² A freeview or free preview is a "period during which a network authorizes an MVPD to distribute its programming to incremental subscribers without charge to the incremental subscribers or to the distributor for these subscribers. Glossary at 5. The viewership of Tennis Channel increases substantially in the freeview periods.

²⁹³ Tennis Channel Exh. 15 (Testimony of Gary Herman) at 7-8 (¶ 18).

²⁹⁴ *Id.* at 7 (¶ 17).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 9 (¶ 24).

4. Threat to Survival

92. Finally, Tennis Channel attempts to convince that Comcast Cable's limited distribution of Tennis Channel threatens its ability to survive.²⁹⁷ It claims that financial analyses prepared by Comcast Cable in conjunction with MFN offers made by Tennis Channel in 2006 and 2007, show that Tennis Channel would have "no value" if it remains on Comcast's Sports Tier."²⁹⁸ Financial analyses of 2006 and 2007, however, are not useful in assessing the effect of Tennis Channel's placement on the Sports Tier in the later time period covered by the complaint.²⁹⁹ As Tennis Channel admits, "by 2009, [the] Tennis Channel was a very different network from what it was in 2006 and 2007" in as much as it had "acquired rights to telecast three out of the four remaining majors, invested in high-definition television, and added famous commentators for its programming."³⁰⁰ Thus, Tennis Channel's claim that its continued placement on the Sports Tier threatens its ability to survive is not adequately substantiated. However, it is not necessary for a network to show that its very survival is imperiled in order to satisfy its burden of showing that an MVPD's actions favoring affiliated networks had unreasonably restrained its ability to compete fairly.

CONCLUSIONS OF LAW

93. Section 616 the Communications Act, added by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),³⁰¹ directs the Commission to promulgate rules which "prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."³⁰²

94. In accordance with that directive, the Commission adopted section 76.1301(c), as an implementing rule that closely tracks the operative language of section 616. Section 76.1301(c) states that:

"[n]o 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

²⁹⁷ Tennis Channel's Proposed Finding of Fact and Conclusions of Law at 45 (¶ 167). As Comcast Cable points out, Comcast's 2007 financial analysis in fact concluded that Tennis Channel was worth [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] on the Sports Tier. Comcast Cable Exh. 66 at COMTT_00009011. See Comcast Cable Proposed Reply Findings of Fact and Conclusions of Law at 41 (¶ 288).

²⁹⁸ *Id.* at 47 (¶ 172).

²⁹⁹ Similarly, the fact that Comcast Cable rejected Tennis Channel's MFN offers in 2006 and 2007 do not show that that Comcast Cable's rejection of a different offer in 2009 was non-discriminatory.

³⁰⁰ Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 71 (¶¶ 264, 268).

³⁰¹ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

³⁰² 47 U.S.C. § 536(a)(3).

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.”³⁰³

95. Sections 616 of the Act and 76.1301(c) of the rules address Congress' concern 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."³⁰⁴ Congress was aware that cable operators in certain instances could abuse their market power to the detriment of unaffiliated programmers.³⁰⁵ Congress enacted sections 616 and 76.1301(c) to protect programming vendors against discrimination that arises from their non-affiliation with MVPDs, which also has an anti-competitive effect.

96. At the same time, Congress wanted to ensure that its bar against such discrimination not act to “restrain[] the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.”³⁰⁶ Indeed, one of the purposes underlying the 1992 Cable Act, of which section 616 is a part, is to “rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming,” a legislative objective that the Commission took into account in adopting section 76.1301(c).³⁰⁷

97. A party seeking to establish a violation of sections 616 and 76.1301(c) must show (1) that the MVPD discriminated against a programming vendor in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation and (2) that the effect of such discrimination unreasonably restrained the ability of the programming vendor to compete fairly.

98. This section of the Initial Decision will first address the burden of proof and First Amendment concerns raised by Comcast Cable. It then considers, under the two-part standard set forth in paragraph 97, whether Comcast Cable has violated sections 616 and 76.1301(c) and addresses the remedies that should be imposed.

³⁰³ 47 C.F.R. § 76.1301(c). Tennis Channel is a national video programming vendor as defined by section 616 of the Act and section 76.1301(c) of the Commission’s rules. 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

³⁰⁴ *Implementation of Sections 12 and 19 of The Cable Television Consumer Protection And Competition Act Of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2643 (¶ 2) (1993) (“*Second Report*”), recon. granted in part, 9 FCC Rcd at 4415 (1994) (“*Second Report Reconsideration*”). See S. Rep. No. 102-92, 102nd Cong., 1 Sess. 1991 at 25, 1991 WL 125145 (“*Senate Report*”).

³⁰⁵ Senate Report at 24.

³⁰⁶ *Second Report Reconsideration*, 9 FCC Rcd at 2643 (¶ 1). See *Second Report*, 9 FCC Rcd at 2648 (¶ 15).

³⁰⁷ *Second Report Reconsideration*, 9 FCC Rcd at 2648 (¶ 15), quoting 1992 Cable Act, § 2(b)(2). See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3402 ¶ 145 (1993).

A. Burden of Proof

99. Tennis Channel urges a bifurcated, shifting burden of proof in carriage complaint proceedings. Tennis Channel argues it bears an initial burden of establishing a *prima facie* case of discrimination. The burden then shifts to the Comcast Cable to show legitimate, non-discriminatory reason(s) for its disparate treatment.³⁰⁸ Since the Media Bureau earlier found that Tennis Channel had established a *prima facie* case sufficient to designate this case for hearing,³⁰⁹ Tennis Channel argues that Comcast Cable bears the burden to prove it did not violate sections 616 and section 76.1301(c). Comcast Cable disagrees, asserting that Tennis Channel bears the burden of proving its claim by a preponderance of the evidence.³¹⁰

100. This Initial Decision reaffirms the ruling made at oral argument that Tennis Channel bears the burden of proof.³¹¹ Although the Media Bureau on the basis of the initial complaint proceedings found that Tennis Channel had established a *prima facie* case sufficient to set this case for hearing, the evidence compiled after the completion of this formal evidentiary hearing is more complete, accurate, and reliable than the evidence considered by the Media Bureau in issuing the *HDO*. For example, after the *HDO* was issued, the parties obtained and/or confirmed information through full discovery. Also, the parties' direct testimony was tested by searching cross-examination of well informed trial counsel. Moreover, placing the burden of proof on Tennis Channel is consistent with the allocation of the burden of proof in previous carriage complaint cases, including *WealthTV*,³¹² and with the historic practice of requiring that the party seeking relief by Commission order bear the burden of proving by preponderance of the evidence that violations occurred.³¹³

101. In the final analysis of this case, however, the manner in which the burden of proof is allocated is immaterial to its disposition. For under any rubric of allocation of burdens of proof, the preponderance of the reliable evidence presented in this case, viewed in its entirety, establishes that Comcast Cable discriminated against Tennis Channel in its sports tier carriage of that network on the basis of affiliation, and that this discrimination had the effect of restraining Tennis Channel's ability to compete fairly in violation of section 616 of the Act and section 76.1301(c) of the Commission's rules.

³⁰⁸ Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 78 (¶ 300).

³⁰⁹ *HDO*, 25 FCC Rcd at 14149 (¶ 2).

³¹⁰ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 77 (¶ 152).

³¹¹ Tr. at 2820 (Presiding Judge).

³¹² *WealthTV Recommended Decision*, 24 FCC Rcd at 12995 (¶¶ 57-58) (quoting *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003)).

³¹³ See, e.g. *Schaffer v. Weast*, 546 U.S. 49, 56, (2005) (noting that where the statute is silent the "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims). See also 5 U.S.C. § 556(d) (providing in the absence of statutory direction that "the proponent of a rule or order has the burden of proof.") See also *Director of Office of Workers' Compensation Programs Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994).

B. First Amendment Concerns

102. Comcast Cable argues that the relevant sections of the Act and implementing rule must be construed narrowly so as not to infringe upon its editorial discretion protected by the U.S. Constitution's First Amendment.³¹⁴ A narrow construction of sections 616 and 76.1301(c) is not necessary in this case to protect Comcast Cable's First Amendment rights. This case is not about Comcast Cable's editorial discretion to decide whether to distribute Tennis Channel programming. Comcast Cable has decided to carry Tennis Channel widely across its systems, albeit generally limited to the Sports Tier, and is perfectly willing to distribute Tennis Channel to subscribers who are willing to pay an additional fee of \$5 to \$8 a month.³¹⁵ This case involves only whether the terms and conditions associated with Comcast Cable's distribution of Tennis Channel constitute discrimination or favoritism on the basis of affiliation or non-affiliation. As shown below, the adjudication of that issue does not adversely affect Comcast Cable's First Amendment rights.³¹⁶

103. Recall that Tennis Channel seeks only an order requiring Comcast Cable to carry Tennis Channel at the same level of distribution that it carries Golf Channel and Venus. That remedy would require Comcast Cable to give Tennis Channel the same level of distribution it provides to Golf Channel and Versus, without mandating any particular level of carriage. Notwithstanding Comcast Cable's assertion to the contrary, that remedy, if granted, would not constitute "mandatory carriage,"³¹⁷ or otherwise compel speech. The remedy considered here thus leaves completely to Comcast Cable the "editorial judgment"³¹⁸ as to whether to carry Tennis Channel, and if so, the manner in which the distribution should be effected. Therefore, under the proposed remedy, Comcast Cable retains absolute discretion to (1) reposition Tennis Channel to broadly penetrated tiers that are occupied by Golf Channel and Versus, or (2) move Golf Channel and Versus to the Sports Tier, or (3) reposition all three channels to an intermediate tier, or (4) not to carry the three channels at all. In other words, the proposed remedy requires only elimination of discrimination in carriage between Tennis Channel and the two Comcast affiliates, without dictating how any of the three networks are to be carried, or not carried. Thus, contrary to Comcast Cable's contention, that remedy does not "impose speech."³¹⁹

³¹⁴ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 81-82 (¶¶ 160-61). Comcast Cable does not argue that sections 616 and 76.1301(c) are facially unconstitutional.

³¹⁵ Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

³¹⁶ Contrary to Comcast Cable's contention, sections 616 and 76.1301(c) are not content-based. See Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 81-82 (¶¶ 160). Sections 616 and 76.1301(c) are economic provisions that prohibit discrimination on the basis of affiliation or non-affiliation, not on the basis of content.

³¹⁷ Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 100 (¶ 198).

³¹⁸ *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network*, Memorandum Opinion and Order, 25 FCC Rcd 18099, 18106 (¶ 12) (2010).

³¹⁹ Comcast Cable Proposed Findings of Fact and Conclusions of Law at 103 (¶ 203).

104. Because this case involves the congressionally mandated elimination of discrimination and not coerced speech, a narrow interpretation of sections 616 and 76.1303(c) is not necessary to protect Comcast Cable's First Amendment rights. Sections 616 and 76.1303(c) will be interpreted in this *Initial Decision* in accordance with the language of those provisions of law, their legislative and administrative intent, common sense, and applicable precedent.

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

105. A video programming vendor seeking to satisfy its burden of proving a violation of sections 616 and 76.1301(c) must first establish that the vertically integrated MVPD in question discriminated against it in the selection, terms, or conditions of carriage "on the basis of [the] affiliation or non-affiliation."³²⁰ In order to establish such discrimination, a party must prove that affiliation or non-affiliation "actually played a role in th[e] process and had a determinative influence on the outcome."³²¹ A party can make that showing by direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence, such as disparate treatment of similarly situated entities,³²² e.g., that an MVPD affords unaffiliated networks less favorable terms and conditions of carriage than it provides to a similarly situated affiliated network. In making a circumstantial showing, a party need not show that the affiliated and unaffiliated networks are identical in all respects to establish that they are similarly situated.³²³ It is only necessary to show a substantial similarity. *Id.*

106. The record evidence in this case clearly shows that Tennis Channel is similarly situated to Golf Channel and Versus. The three networks provide the same *genre* of programming in the form of sports programming throughout the year.³²⁴ The three networks have similar audience demographics in that they attract affluent viewers who are predominantly male in the overlapping 25-to-54 or 35-to-54 age brackets.³²⁵ The three channels target or serve many of the same advertisers³²⁶ and have remarkably similar ratings.³²⁷ And even though Golf Channel and Versus spend more money on programming than does Tennis Channel, the clear weight of the record evidence, considered in its entirety, shows Tennis Channel to be a sports network similarly situated to Golf Channel and Versus.

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

³²¹ *WealthTV Recommended Decision*, 24 FCC Rcd at 13397-98 (¶ 63) (quoting *Hazan Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

³²² *Id.* at 13398.

³²³ See *Eaton v. Indiana Dept. Of Corrections*, 657 F.3d 551 (7th Cir. 2011). Cf. *Amrhein v. Health Care Service Corp*, 546 F.3d 854, 860 (7th Cir. 2008). See *Cordi-Allen v. Conlon*, 494 F.3d 245, 255 (1st Cir. 2007) ("a 'similarly situated' requirement . . . properly understood, does not demand identity."). See also *WealthTV*, 25 FCC Rcd at 8978 (¶ 22).

³²⁴ See paragraph 25, *supra*.

³²⁵ See paragraphs 43-44, *supra*.

³²⁶ See paragraphs 45-47, *supra*.

³²⁷ See paragraphs 48-49, *supra*.

107. The undisputed record evidence further shows that Comcast Cable gives Tennis Channel less favorable treatment in the terms and conditions of carriage than it provides to Golf Channel and Versus. Comcast generally carries Tennis Channel on the narrowly distributed Sports Tier that only reaches [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of Comcast subscribers. In contrast, Comcast carries Golf Channel and Versus on highly distributed tiers to [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of its subscribers.³²⁸ In addition, Comcast gives Tennis Channel less favorable channel placement than it provides to Golf Channel and Versus.³²⁹ Comcast Cable's provision of more advantageous carriage terms and conditions to its network affiliates Golf Channel and Versus, than it does to the similarly situated unaffiliated network, Tennis Channel, is reliable, convincing, and particularly strong circumstantial evidence of disparate treatment that is based solely on affiliation.

108. Other record evidence corroborates that Comcast Cable's unequal treatment of Tennis Channel is based on affiliation. Senior Comcast executives have acknowledged that Comcast's affiliates get cared for like "siblings," in contrast to unaffiliated networks which are dealt with like "strangers."³³⁰ Moreover, the less favorable carriage distribution accorded to Tennis Channel is part of a general overall pattern in which Comcast Cable gives affiliated sports networks more distribution than unaffiliated sports networks. Comcast Cable carries not one affiliated sports network exclusively on the Sports Tier. Convincingly, there is even a correlation between a sports network's distribution on Comcast Cable and Comcast's ownership interest in that network: networks in which Comcast has equity tend to have greater distribution on Comcast Cable's systems.³³¹

109. Substantial record evidence also shows that Comcast Cable gives special assistance or favors to its affiliated sports networks that it does not provide to unaffiliated networks. For example, Comcast Cable took steps to ensure that Versus fulfilled distribution requirements in a contract for valuable programming rights; a Comcast Cable executive represented Versus in its carriage negotiations with another MVPD; and another Comcast Cable executive assisted Versus in obtaining favorable channel placement on Comcast Cable's systems.³³² No such services were provided to Tennis Channel.

110. Comcast Cable argues that decisions of other MVPDs to give Tennis Channel narrower distribution than Golf Channel and Versus show that its own carriage of Tennis Channel has a legitimate non-discriminatory basis. That argument is unpersuasive for two reasons. First, substantial record evidence shows Comcast Cable's distribution decisions have [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] on the industry. Thus, Comcast Cable's retention of Tennis Channel on a narrowly penetrated tier influences other

³²⁸ See paragraphs 54, *supra*.

³²⁹ See paragraph 53, *supra*.

³³⁰ See paragraphs 55, *supra*.

³³¹ See paragraph 57-59, *supra*.

³³² See paragraph 60, *supra*.

MVPDs to carry Tennis Channel at the same level of distribution.³³³ Second, substantial record evidence also shows that Comcast Cable's distribution of Tennis Channel, Golf Channel, and Versus are not in line with the market. In fact, Comcast Cable carries Golf Channel and Versus at a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] penetration rate than the industry average while it carries Tennis Channel at a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] penetration rate than the industry average.³³⁴

111. Substantial record evidence further shows that affiliation, not the time period in which Tennis Channel asked for broader distribution, was the driving force behind Comcast Cable's decision to retain the network on the Sports Tier. During the very time period in which Tennis Channel sought increased distribution, Comcast Cable placed, repositioned, or proposed placement of its affiliated sports networks onto widely distributed tiers,³³⁵ while leaving only unaffiliated networks exclusively on the Sports Tier.

112. Although Comcast Cable claims that it denied Tennis Channel broader carriage based upon a cost benefit analysis, the record shows that Comcast Cable did not analyze the benefits that would accrue from giving Tennis Channel greater penetration. Comcast Cable's purported cost concerns are undermined by the undisputed fact that Tennis Channel's proposed license fees were substantially less than the license fees Comcast Cable pays to distribute Golf Channel and Versus, which the record evidence establishes are similarly situated to Tennis Channel.³³⁶

113. Comcast Cable's practice of retaining Tennis Channel on the Sports Tier while distributing all its affiliated sports networks, including Golf Channel and Versus, on more widely distributed tiers is economically advantageous to Comcast. The Sports Tier is highly profitable, and retaining a popular network like Tennis Channel on that tier increases the value of the Sports Tier and bolsters its profitability. At the same time, carrying all of its affiliated networks on more broadly distributed tiers protects those networks from the financial disadvantages associated with restricted distribution. This dual system of distribution is strongly persuasive evidence of an affiliation-based discrimination.³³⁷

114. As Comcast Cable points out, repositioning Tennis Channel to a more widely distributed tier would require Comcast Cable to pay greater license fees than it would if it were to retain Tennis Channel primarily on the Sports Tier. An entity, however, cannot avoid complying with an anti-discrimination statute on grounds of the costs incurred to eliminate the discrimination.³³⁸ In any event, eliminating the discrimination does not necessarily require Comcast Cable to pay Tennis Channel additional license fees. Comcast Cable, for example,

³³³ See paragraph 65, *supra*.

³³⁴ See paragraphs 66-67, *supra*.

³³⁵ See paragraph 72-74, *supra*.

³³⁶ See paragraph 75-78, *supra*.

³³⁷ See paragraph 79-80, *supra*.

³³⁸ See generally *City of L.A. Dep't of Water v. Manhart*, 435 U.S. 702, 716-18 (1978); *EEOC v. Indiana Bell Tel Co.*, 256 F.3d 516, 523-24 (7th Cir. 2002).

could readily avoid higher payments by repositioning Golf Channel and Versus to the Sports Tier.

D. Unreasonable Restraints on Ability to Compete Fairly

115. In order to establish a violation of sections 616 and 76.1301(c), a video programming vendor must show that the effect of the MVPD's discriminatory conduct is to "unreasonably restrain" its "ability to compete fairly."³³⁹ Tennis Channel adequately has satisfied its burden of proof as to this issue. Comcast Cable's decision to carry Tennis Channel on the Sports Tier while providing similarly situated affiliated networks Golf Channel and Versus with broader coverage, adversely affects Tennis Channel in a variety of ways.

116. First, as a result of Comcast Cable's discriminatory treatment, Tennis Channel has [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than Golf Channel and Versus, which in turn greatly diminishes the amount of its subscribers' fees.³⁴⁰ Second, Comcast Cable's discriminatory treatment of Tennis Channel in channel placement also impedes its ability to attract subscribers.³⁴¹ Third, diminished licensing revenues *vis-à-vis* Golf Channel and Versus makes it more difficult for Tennis Channel to acquire valuable programming rights and to make other investments in the network.³⁴² And fourth, with fewer subscribers, Tennis Channel has greater difficulty in attracting advertising and must charge lower prices per unit than it otherwise could for that advertising that it is able to attract.³⁴³

E. Remedy

117. *Forfeiture.* The *HDO* requires that the Presiding Judge, in light of the evidence adduced in the hearing, "determine whether a forfeiture should be imposed on Comcast [Cable]."³⁴⁴ Given that the record evidence establishes by a preponderance of evidence that Comcast Cable has violated section 616 of the Act and section 76.1301(c) of the Commission's rules,³⁴⁵ the imposition of a forfeiture is appropriate in this case. Both Tennis Channel as Complainant, and the Enforcement Division as advocate for the public interest, recommend that the Presiding Judge order Comcast Cable to pay a forfeiture in the amount of \$375,000.³⁴⁶

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

³⁴⁰ See paragraph 82, *supra*.

³⁴¹ See paragraphs 84-85, *supra*.

³⁴² See paragraphs 86-88, *supra*.

³⁴³ See paragraphs 89-91, *supra*.

³⁴⁴ *HDO*, 25 FCC Rcd at 14163 (¶ 24) (footnote omitted).

³⁴⁵ 47 U.S.C. § 536(a)(3); 76.1301(c).

³⁴⁶ Enforcement Bureau Comments at 17 (¶ 35); Tennis Channel Proposed Findings of Fact and Conclusions of Law at (¶¶ 317-327). After the Enforcement Bureau recommended that the Presiding Judge grant Tennis Channel's relief in this case, Comcast Cable made comments that could be construed as criticizing the competency of the Bureau's attorneys. Tr. at 2901, 2922-23, 2947, 2970) (oral

Comcast Cable denies that any remedy should be imposed, but acknowledges that “[t]he appropriate remedy if a violation had been found in this matter would be the imposition of a forfeiture.”³⁴⁷ Comcast Cable does not argue that the specific facts of this case show that an amount lesser than the maximum \$375,000 forfeiture would be appropriate or justified if it were found to have violated the Act and the Commission’s rules.

118. Section 503(b)(1)(B) of the Communications Act and section 1.80(a)(a)(2) of the Commission’s rules authorize the assessment of a forfeiture where, as in this case, a person has “willfully or repeatedly failed to comply” with a provision of the Communications Act or the Commission’s rules.³⁴⁸ Because Comcast Cable is a cable operator, it is subject to a maximum forfeiture of \$37,500 per day for a single, continuing violation up to a maximum fine of \$375,000.³⁴⁹ In determining the forfeiture amount, “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, [and] ability to pay must be taken into account as well as any “other matters as justice may require.”³⁵⁰ Based upon these factors, the maximum forfeiture of \$375,000 is warranted for the serious violations of law in this case. As shown above, the proven violations are a product of a corporate policy of Comcast’s favoring its affiliates *vis-à-vis* unaffiliated entities in the terms and conditions of carriage. The violations of law continued for a substantial period of time and continue to the present day. Comcast in the past has violated Commission rules³⁵¹ and certainly is able to pay a substantial fine in the above amount. Indeed, as the Enforcement Bureau pointed out, a forfeiture in a lesser amount “would be unlikely to deter a company as large as Comcast from future violations of [the] rules in its future cable carriage decisions.”³⁵² Accordingly, an assessment of a forfeiture in the amount of \$375,000 against Comcast Cable is in the public interest.

argument). Any such criticism is wholly without foundation. Enforcement Bureau counsel in this proceeding at all times acted in a competent and professional manner.

³⁴⁷ Comcast Proposed Findings of Fact and Conclusions of Law at 101 (¶ 199); Comcast Proposed Reply Findings of Fact and Conclusions of Law at 56 (¶ 317).

³⁴⁸ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(f)(2).

³⁴⁹ 47 C.F.R. § 1.80(b)(1).

³⁵⁰ 47 U.S.C. § 503(b)(2)(e); 47 C.F.R. § 1.80(b)(4).

³⁵¹ *In the Matter of Comcast Corp.*, Notice of Apparent Liability for Forfeiture and Order, 24 FCC Rcd 929 (EB 2009).

³⁵² Enforcement Bureau Comments at 17. The Commission’s forfeiture guidelines set forth base forfeiture amounts (subject to upward or downward adjustments) for a number of infractions but not for violations of program carriage rules. 47 C.F.R. § 1.80(b)(4) note § 1. The base forfeiture amounts for the cable leased access rules is \$7500. *Id.* Where the guidelines provide no base forfeiture amount for the specific infraction involved in a particular case, the Commission’s staff has based the forfeiture upon analogous violations for which there is a specified base forfeiture. *See In the Matter of Nexstar Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 18160, 18162-63 (MB 2005); *In the Matter of Fox Television Stations, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 9847, 9851 (EB 2005). The forfeiture guidelines, however, are not mandatory. *See* 47 C.F.R. § 1.80(b)(4) note (“The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.”). Given the long duration of the violation at issue in this case, the use of a

119. *Mandatory Equality in Treatment.* A forfeiture penalizes Comcast Cable for its violations, but it does not remediate the unlawful discrimination. Sections 616 and 76.1301(c) are provisions of law prohibiting discrimination in the terms and conditions video program distribution on the basis of affiliation. Clearly, an appropriate remedy for a violation of those provisions would be an order compelling elimination of the discriminatory treatment that gave rise to the violations. Therefore, in addition to forfeiture, Comcast Cable should afford Tennis Channel the same treatment in the terms and conditions of video program distribution that it provides to its similarly situated affiliates, Golf Channel and Versus. Subject to an exception regarding analog services that is noted below, this remedy requires Comcast Cable to carry Tennis Channel at the same level of distribution that it carries Golf Channel and Versus.³⁵³ Comcast Cable otherwise has full discretion in determining the level of penetration it chooses to carry the three channels. However, it cannot continue to discriminate against Tennis Channel in favor of Golf Channel and Versus in terms and conditions of their distribution.³⁵⁴

120. This requirement of non-discriminatory treatment also requires Comcast Cable to provide Tennis Channel with equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement. Undisputed record evidence establishes that Comcast gives more favorable channel placement to Golf Channel and Versus than it does to Tennis Channel.³⁵⁵ Comcast Cable's argument is unavailing that this remedy is inappropriate because Tennis Channel did not specifically request modified channel placement in its complaint.³⁵⁶ The *HDO* directs the Presiding Judge to determine whether to order Comcast Cable to carry Tennis Channel "and/or

base forfeiture of \$7500 per day (the base forfeiture for the violation of an analogous cable rule), even in the absence of any upward adjustments, provides for the maximum fine of \$375,000. The forfeiture guidelines thus support the imposition of a \$375,000 forfeiture in this case.

³⁵³ Given bandwidth limitations, Comcast Cable argues that adding Tennis Channel to the analog expanded basic level of service would require it to delete an existing network's position on that tier. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 46 (¶ 300). At oral argument, counsel for Tennis Channel stated that Tennis Channel was "not asking" that it be placed on an analog tier if such placement would require Comcast to displace existing networks on that tier. Tr. at 2978. The Enforcement Bureau similarly "recommends tailoring the remedy to exclude all analog systems where bandwidth limitations would require the deletion of existing programming in order to distribute Tennis Channel on the system." Enforcement Bureau Comments at 16 (¶ 33). The requirement that Comcast Cable give Tennis Channel the same treatment in video program distribution as it provides to Golf Channel and Versus set forth above excludes parity on analog systems where the addition of Tennis Channel would require displacement of existing networks.

³⁵⁴ The Enforcement Bureau asserts that "an appropriate remedy would be to direct Comcast [Cable] to carry Tennis Channel at an average penetration rate equal to [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]." Enforcement Bureau Comments at 16 (¶ 33). That proposed remedy, however, has a double flaw: it would not eradicate the disparate treatment of similarly situated entities and, by mandating a specific level of carriage, would unnecessarily intrude upon Comcast Cable's business decisions.

³⁵⁵ See paragraph 53, *supra*.

³⁵⁶ See Comcast Cable's Proposed Reply Findings of Fact and Conclusions of Law at 57 (¶ 318).

whether Comcast [Cable] should be required to implement such other carriage-related remedial measures as are deemed appropriate.”³⁵⁷ Equitable treatment in channel placement is a “carriage-related remedial measure” that the Presiding Judge expressly is authorized to consider under the *HDO*.³⁵⁸

121. The requirement of non-discriminatory treatment does not, as Comcast Cable contends, compel Comcast Cable to carry Tennis Channel at any particular level of distribution.³⁵⁹ As noted above, Comcast Cable may carry all three networks on broadly penetrated tiers, carry all three networks on the Sports Channel, or even decide not to carry the three networks at all. Thus, this mandate of non-discriminatory treatment only requires that Comcast Cable stop discriminating against Tennis Channel while favoring Golf Channel and Versus in terms and conditions of carriage. The remedy imposed in this order does not, as Comcast Cable erroneously contends, infringe upon Comcast Cable’s editorial discretion by “forcing broader carriage” of Tennis Channel.³⁶⁰

ULTIMATE CONCLUSIONS AND DECISION

122. Based on the foregoing findings of facts and conclusions of law, it is concluded that Tennis Channel has satisfied its burden of proving that Comcast Cable engaged in discrimination

³⁵⁷ *HDO*, 25 FCC Rcd at 14163 (¶ 24).

³⁵⁸ Comcast Cable argues that it would be inappropriate for the Presiding Judge to order it to carry Tennis Channel at the same penetration level that it carries Versus and Golf Channel until the Commission finally resolves its statute of limitations defense. Comcast Cable argues that newly discovered evidence supports its arguments on the statute of limitations issue. See Comcast Cable’s Proposed Reply Findings of Fact and Conclusions of Law at 58-59 (¶¶ 321-24). That argument is without merit. As Comcast Cable acknowledges, the *HDO* specifically directed the Presiding Judge *not* to resolve “whether Tennis Channel’s complaint was filed in accordance with the program carriage statute of limitations.” *HDO*, 25 FCC Rcd at 14150 n.4. Notwithstanding that instruction, the *HDO* expressly directs the Presiding Judge to determine, in light of the evidence adduced at the hearing, the carriage-related remedial measures, if any, that should be imposed in this case. *Id.* at 14163 (¶ 24(b)). The *HDO* thus specifically contemplates that the Presiding Judge in his order will address the remedies that are appropriate to this case even though the statute of limitations issue remains unresolved at this stage of the proceedings.

³⁵⁹ Tennis Channel asks the Presiding Judge to order Comcast Cable to “pay carriage fees for Tennis Channel at the per-subscriber rate set forth in the affiliation agreement.” Tennis Channel’s Proposed Findings of Fact and Conclusions of Law at 82 (¶ 315). The Enforcement Bureau suggests that Tennis Channel’s 2009 proposal to Comcast Cable might set an appropriate price schedule or alternatively that the Presiding Judge require additional briefing on the issue. Enforcement Bureau Comments at 16 (¶ 34). Comcast Cable argues that if it were found that Tennis Channel were entitled to broader distribution, it should not receive any additional fees for that broader distribution. Comcast Cable’s Proposed Findings of Fact and Conclusions of Law at 4, 105-06 (¶¶ 8, 207-09). The *HDO* directs the Presiding Judge to set “the price, terms, and conditions” of carriage only if Comcast Cable is ordered “to carry . . . Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers.” *HDO*, 25 FCC Rcd at 14163 (¶ 24(b)). Thus, it is not necessary for this order to contain any prescription of license fees in this case.

³⁶⁰ See Comcast Cable’s Proposed Findings of Fact and Conclusions of Law at 102 (¶ 202)

in the selection, terms or conditions of carriage on the basis of its non-affiliation with Tennis Channel.

123. Based on the foregoing findings of facts and conclusions of law, it is further concluded that Tennis Channel has satisfied its burden of proving that Comcast Cable unreasonably restrained Tennis Channel's ability to compete fairly.

124. In light of the ultimate conclusions reached in paragraphs 122 and 123, IT IS DECIDED AND ADJUDICATED that Comcast Cable has violated section 616(a) of the Communications Act and section 76.1301(c) of the Commission's rules.

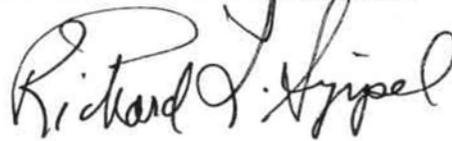
ORDERS

125. IT IS ORDERED that pursuant to section 503 of the Communications Act of 1934, as amended, Comcast Cable IS ORDERED TO PAY THE GOVERNMENT A MONETARY FORFEITURE in the amount \$375,000.³⁶¹

126. IT IS FURTHER ORDERED that Comcast Cable is prohibited from discriminating against Tennis Channel *vis-à-vis* its similarly situated affiliates, Golf Channel and Versus, in terms and conditions of video program distribution.

127. IT IS FINALLY ORDERED that Comcast Cable must proceed as soon as practicable with remediation as discussed in paragraphs 125 and 126 above.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Chief Administrative Law Judge

³⁶¹ This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case of its own motion. 47 C.FR. §1.276(b)

REDACTED VERSION

JOINT GLOSSARY OF TERMS

À La Carte	Offering a network on an individual per-channel basis rather than as part of a package or tier of programming (defined below).
Ad Avails (or Advertising Availabilities)	Advertising units during the programming of a network (usually 2-3 minutes per hour) that are made available for the distributor to sell under a standard term of an affiliation agreement. The network reserves the remaining advertising time for sale itself.
Affiliated	A network is "affiliated" with an MVPD for the purposes of the program carriage rules if the MVPD holds an ownership interest in the network that is attributable under Section 76.1300(a)-(b) of the Commission's rules. As a general rule, a programmer is "'affiliated' with respect to a multichannel distributor if the distributor holds five percent or more of the stock of the programmer, whether voting or non-voting." <i>In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order, MM Docket No. 92-265, 9 FCC Rcd 2642 ¶ 19 (rel. 1993).</i>
Affiliation Agreement	In this context, a contract pursuant to which content is licensed by a programming service (such as Tennis Channel) to an MVPD (such as Comcast) for distribution to the MVPD's retail subscribers.
Analog	Cable systems distribute analog video signals in the form of modulated radio frequency transmitted through a closed transmission path such as coaxial cable or fiber. Interference or signal ingress during cable transmission, and the accumulation of "noise" as signals are amplified over the course of transmission, can result in reduced picture quality. Until recent years, all television signals for decades were analog, which requires substantially more bandwidth than digital signals for distribution of the same content. Many cable systems still distribute analog channels. <i>Compare Digital (defined below).</i>
Anchor Programming	A term used by Tennis Channel in this proceeding to refer to coverage of sporting events on a live basis or within two weeks after the event occurred.
B1	<i>See Tier.</i>

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B2	<i>See Tier.</i>
Bandwidth	<p>The capacity available for delivery of content (voice, video, and data) through a cable system.</p> <p>A standard-definition digital channel generally occupies about one-tenth the bandwidth of a linear analog channel, and a high-definition digital channel generally occupies about one-third the bandwidth of a linear analog channel.</p>
Carriage Agreement	<i>See Affiliation Agreement.</i>
CCR	<p>Channel Change Request. A form submitted by Comcast system employees to Comcast regional, divisional, and corporate management for approval to change its channel lineup. Changes include launching a network on a system for the first time, dropping a network, moving a network to a new channel number, and/or moving a network to a new tier (melting or negative repositioning).</p>
Channel Capacity	<p>The maximum number of programming services that can be simultaneously carried within the bandwidth of a cable system devoted to video distribution.</p>
Comcast	<p>Defendant Comcast Cable Communications, LLC (itself or one of its affiliates).</p>
Comcast Cable Communications, LLC	<p>Subsidiary of Comcast Corp. that distributes multichannel video programming. Comcast Cable Communications, LLC is the Defendant in this case.</p>
Comcast Corp.	<p>Parent company to Comcast Cable Communications, LLC and Comcast Programming Group.</p>
Comcast Programming Group	<p>Until 2011, the group within Comcast Corp. that operated certain of Comcast's affiliated cable networks, including Versus and Golf Channel.</p>
Comcast SportsNet	<p>The brand name for a group of regional sports networks that are affiliated with Comcast.</p> <p>The Comcast SportsNet services offer multi-sport programming.</p> <p><i>See RSN.</i></p>

REDACTED VERSION

Core Audience	The demographic group (e.g., age and gender group) that predominates in a network's audience, or is the predominant target of its programming.
Coverage Area Rating	The number of households or persons viewing a network, as a percentage of all households or persons that receive the network. <i>Compare Total Market Rating.</i>
Crawl	Line of scrolling text moving ("crawling") across the screen.
D0	<i>See Tier.</i>
D1	<i>See Tier.</i>
DS	<i>See Tier.</i>
DBS	Abbreviation for "Direct Broadcast Satellite." An MVPD (defined below) that transmits video programming from satellites directly to dishes at the viewer's location. DIRECTV and Dish Network (also known as EchoStar) are DBS operators.
Digital	Video signals transmitted through encoding into streams of binary electronic "bits." Compared to analog distribution, digital signals are less susceptible to interference during transmission, resulting in higher signal quality and resolution. Digital signals require less bandwidth than would be required for analog signals distributing the same channel. <i>Compare Analog.</i>
Digital Classic	<i>See Tier.</i>
Digital Starter	<i>See Tier.</i>
Distribution Incentives	Consideration offered by a network that is designed to make it less expensive for an MVPD (defined below) to distribute or expand distribution of the network. Examples include cash, marketing assistance, discounted licensing fees, equity, or free periods of carriage. When distribution incentives are provided to encourage an MVPD to launch a programming service for the first time on a system, they also are referred to as "launch support" or "launch incentives" (defined below).
DMA	Abbreviation for "Designated Market Area." A geographical designation of a media market, created by Nielsen Media Research.

REDACTED VERSION

Dual Illumination	The carriage of a network on more than one tier at once.
Freeview	Short for "free preview." A period during which a network authorizes an MVPD to distribute its programming to incremental subscribers without charge to the incremental subscribers or to the distributor for these subscribers.
Golf Channel	A network focusing on golf and golf-related programming that, prior to the merger of Comcast and NBC-Universal, was wholly-owned by Comcast.
Grand Slams	The four most prestigious annual tennis tournaments: the Australian Open, the French Open, Wimbledon, and the U.S. Open.
HD	Abbreviation for "High Definition." Digital transmission of video programming with substantially improved video and audio quality using any of the following formats: 1080p, 1080i, 720p.
Headends	Local facilities used to collect and transmit multichannel video programming from a distributor to the customer.
HH	Household.
Launch Support	Also known as "Launch Incentives." Payments or other consideration offered by a network that is designed to pay an MVPD (defined below) to launch the network's programming service or to distribute it more broadly. Examples include cash, marketing assistance, discounted licensing fees, equity, or free periods of carriage.
License Fee	<p>The fee that an entity pays for the right to distribute programming.</p> <p>In the context of a relationship between a network and an MVPD, the license fee, also called a carriage fee, is paid by the MVPD to the network in exchange for the right to carry the network. The license fee is typically specified in the affiliation agreement and expressed as an amount of money per subscriber per month.</p> <p>In the context of a relationship between a network and the owner of programming rights, see "Rights Fees."</p>

REDACTED VERSION

Licensing Rights	In the context of a relationship between a network and the owner of programming rights, the network's rights to telecast programming.
Linear Network	Linear networks, such as Tennis Channel, Golf Channel, and Versus, are channels that offer programming on a continuous and fixed schedule established by the network. <i>Compare VOD (defined below).</i>
Major Championships	Also called the "Majors." The four most prestigious annual men's golf tournaments: the Masters Tournament, the U.S. Open Championship, the British Open Championship, and the PGA Championship.
Major League Sports Networks	The primary national leagues that offer team sports in the United States are the National Football League, the National Basketball Association, Major League Baseball, and the National Hockey League. Each league has a network that offers live games and other programming related to that league's sport: respectively, the NFL Network, NBA TV, the MLB Network, and the NHL Network.
Melt	To move a channel from a less distributed to a more distributed tier of service (e.g., from the Sports Tier to D1).
Metered Market	Nielsen-defined television market in which Nielsen measures audiences by way of electronic meters attached to television sets. There are 56 metered markets in the United States, reaching about 70% of all television homes in the country.
MFN	Abbreviation for "Most Favored Nations." A provision in affiliation agreements granting a distributor the right to be offered any more favorable rates, terms, or conditions subsequently offered or granted by a network to another distributor.
MSO	Abbreviation for "Multiple System Operator," which refers to a cable company that owns or operates multiple cable systems, often in different geographic locations. Comcast Cable Communications, LLC; Time Warner Cable; Cox; Cablevision; and Charter are the five largest MSOs in the United States.

REDACTED VERSION

MVPD	Abbreviation for "Multichannel Video Programming Distributor." An entity engaged in the business of making available for purchase by subscribers or customers, multiple channels of video programming. MVPDs include traditional cable operators, such as Comcast and Time Warner Cable, telephone companies, such as Verizon FiOS and AT&T U-Verse, and DBS operators, such as DirecTV and DISH Network.
Nielsen Local Market Rating	Total Market Rating published by Nielsen for a specific local market, as defined by Nielsen. <i>Compare Nielsen National Rating.</i>
Nielsen National Rating	Total Market Rating or Coverage Area Rating published by Nielsen for the Nielsen national market. <i>Compare Nielsen Local Market Rating.</i>
OLN	Outdoor Life Network (Versus's name before 2007).
Penetration	A network's "penetration" is a percentage reflecting the proportion of a particular MVPD's subscribers that receive a particular network.
Prime Time	In general, the three evening hours (four on Sunday) programmed by broadcast and cable networks from 8 p.m. until 11 p.m. Eastern and Pacific Time and from 7 p.m. until 10 p.m. Central and Mountain Time, Monday through Saturday, starting an hour earlier on Sunday.
PSPM	Abbreviation for "per subscriber per month." <i>See License Fee.</i>
Rate Card	The standard set of license fee rates offered by a programmer to MVPDs.
Rights Fees	A network's payments to entities that own content for the rights to telecast specific programming owned by those entities.
RSN	Abbreviation for "Regional Sports Network." A network that telecasts sports-related programming targeted to fans in a particular geographic region.
SD	Abbreviation for "Standard Definition," which refers to transmission of video programming at traditional resolutions (e.g., 480i).
Shoulder Programming	Non-anchor programming shown on a network. <i>See also Anchor Programming.</i>

REDACTED VERSION

Sports Entertainment Package ("SEP")	See Tier.
Sports Tier	See Tier.
Subscriber	A customer of an MVPD. Sometimes referred to as a "sub."
Telco	Abbreviation for "Telephone Company." Refers to telephone companies, such as Verizon and AT&T, that provide multichannel video programming and are MVPDs.
Tennis Channel	A network focusing on tennis and other racquet-sport-related programming. Tennis Channel is unaffiliated with Comcast and is the Complainant in this case.
Tent Pole Content	A network's marquee programming—in sports, for example, a key match or game coverage. An event that supports (<i>i.e.</i> , draws audiences to) content both before and after it.
Tier	<p>A bundle of cable programming services or networks sold to subscribers at a package price, or the level of service on which a channel is carried. Each tier typically carries an incremental cost to the subscriber.</p> <p>Tiers on Comcast cable systems include:</p> <ul style="list-style-type: none"> ▪ Broadcast Basic or B1: Broadcast Basic (or Limited Basic) generally refers to the most highly penetrated level of analog service on Comcast systems. It is received by [REDACTED] Comcast's video customers. This package contains the broadcast networks and certain other governmentally mandated content. ▪ Expanded Basic or B2: Expanded Basic refers to the most highly penetrated level of analog service on non-digitized Comcast systems after government-mandated broadcast basic. ▪ Digital Starter, D0, or Digitized Expanded Basic: Digital Starter is the most broadly distributed digital tier, and the most highly penetrated level of service on digitized Comcast systems after government-mandated broadcast basic. In 2009, Digital Starter had approximately [REDACTED] subscribers. Taken together, Expanded Basic and Digital Starter are received by about [REDACTED] of Comcast's subscribers. ▪ Digital Preferred or D1: Digital Preferred is the second most broadly distributed digital tier and is distributed to

REDACTED VERSION

	<p>██████████ of Comcast's total subscribers. In 2009, Digital Preferred had approximately ██████████ million subscribers.</p> <ul style="list-style-type: none"> ▪ Sports Entertainment Package (SEP) or Sports Tier: A package of sports-related channels which Comcast makes available to almost all of its subscribers for an additional monthly fee of approximately \$5-8. In 2009, approximately ██████████ subscribers ██████████ received the Sports Tier.
Total Market Rating	<p>The number of persons or households viewing a network, as a percentage of all television households in a market, whether or not those households receive the network.</p> <p><i>Compare Coverage Area Rating.</i></p>
TTC	Tennis Channel.
Versus	A network providing multi-sport programming that, prior to the merger of Comcast and NBC-Universal, was wholly-owned by Comcast. Formerly known as the Outdoor Life Network (OLN).
Vertically Integrated MVPD	A company that is affiliated with both an MVPD and a network. Comcast Corp. is vertically integrated.
VOD	<p>Abbreviation for "Video-on-Demand," which refers to programming offered on a per-program basis, either with or without a separate per-program fee (in this latter case – "Free VOD" or "Free On Demand"). Video-on-Demand programming typically can be viewed at any time selected by the viewer, often with pause, fast-forward and rewind functionality.</p> <p><i>Compare Linear.</i></p>
Weighted Average	An average in which each unit in the series being averaged is multiplied by a weight relative to its importance, the result summed and the total divided by the sum of the weights.