REDACTED VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Tennis Channel, Inc.,	)	
Complainant	)	
	)	MB Docket No. 10-204
v.	)	File No. CSR-8258-P
	)	
Comcast Cable Communications, LLC,	)	
Defendant	)	

To: The Commission

OPPOSITION TO TENNIS CHANNEL'S PETITION
TO COMPEL COMCAST'S COMPLIANCE WITH INITIAL DECISION

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SUMMARY

Comcast opposes Tennis Channel's Petition, which asks the Commission to compel immediate "compliance" with the Initial Decision issued by the Chief Administrative Law Judge. Tennis Channel's request is contrary to the express terms of the Initial Decision and the prescribed Commission procedures for lodging exceptions thereto. Even worse, granting the Petition would violate the Administrative Procedure Act and the Constitution.

The relevant language of the Initial Decision is unambiguous. By its terms, the Initial Decision "shall become effective . . . 50 days after release *if exceptions are not filed* within 30 days thereafter. . . ." Comcast *has* filed timely exceptions, demonstrating the Initial Decision's pervasive legal and factual errors. Accordingly, the Initial Decision is currently inoperative and will so remain until the Commission addresses Comcast's Exceptions in a judicially reviewable order.

By providing that the Initial Decision shall remain inoperative pending Commission review of it, the ALJ has done no more than what the APA and due process require.

The APA forbids an agency from making an ALJ's initial decision immediately effective where the agency has chosen to require that a party exhaust agency review of that decision before seeking judicial review. This requirement avoids the fundamental unfairness of a party being precluded indefinitely from seeking redress in the courts while being subject to an already-operative administrative action. The ALJ is obligated to comply with the APA and did so here – also consistent with the Commission's general hearing rule – by providing that the Initial Decision is stayed while the Commission is considering exceptions to the decision.

The Due Process Clause of the Constitution does not allow a decision to become effective where the agency has not fully considered a decisive threshold issue in the case. Here, the Media Bureau forbade the ALJ from considering whether the applicable statute of limitations bars Tennis Channel's complaint. As a result, evidence discovered during the hearing showing that Tennis Channel long delayed filing its complaint has yet to be considered. The due process violation of granting Tennis Channel's request and forcing Comcast to comply with an order before proof is heard of a threshold and complete defense would be particularly egregious given the "unprecedented" nature of the Initial Decision (Tennis Channel's own characterization), which misapplies Section 616, fundamentally alters a binding contract, and tramples on Comcast's First Amendment rights.

In the event that the Commission is considering granting Tennis Channel's Petition, then it should contemporaneously consider Comcast's Conditional Petition for Stay, also filed today. If the Commission grants Tennis Channel's Petition, then it should immediately grant Comcast's Conditional Petition for Stay.

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OPPOSITION TO TENNIS CHANNEL'S PETITION
TO COMPEL COMCAST'S COMPLIANCE WITH INITIAL DECISION

Comcast Cable Communications, LLC ("Comcast") respectfully opposes the Petition To Compel Comcast's Compliance with Initial Decision ("Petition") filed by The Tennis Channel, Inc. ("Tennis Channel").[1] Tennis Channel's request is contrary to the express terms of the Initial Decision issued by the Chief Administrative Law Judge ("ALJ")[2] and the prescribed Commission procedures for challenging an initial decision. Even worse, granting the Petition would violate the Administrative Procedure Act and the Constitution.

PRELIMINARY STATEMENT

In this program carriage complaint proceeding, Tennis Channel seeks to compel Comcast to carry Tennis Channel on terms different (and far more advantageous to Tennis Channel) than the parties agreed by contract or even than Tennis Channel proposed in 2009. Specifically, Tennis Channel claims that Comcast has unlawfully discriminated against it in the manner that

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[1] *The Tennis Channel, Inc. v. Comcast Cable Commcn's, LLC*, Petition To Compel Comcast's Compliance With Initial Decision, MB Docket No. 10-204, File No. CSR 8258-P (filed Jan. 13, 2012) ("Petition").

[2] *The Tennis Channel, Inc. v. Comcast Cable Commcn's, LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR 8258-P (rel. Dec. 20, 2011) ("*Initial Decision*").

Comcast carries Tennis Channel as opposed to Comcast-affiliated Golf Channel and Versus (recently renamed NBC Sports Network), in violation of Section 616 of the Communications Act of 1934, as amended ("Communications Act").[3] The Media Bureau rejected Comcast's statute-of-limitations defense, barred the ALJ from ruling on this defense (and noted that Commission review of the Bureau's ruling would be deferred), and referred the complaint to the ALJ.[4] The ALJ rendered an Initial Decision granting Tennis Channel's complaint. The ALJ ruled that the decision would not be effective pending Commission review. The final footnote (footnote 361) of the Initial Decision provides:

> 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.[5]

Tennis Channel now asks that the Commission set aside the ALJ's effective date determination.

The Initial Decision suffers from pervasive legal and factual errors, and Comcast has filed timely exceptions,[6] in accordance with governing Commission rules.[7] Tennis Channel objects to footnote 361 of the Initial Decision, which provides that the decision will become effective 50 days after its release, *if exceptions are not filed within 30 days*. In effect, by filing

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[3] 47 U.S.C. § 536.

[4] *The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Hearing Designation Order, 25 FCC Rcd 14149 (MB 2010) ("*HDO*"); *see Initial Decision* ¶ 12 n.57 (noting that the statute-of-limitations defense was not an issue designated for resolution by the ALJ and that the Commission's review of this issue would be deferred to the present juncture pursuant to the Commission's rules). Accordingly, Comcast filed an Application for Review on January 19, 2012.

[5] *Initial Decision* ¶ 125 n.361 (emphasis added).

[6] *The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Exceptions to Initial Decision, MB Docket No. 10-204, File No. CSR 8258-P (filed Jan. 19, 2012) ("Exceptions").

[7] 47 C.F.R. § 1.276(a); *id.* § 1.277(a)-(b).

its disagreement with the Initial Decision in the form of a petition rather than as an exception, Tennis Channel requests that the Commission expedite review of its objections to this footnote and prioritize Tennis Channel's exception to the Initial Decision over Comcast's Exceptions. Granting Tennis Channel's request for priority consideration would be contrary to law, and it would be manifestly unfair to Comcast, which is the party most aggrieved by the decision. Allowing the Initial Decision go into effect prematurely would impose massive costs and disruption on Comcast and its subscribers.

By providing that the Initial Decision shall remain inoperative pending Commission review of it, footnote 361 does no more than what the APA and due process require. The APA forbids an agency from both making an ALJ's initial decision immediately effective and, absent an express statutory exhaustion requirement (there is none here), requiring that a party exhaust Commission review of that decision before the party can seek judicial intervention. Moreover, the Due Process Clause of the Constitution does not allow a decision to become effective where the agency has not fully considered a decisive threshold issue in the case – here, whether the applicable statute of limitations bars Tennis Channel's complaint. This due process violation would be particularly egregious given the "unprecedented" nature of the Initial Decision, which misapplies Section 616 and fundamentally alters a binding contract and, in doing so, tramples on Comcast's First Amendment rights.[8]

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[8] Comcast agrees with Tennis Channel that the Initial Decision is "unprecedented." *See* Press Release, Tennis Channel, *Tennis Channel Wins Landmark Decision in Comcast Carriage Complaint* (Dec. 20, 2011), *available at* http://www.tennischannel.com/aboutus/pressrelease/pressreleasedetail.aspx?id=239. Never before has a Commission official commandeered an MVPD's editorial discretion in the program carriage context with the effect of depriving an MVPD of the benefit of the bargain it struck in a privately and freely negotiated carriage contract.

ARGUMENT

I. Tennis Channel's Petition Is Procedurally Improper

Given the serious and substantive issues raised in Comcast's Exceptions, there can be no claim that Tennis Channel is somehow uniquely deserving of expedited and irregular consideration of *its* disagreement with the Initial Decision. Tennis Channel takes issue with a single footnote regarding the effective date, whereas Comcast has numerous, substantial legal and factual challenges to the Initial Decision.[9] The Commission should consider both Comcast's and Tennis Channel's exceptions (and replies thereto) together.[10]

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[9] For example, the Initial Decision ignored whether requiring Comcast to carry Tennis Channel at the same level as Golf Channel and Versus could withstand First Amendment scrutiny. Instead, the Initial Decision reasoned that the First Amendment is not implicated because the order gives Comcast the choice of increasing distribution of Tennis Channel, or decreasing the distribution of its own networks, Golf Channel and Versus. *Initial Decision* ¶¶ 102-04. That reasoning, however, is clearly wrong – forcing a defendant to choose between compelled speech (more tennis programming) or restricted speech (less golf, hockey, and other sports programming) does not avoid First Amendment issues; it compounds them. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974); *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 271-72 (D.C. Cir. 2000) (directing the FCC to repeal the personal attack and political editorial rules); *Healy v. James*, 408 U.S. 169, 183 (1972); *see also New York v. United States*, 505 U.S. 144, 176 (1992) (because Congress could not directly impose either of two challenged requirements on States, "it follows that Congress lacks the power to offer the States a choice between the two"); *see generally* Exceptions at 31-35.

Further, in finding that Comcast's carriage decision was the product of unlawful affiliation-based discrimination, the Initial Decision simply ignored the fact that ***every*** major MVPD carries Golf Channel and Versus to more subscribers than Tennis Channel. *See* Exceptions at 3. By ordering Comcast to provide Tennis Channel carriage-parity with Golf Channel and Versus, the Initial Decision would in effect require Comcast to carry Tennis Channel at a level that is completely out of step with the commercial marketplace. *See id.*

Plus, as discussed in Comcast's Exceptions, the Initial Decision applied a different discrimination standard than the Commission used in *MASN v. Time Warner Cable*. *See id.* at 13-16. And the Initial Decision misinterpreted and misapplied the competitive restraint prong of Section 616. *See id.* at 7-11.

[10] Tennis Channel should not be allowed to jump the line simply because it filed an

The fairness in that approach would obviously be lost if the Commission were to undertake a piecemeal review, as Tennis Channel urges. Striking footnote 361 would prejudice Comcast and its customers by mandating that a draconian carriage and channel repositioning remedy take effect now, before the Commission even determines whether there was any violation to be remedied (and would result in substantial cost and customer disruption should the Initial Decision later be reversed).[11] In contrast, any prejudice to Tennis Channel in awaiting a final Commission ruling is minimal, as it will continue to enjoy the carriage it has contracted to receive on Comcast systems (available to virtually all Comcast subscribers on the sports tier). As more fully explained in Comcast's contemporaneous Conditional Petition for Stay, the harms of allowing for immediate effectiveness of the Initial Decision vastly outweigh any harms to Tennis Channel of maintaining the status quo carriage on Comcast systems during this period.[12]

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exceptions brief in the style of a petition rather than the proper format. Despite the procedural irregularity of the Petition, Comcast does not ask that it be rejected as improperly filed but instead that it be considered together with Comcast's Exceptions and Application for Review, and Comcast's Conditional Petition for Stay, also filed today.

[11] Comcast is nonetheless engaging in good-faith planning for compliance with and implementation of the Initial Decision, should it become effective. Notwithstanding the non-effectiveness of the Initial Decision, Comcast earlier this month conferred with Tennis Channel about compliance and implementation issues, as Tennis Channel acknowledges, *see* Petition at 2-3, and Comcast fully intends to continue its planning and its discussions with Tennis Channel in the absence of any Commission action. In this way, Comcast will be prepared to implement the remedies as soon as practicable if and when the Initial Decision becomes effective. Comcast's initial planning has confirmed the myriad practical difficulties the Initial Decision's orders entail. For example, in light of the Initial Decision's requirement that Comcast provide Tennis Channel "equitable treatment" in terms of channel position vis-à-vis Golf Channel and Versus, *see Initial Decision* ¶ 120, Comcast has undertaken to evaluate the channel positions of Golf Channel and Versus and any vacancies that may be nearby across more than {[redacted]} different channel configurations. Finding Tennis Channel new channel positions presents numerous logistical and practical challenges. *See The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Comcast's Conditional Petition for Stay, MB Docket No. 10-204, File No. CSR 8258-P, at 22-26. (filed Jan. 25, 2012) ("Conditional Petition for Stay").

[12] To fully preserve its rights, Comcast is contemporaneously submitting a Conditional

Finally, the Petition's none-too-subtle suggestion that the Commission should take the opportunity to flex its "regulatory muscle" and teach "respect for this regulatory regime" with reference to (and mischaracterizations of) other proceedings[13] has no place in the consideration of the merits of the issues raised herein.

II. The Plain Meaning of Footnote 361 Is Clear, And Its Effect Is Consistent with the ALJ's Authority

Tennis Channel contends that footnote 361 "cannot sensibly be read" to mean anything other than "simply noting when the hearing proceeding will be terminated and referring the parties to the Commission's general rules regarding appeals and exceptions."[14] But the language and effect of the footnote are crystal clear, especially when the intertwined strands of the sentence are separated out: The Initial Decision is effective 50 days after the Initial Decision's release, and the proceeding is terminated, unless exceptions are filed within 30 days of the Initial Decision's release, in which case the Initial Decision is not yet effective, and the proceeding continues to a final Commission decision. In the context of the Part 1 hearing rules to which footnote 361 itself refers,[15] this type of language has a longstanding and well-accepted meaning

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Petition for Stay, which explains at greater length why the balance of stay factors weighs in favor of a stay pending further review and disputes the litany of harms Tennis Channel is allegedly suffering. *See* Petition at 7-8 & n.32; Conditional Petition for Stay at 22-28. Should the Commission undertake to consider Tennis Channel's Petition outside of the consideration of Comcast's Exceptions and Application for Review, Comcast respectfully requests, in the interest of fairness to Comcast and administrative efficiency, that the Commission also contemporaneously consider Comcast's Conditional Petition for Stay; in the event that the Commission grants Tennis Channel's Petition, then it should immediately grant Comcast's Conditional Petition for Stay.

[13] Petition at 10-11

[14] Petition at 6.

[15] *See Initial Decision* ¶ 125 n.361 (citing 47 C.F.R. § 1.276(b)).

that the decision is not operative until final Commission action.[16]

Seen in this light, Tennis Channel's claim that the Initial Decision would be self-contradictory if footnote 361 is given its plain meaning does not withstand scrutiny. Although it is certainly true that an ordering clause of the Initial Decision requires remediation of the alleged violations to occur "as soon as practicable,"[17] there is nothing odd or unusual in saying that an order will become effective upon Commission review and that it must be implemented as soon as practicable thereafter. Courts routinely, out of prudence and fairness, will stay the effectiveness of a decision until the time for filing a request for further review has expired or further review has been completed.[18] Such delay in effectiveness is especially warranted where the decision at

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[16] *See, e.g., In re Applications of Casey Broad. Co.; Camden Broad. Co.; Radio Charlton, Inc.; Lloyd Brinks; For a Construction Permit for a New FM Station*, Memorandum Opinion & Order, 88 FCC 2d 1114, 1115 (Rev. Bd. 1981) ("[T]he mere filing of exceptions does stay the effectiveness of [an] Initial Decision."); *see also In re Applications of The O.T.H.R., Inc.; Alden Commc'ns of Texas, Inc.; Bluebonnet Broad. Co.; For a Construction Permit for a New Commercial Television Station*, Memorandum Opinion & Order, 96 FCC 2d 551, 553 & n.4 (Rev. Bd. 1984) ("While [the] Initial Decision remains the 'law of the case' unless and until overturned by higher authority, it cannot confer any substantive rights until the stay [triggered by the filing of exceptions] is lifted.").

[17] Tennis Channel's suggestion that that footnote 361 "may have been intended . . . to relate only to the forfeiture," because it is appended to the paragraph ordering forfeiture, is a non sequitur. Petition at 6 n.28. The subject of the footnote – "[t]his *Initial Decision*" – is indisputably the complete Initial Decision, not just the forfeiture remedy. Moreover, footnote 361 is appended to the first paragraph of the "Orders" section of the Initial Decision – a perfectly sensible placement given that the footnote applies to all three ordering paragraphs. *Initial Decision* ¶ 125. And the "as soon as practicable" requirement that Tennis Channel claims overrides the footnote applies equally to the forfeiture remedy and the carriage and channel placement remedies. *See id.* ¶ 127 (referring back to paragraphs 125 and 126).

[18] *See, e.g.*, Fed. R. Civ. P. 62(c) (court may grant a stay of a judgment pending appeal); Fed. R. App. P. 41(d) (timely filing of motion for rehearing en banc stays issuance of mandate, unless the court orders otherwise); D.C. Cir. Rule 41 ("While retaining discretion to direct immediate issuance of its mandate in an appropriate case, the court ordinarily will include as part of its disposition an instruction that the clerk withhold issuance of the mandate until the expiration of the time for filing a petition for rehearing or a petition for rehearing en banc and, if such petition is timely filed, until 7 days after disposition thereof.").

issue is "unprecedented," in Tennis Channel's words, and where "[t]he "factual and legal issues . . . are numerous and involved," in the words of the Office of General Counsel.[19]

Tennis Channel's contention that footnote 361 is inconsistent with the Media Bureau's *HDO* and the Part 76 Commission rules is beside the point. As discussed below, because the Communications Act does not mandate administrative review of initial decisions, the rules in question, sections 76.10(c) and 76.1032(g),[20] do not comport with the requirements of the APA insofar as they allow for the premature effectiveness of a remedy in program carriage cases. Therefore, the ALJ was right to point to and rely on the Commission's general hearing rule, at section 1.276, which *does* comport with the APA by providing that an initial decision is stayed while the Commission is considering exceptions to the decision.[21]

In any event, Tennis Channel's argument that the ALJ is bound by the *HDO* or sections 76.10(c) and 76.1302(g) is without merit.[22] The ALJ's authority as the presiding officer derives from section 7 of the APA and section 409 of the Communications Act; it does not derive from delegations of authority through a Commission order made pursuant to section 5(c) of the

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[19] *The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Order, FCC 12I-01 ¶ 2 (OGC rel. Jan. 13, 2012).

[20] 47 C.F.R. §§ 76.10(c); 76.1302(g). When the Commission first adopted and later consolidated these rules, it did not consider whether they conflicted with the APA. *See In re 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 & Order, 9 FCC Rcd 2642 ¶ 34 (1993) ("*1993 Program Carriage Order*"); *In re 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, Report & Order, 14 FCC Rcd 418 ¶ 16 (1999).

[21] *See Initial Decision* ¶ 125 n.361 (citing 47 C.F.R. § 1.276(b)); 47 C.F.R. § 1.276(a) (providing for the stay of the effectiveness of an initial decision once exceptions are filed); *id.* § 1.276(d) (same).

[22] *See* Petition at 4-6.

Communications Act.[23] For this reason, the Presiding Judge is required to "[t]ake actions and make decisions in conformity with the Administrative Procedure Act"[24] – as he has done in footnote 361. By establishing a "timetable for compliance" that is contingent on Commission review of any exceptions that are filed, footnote 361 reconciles section 76.1302(g) with the requirements of the APA.[25]

III. Tennis Channel's Exception Is Contrary to Law

A. Footnote 361 Implements the APA's Requirement That the Initial Decision Remain Inoperative Pending Agency Review

Although the Petition does not mention the APA, the relief that Tennis Channel requests is squarely prohibited by it.[26] The APA provides that, absent an express statutory exhaustion

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[23] *See* 47 C.F.R. § 0.201(a)(2) Note.

[24] 47 C.F.R. § 1.243(j).

[25] The case law cited in the Petition is inapposite, *see* Petition at 6-7 & n.30, because there is no indication that the Media Bureau in the *HDO* "already considered," let alone "thoroughly considered," the APA issue or the other issues raised by the immediate effectiveness of a mandatory carriage order. *Compare id.* (citing and quoting, *inter alia*, *In re Applications of Tequesta Television Inc.*, 2 FCC Rcd 41 ¶ 10 (1987) and *In re Applications of Atlantic Broad. Co.*, 5 FCC 2d 717 ¶ 9 (1966), and claiming that the *HDO* "on its face evidences" the Bureau's thorough consideration of this issue) *with HDO* ¶ 24 n.120 (simply reciting the provisions of section 76.1302(g)). In any event, even if the Bureau had thoroughly considered these issues, the ALJ is free – and, indeed, required – to apply his independent judgment in complying with the APA. *See* 47 C.F.R. § 1.243(j).

[26] Tennis Channel erroneously argues that Comcast's "sole stated basis" for the position that the Initial Decision is not yet effective is footnote 361. Petition at 6. As shown above, that is, in fact, the plain meaning and effect of footnote 361. But, as Tennis Channel is also undoubtedly aware, Comcast has explained at length in comments filed in the pending program carriage rulemaking proceeding why no ALJ initial decision mandating carriage may lawfully go into effect immediately under the APA. *See In re Revision of the Commission's Program Carriage Rules*, MB Docket No. 11-131, Comments of Comcast Corporation, at 46-51 (Nov. 28, 2011). Indeed, Tennis Channel repeatedly cites those same comments in its Petition for other purposes. *See* Petition at 9-10 & nn.34, 37. Yet, despite being fully acquainted with these arguments, Tennis Channel chose to ignore them in the Petition.

requirement, an agency may condition judicial review of an agency action on exhaustion of agency appeals only if "the action meanwhile is inoperative."[27] This requirement avoids the "fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective."[28] As the Supreme Court has explained:

> Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be "inoperative" pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.[29]

The Commission's rules and orders compel parties to seek Commission review of a program carriage initial decision prior to judicial review,[30] mandating that "[a] ruling on the merits by the ALJ ***must*** be appealed directly to the Commission."[31] Further, the rules expressly condition Comcast's ability to apply for review of the Media Bureau's *HDO* on the filing of exceptions to the Initial Decision to the Commission.[32] Thus, Comcast had to appeal within the

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[27] 5 U.S.C. § 704; *see also* Attorney General's Manual on the Administrative Procedure Act (1947) ("[A]n agency . . . may by rule require a party to appeal to it from an initial decision of a hearing officer only if [the matter] determined upon by the hearing officer is held in abeyance pending the agency's action on the appeal.").

[28] S. Rep. No. 79-752, at 27 (1945).

[29] *Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

[30] Nothing in the Communications Act expressly mandates exhaustion of agency review procedures prior to seeking judicial review of an initial decision. While the Communications Act requires exhaustion of agency remedies as a condition of judicial review of actions taken pursuant to delegated authority, 47 U.S.C. § 155(c)(7), initial decisions are expressly excluded from that requirement, *id.* § 155(c)(2).

[31] *1993 Program Carriage Order* ¶ 34 (emphasis added).

[32] 47 C.F.R. § 1.115(e)(3). The Communications Act requires such an application for

agency to challenge the *HDO*'s erroneous ruling on the threshold limitations issue. Granting Tennis Channel's Petition would deprive Comcast of both an inoperative Initial Decision and entitlement to immediate judicial review, and thus would violate the APA statutory scheme. Under these circumstances, and to ensure that the Commission acts consistently with the APA, footnote 361 should remain in effect, and the Initial Decision should remain inoperative pending Commission review.

Finally, contrary to the Petition, the fact that Section 616 directed the Commission to "provide for expedited review" of program carriage cases does not require that the Initial Decision's mandatory carriage order go into effect immediately. Far from it – the Commission's "review" can be as expedited as the Commission sees fit, consistent with the mandates of fairness and due process.[33] But requiring the implementation of a remedy before an expedited "review" is completed does not effectuate Section 616; in fact, it frustrates the purpose of Section 616 and the statutory requirement to "rely on the marketplace, to the maximum extent feasible"[34] by overriding a privately and freely negotiated carriage contract prior to final disposition of the case and thereby causing significant marketplace uncertainty.[35] Moreover, the

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review of the *HDO* prior to seeking judicial review of the *HDO*. *See* 47 U.S.C. § 155(c)(7).

[33] *Cf. Herring Broad., Inc. d/b/a WealthTV, et al. v. Time Warner Cable Inc., et al.*, Order, 24 FCC Rcd 1581 (2009) (rescinding a Media Bureau Order and ordering the ALJ to proceed "as expeditiously as possible, consistent with the mandates of fairness and due process").

[34] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463.

[35] Tennis Channel beats the drum for the imposition of a windfall mandatory carriage remedy prior to a final Commission decision by claiming that "Comcast has lost on the merits at every stage." Petition at 8. This is true, as far as it goes, but the Commission need only review its recent program carriage precedent to see that it does not go very far. In the *WealthTV* case, Comcast and the other defendants "lost" the prima facie stage before the Media Bureau, only to prevail before the ALJ and the full Commission. *See Herring Broad., Inc. d/b/a WealthTV v.*

Section 616 requirement to promulgate rules that provide for expedited review is a *general* rulemaking requirement that did not expressly (or even implicitly) override the specific APA requirement that non-final initial decisions cannot be given immediate effect if the agency chooses to disallow their immediate judicial review.[36] In short, although the Petition claims that the "clear terms of Section 616" provide for immediate effectiveness of initial decisions,[37] such terms simply do not exist.

B. Footnote 361 Implements the Requirements of Due Process

It would be fundamentally unfair and a violation of due process to force Comcast to comply with a remedial order without having had an opportunity to be heard on highly relevant evidence establishing that Tennis Channel's claim is time-barred. The Media Bureau addressed

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Time Warner Cable, Inc., 26 FCC Rcd 8971 (2011), *appeal docketed*, No. 11-73134 (9th Cir. Oct. 19, 2011). In the *MASN/Time Warner Cable* case, Time Warner Cable "lost" multiple early rounds – before two arbitrators, and the Media Bureau – only ultimately to prevail before the Commission. *See TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, 25 FCC Rcd 18099, ¶ 4 (2010) (recounting the procedural history), *appeal docketed*, No. 11-1151 (4th Cir. Feb. 22, 2011). While the Bureau's mandatory carriage order in that case was apparently automatically stayed without protest by MASN, had the logic of Tennis Channel's argument here obtained there, Time Warner Cable subscribers in North Carolina might have been forced by government fiat to receive (and pay for) a costly service for which there was little demand for upwards of two years, before the same government agency determined authoritatively that there was no violation and reversed the prior order. *See id.* ¶¶ 13-18 (finding that Time Warner Cable legitimately determined that there was limited demand for MASN in North Carolina and that carriage of MASN would be prohibitively costly).

[36] *See* 5 U.S.C. § 559 ("Subsequent statute may not be held to supersede or modify . . . [the APA], except to the extent that is does so *expressly*." (emphasis added)); *see also Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) ("Applying § 559, the Supreme Court has held that 'exemptions from the terms of the [APA] are not lightly to be presumed in view of the statement in [§ 559] that modifications must be express." (quoting *Marcelo v. Bonds*, 349 U.S. 302, 310 (1955)); *id.* ("'The import of the § 559 instruction is that Congress's *intent to make a substantive change* be clear'" (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. Of Governors*, 745 F.2d 677, 686 (D.C. Cir. 1984)) (emphasis in original)).

[37] Petition at ii.

the issue on the pleadings, without the benefit of relevant evidence, and then barred the ALJ from considering subsequently discovered evidence. As a result, evidence discovered during the hearing showing that Tennis Channel planned – and then deliberately delayed – filing its complaint *for years* has yet to be considered. As the Commission has explained, "the fundamental purpose of a statute of limitations [is] to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed."[38] Comcast has been deprived of that protection here. If Tennis Channel's Petition were granted, then Comcast would be forced to comply with an order based on a provably untimely claim, before the proof of untimeliness is heard. The deprivation of due process would be particularly egregious, because it would grievously invade Comcast's First Amendment rights without thorough agency and judicial review of the factual and legal bases for such an order.

It is axiomatic that "our entire jurisprudence runs counter to the notion of court action taken before . . . an opportunity to be heard has been granted."[39] Due process requires "an opportunity to meet and present evidence" prior to agency action.[40] Comcast will have been denied that opportunity prior to the Initial Decision being effective if the order is allowed to take effect without any consideration of crucial evidence relevant to Comcast's statute of limitations

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[38] *In re Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, 11522 ¶ 38 (2011) (emphasis added; quotation omitted).

[39] *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974).

[40] *Alaska Airlines, Inc. v. Civil Aeronautics Bd.*, 545 F.2d 194, 200 (D.C. Cir. 1976); *see also Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208 (D.C. Cir. 2001).

defense that it first discovered during the hearing proceeding.[41] The due process violation would be particularly egregious given the First Amendment burdens (either of forced or restrained speech) inflicted by the Initial Decision. Footnote 361 avoids that violation of due process.

* * *

In the event that the Commission is considering granting the Petition, then it should also consider Comcast's Conditional Petition for Stay. For the reasons set forth in the Conditional Petition for Stay, Comcast is entitled to a stay of the effectiveness of the Initial Decision. A stay should immediately be granted in the event that Tennis Channel's Petition is granted.

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[41] *See Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.").

CONCLUSION

For the reasons set forth above, the Commission should deny Tennis Channel's Petition. In the alternative, the Commission should grant Comcast's Conditional Petition for Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David B. Toscano, do hereby certify that on this 25th day of January, 2012, I caused the foregoing Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision to be served upon the following by hand-delivery and electronic mail.

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