

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

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

**COMCAST'S CONDITIONAL PETITION FOR STAY**

Kathryn A. Zachem  
*Regulatory Affairs*

Lynn R. Charytan  
*Legal Regulatory Affairs*

COMCAST CORPORATION  
300 New Jersey Avenue, Suite 700  
Washington, D.C. 20001  
(202) 379-7134

Michael P. Carroll  
David B. Toscano  
DAVIS POLK & WARDWELL LLP  
450 Lexington Avenue  
New York, N.Y. 10017  
(212) 450-4000

James L. Casserly  
Michael D. Hurwitz  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, NW  
Washington, D.C. 20006  
(202) 303-1000

David H. Solomon  
J. Wade Lindsay  
WILKINSON BARKER KNAUER, LLP  
2300 N Street, NW, Suite 700  
Washington, D.C. 20037  
(202) 783-4141

Miguel A. Estrada  
Cynthia E. Richman  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 955-8500

*Attorneys for Defendant Comcast Cable  
Communications, LLC*

January 25, 2012

## SUMMARY

The Initial Decision in this case imposes an unprecedented burden on Comcast and its customers on the basis of a fundamental misunderstanding of the controlling law and a disregard of dispositive evidence. On January 13, 2012, Tennis Channel filed a petition to alter that decision to make it immediately effective—seeking to cement its victory under that erroneous ruling even as Comcast’s substantial exceptions are pending. The Commission should deny Tennis Channel’s petition for all the reasons set forth in Comcast’s opposition. But, in the event that the Commission grants the petition, Comcast respectfully requests that the Commission immediately stay the Initial Decision pending further review.

Tennis Channel entered a contract with Comcast in 2005 allowing Comcast to carry its network on any tier, including the sports tier where Tennis Channel first asked to be carried and where Comcast currently carries it. When Tennis Channel later sought broader carriage, Comcast weighed the costs, found no offsetting benefits, and declined. Tennis Channel then sought the Commission’s assistance, through this litigation, to rewrite its contract. It claimed that Comcast violated Section 616 of the Communications Act by distributing its network less broadly than Golf Channel and Versus (now NBC Sports Network), two Comcast affiliates, even though every major MVPD—including two of Tennis Channel’s own affiliates—does the same.

The Initial Decision rules in Tennis Channel’s favor, awarding an unprecedented remedy. It requires Comcast to carry Tennis Channel at least as broadly as Golf Channel and Versus, thus mandating terms of carriage that Tennis Channel did not bargain for and that Tennis Channel has not been able to obtain from *any* major MVPD. The Initial Decision also directs Comcast to provide Tennis Channel “equitable” channel placement vis-à-vis the other networks, although Tennis Channel did not seek this remedy in its complaint. The Initial Decision imposes these duties in contravention of Section 616—which is designed to protect competition in the marketplace, not to extend special privileges to preferred market participants—and in disregard for Comcast’s freedoms of speech and press. It should be stayed pending review.

At a minimum, to the extent that the Commission conditions judicial review on agency exhaustion, the Administrative Procedure Act (“APA”) mandates that the Commission grant a stay pending exhaustion of Comcast’s administrative remedies. The APA provides that, absent a statutory exhaustion requirement, an agency may condition judicial review on exhaustion only if “the action meanwhile is inoperative.” 5 U.S.C. § 704. Because there is no statutory exhaustion requirement applicable to this case, this provision applies with full force.

Additionally, any relief should be stayed pending the conclusion of all review, including judicial review should it prove necessary, under the usual four-factor test applied by the Commission and the courts. This test looks to (1) petitioner’s likelihood of success on the merits, (2) irreparable injury to the petitioner, (3) harm to other parties, and (4) the public interest. Each factor strongly weighs in favor of a stay in this case.

*First*, Comcast is likely to succeed on the merits. At the threshold, Tennis Channel’s complaint is untimely under the one-year statute of limitations contained in 47 C.F.R. § 76.1302(f). That complaint assails decisions made over six years ago: The parties’ 2005 agreement permits Comcast to distribute Tennis Channel on its sports tier, although Golf

Channel and Versus were already more broadly distributed at that time, and Comcast has exercised its right to sports-tier carriage ever since. Moreover, newly discovered evidence, not yet considered by the Commission, shows that Tennis Channel contemplated litigation as early as 2007 and delayed its complaint for years for tactical reasons.

The Initial Decision also misapplies and misinterprets Section 616. Consistent with the First Amendment, Congress drafted Section 616 narrowly to address specific, severe threats to competition in the marketplace: “unreasonabl[e] restrain[ts]” on a programmer’s ability to compete. Yet Tennis Channel demonstrated no severe impairment of its ability to compete; it has deliberately sought out sports-tier carriage from Comcast and other MVPDs, it can reach virtually all Comcast subscribers who are willing to pay for it, and, to the extent it deems sports-tier carriage inadequate, it is free to seek broad carriage on other MVPDs, including satellite companies that reach every American household. Additionally, although only handicaps resulting from intentional discrimination on the basis of affiliation trigger the statute, un rebutted evidence demonstrates that Comcast’s decision was based on legitimate cost-benefit analysis.

Even if the Initial Decision could be squared with the statute, it also violates the First Amendment by conditioning Comcast’s right to speak through its own networks on its broader distribution of Tennis Channel, a condition that both usurps Comcast’s editorial discretion and constitutes an impermissible penalty for its speech. Incredibly, however, the Initial Decision concluded that Comcast’s First Amendment rights are not even implicated—and thus failed to analyze the burden on those rights *at all*—on the ground that Comcast can *choose* the nature of the restraint. But government cannot evade the Constitution—let alone escape constitutional scrutiny altogether—by forcing parties to choose between unconstitutional options.

Finally, even if the Commission upholds this erroneous finding of discrimination, it will still be required to revise the Initial Decision to clarify the limits of Comcast’s obligation. The harm asserted by Tennis Channel—denial of access to subscribers—can be remedied through broader distribution; the remedy should not require any particular channel placement (which Tennis Channel did not seek in its complaint, or the underlying negotiations) or additional license fees for broader distribution to which Comcast has never agreed. Yet the Initial Decision does not even attempt to address that issue.

*Second*, Comcast will be irreparably injured in the absence of a stay. A violation of a party’s constitutional rights is always irreparable injury. Moreover, moving even one channel may require wholesale alterations to Comcast’s channel line-up, as each channel displaces another, giving rise to a kind of domino effect. These changes will be difficult and costly to implement across Comcast’s more than {{[REDACTED]}} channel line-ups. They will cause inevitable viewer confusion and, potentially, loss of goodwill, requiring significant expenditures on customer education. And, these changes will require Comcast to take steps to protect its relationships with other programming vendors, which may lose customers and advertising revenue due to customer confusion as a result of these channels’ being moved to make way for Tennis Channel. Should the Initial Decision be reversed, these changes will be exceedingly difficult to unwind, and Comcast will be required to proceed with great care, at great expense, to minimize the viewer confusion that may result and the harm that could accrue to networks that are relocated twice within a relatively short period of time. These harms, moreover, are

magnified by the fact that Comcast cannot know whether it will ultimately be required to pay additional license fees and will not be able to recover any additional fees that it does pay.

*Third*, a stay would impose no harm on Tennis Channel. After all, it actively sought out and voluntarily entered into an agreement in 2005 allowing Comcast to carry it on a sports tier, and that contract is consistent with the terms that Tennis Channel has been able to obtain from other MVPDs. Comcast has carried Tennis Channel on its sports tier since 2005, and yet Tennis Channel waited until 2010 to challenge that level of carriage before the Commission. Tennis Channel itself insists that, instead of suffering, it has *grown* and *improved* over the intervening years. Tennis Channel cannot seriously claim that continuing to abide by its contract with Comcast will cause it cognizable injury.

*Fourth*, the public interest favors a stay. A stay will avoid harm to Comcast's customers and other networks while review is pending by preventing the confusion that may arise as a result of changes to Comcast's channel line-up. Such confusion unnecessarily frustrates viewers and—if viewers do not migrate to a displaced network's new location—can damage the network's business. Moreover, it is always in the public interest to avoid a violation of a party's constitutional rights. This is especially true of First Amendment rights, as the public has a stake in having the success or failure of content decided by private preference, rather than governmental fiat. Most major MVPDs do not broadly distribute Tennis Channel because consumer demand does not justify broad distribution. The public will not gain, and may in fact be injured, if the Initial Decision is allowed to overturn the judgment of the market.

**TABLE OF CONTENTS**

	<u>PAGE</u>
SUMMARY .....	i
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	v
BACKGROUND .....	1
ARGUMENT .....	5
I.    The APA Requires A Stay Pending Commission Review.....	7
II.   Comcast Is Entitled To A Stay Under The Four-Factor Test Applied By The Commission And The Courts.....	8
A.    Comcast Is Likely To Prevail on the Merits .....	8
1.    Tennis Channel’s Complaint Is Untimely.....	9
2.    The Initial Decision Misapplies Section 616 .....	12
3.    The Initial Decision Violates Comcast’s First Amendment Rights .....	17
B.    Comcast Will Be Irreparably Harmed Absent A Stay .....	22
C.    Tennis Channel Would Not Be Injured By A Stay.....	27
D.    The Public Interest Favors A Stay .....	27
CONCLUSION.....	28

**TABLE OF AUTHORITIES**

	<u>PAGE</u>
<b>Cases</b>	
<i>3M Co. v. Browner</i> , 17 F.3d 1453 (D.C. Cir. 1994).....	10
<i>Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett</i> , 131 S. Ct. 2806 (2011).....	18
<i>Ark. Writers’ Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987).....	19
<i>Bd. of Regents of University of the State of N.Y. v. Tomanio</i> , 446 U.S. 478 (1980).....	9, 10
<i>Bernal v. Fainter</i> , 467 U.S. 216 (1984).....	19
<i>Brown v. Entm’t Merchants Ass’n</i> , 131 S. Ct. 2729 (2011).....	18
<i>Cablevision v. FCC</i> , 649 F.3d 695 (D.C. Cir. 2011).....	20
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010).....	18
<i>Comcast Corp. v. FCC</i> , 579 F.3d 1 (D.C. Cir. 2009).....	20
<i>Darby v. Cisneros</i> , 509 U.S. 137 (1993).....	7
<i>Davis v. Fed. Election Comm’n</i> , 554 U.S. 724 (2008).....	18
<i>Déjà Vu of Nashville, Inc. v. Metro. Gov’t of Nashville</i> , 274 F.3d 377 (6th Cir. 2001).....	27
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	22
<i>Firecross Ministries v. Municipality of Ponce</i> , 204 F. Supp. 2d 244 (D.P.R. 2002).....	19

*Hecht v. Pro-Football, Inc.*,  
570 F.2d 982 (D.C. Cir. 1977)..... 14

*MCI Commc 'ns Corp. v. Am. Tel. & Tel. Co.*,  
708 F.2d 1081 (7th Cir. 1983) ..... 14

*Miami Herald Publ'g Co. v. Tornillo*,  
418 U.S. 241 (1974)..... 18

*Mills v. District of Columbia*,  
571 F.3d 1304 (D.C. Cir. 2009)..... 22

*Nat'l Treasury Employees Union v. FLRA*,  
712 F.2d 669 (D.C. Cir. 1983)..... 27

*New York v. United States*,  
505 U.S. 144 (1992)..... 18

*Pacific Bell Tel. Co. v. linkLine Commc 'ns*,  
555 U.S. 438 (2009)..... 14

*R.A.V. v. City of St. Paul*,  
505 U.S. 377 (1992)..... 19

*Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*,  
217 F.3d 8 (1st Cir. 2000)..... 25

*Sorrell v. IMS Health Inc.*,  
131 S. Ct. 2653 (2011)..... 18

*Sottera, Inc. v. FDA*,  
627 F.3d 891 (D.C. Cir. 2010)..... 22

*Time Warner v. FCC*,  
93 F.3d 957 (D.C. Cir. 1996), *reh'g denied*, 105 F.3d 723 (D.C. Cir. 1997). ..... 19, 20

*Turner Broad. Sys., Inc. v. FCC*,  
512 U.S. 622 (1994)..... 13, 18, 19, 20

*Turner Broad. Sys., Inc. v. FCC*,  
520 U.S. 180 (1997)..... 19, 20

*United States v. Playboy Entm't Group, Inc.*,  
529 U.S. 803 (2000)..... 19

*Va. Petroleum Jobbers Ass'n v. FPC*,  
259 F.2d 921 (1958)..... 8

*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,  
540 U.S. 398 (2004)..... 14

*Wash Metro. Area Transit Comm’n v. Holiday Tours, Inc.*,  
559 F.2d 841 (D.C. Cir. 1977)..... 9

*Wooley v. Maynard*,  
430 U.S. 705 (1977)..... 18

**Statutes**

47 U.S.C. § 155..... 7

5 U.S.C. § 704..... 7

5 U.S.C. § 705..... 8, 13

Cable Television Consumer Protection and Competition Act of 1992,  
Pub. L. No. 102-385, 106 Stat. 1460 ..... 13

**Regulations**

47 C.F.R. § 76.1302 ..... 10, 12

**Administrative Materials**

*1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules, Order on Reconsideration*,  
14 FCC Rcd 16433 (1999)..... 11

*1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules, Report & Order*,  
14 FCC Rcd 418 (1999)..... 11

*Brunson Commc’ns, Inc. v. RCN Telecom Servs., Inc.*,  
15 FCC Rcd 12883 (CSB 2000). ..... 8, 9

*EchoStar Commc’ns Corp. v. Fox/Liberty Networks, LLC*,  
13 FCC Rcd 21841 (CSB 1998) ..... 10

*EchoStar Commc’ns Corp. v. Fox/Liberty Networks, LLC*,  
14 FCC Rcd 10480 (CSB 1999) ..... 11

*Implementation of Cable Television Consumer Protection and Competition Act of 1992 Development of Competition & Diversity in Video Programming Distribution & Carriage*,  
9 FCC Rcd 4415 (1994)..... 12

*In re AT&T Corp. v. Ameritech Corp.*,  
13 FCC Rcd 14508 (1998)..... 8

*In re Comcast Cable Commcn’s, LLC*,  
20 FCC Rcd 8217 (MB 2005)..... 8

*In the Matter of CBS Commc’ns Servs., Inc. & Centennial Wireless PCS License Corp.*,  
13 FCC Rcd 4471 (1998)..... 22

*In the Matter of 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 (2011)..... 10, 11, 12, 20

*Mid-Atlantic Sports Network v. Time Warner Cable LLC*,  
25 FCC Rcd 18099 (2010), *appeal docketed, TCR Sports Broadcasting Holding, LLP  
v. FCC*, No. 11-1151 (4th Cir. 2011)..... 9, 15, 16

*Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*,  
25 FCC Rcd 14149 (MB 2010)..... 4, 11

**Other Authorities**

Alex Sherman, *Verizon TV Users Gain Access to Tennis Channel as Dispute Ends*,  
BUSINESSWEEK, Jan. 17, 2012, <http://www.businessweek.com/news/2012-01-17/verizon-tv-users-gain-access-to-tennis-channel-as-dispute-ends.html> ..... 3

Attorney General’s Manual on the Administrative Procedure Act (1947)..... 7

H.R. Rep. 102-628 (1992)..... 13

S. Rep. No. 79-752 (1945)..... 7

## BACKGROUND

Comcast launched Golf Channel and Versus (now NBC Sports Network) in 1995, at a time when Comcast and other MVPDs had spare system capacity and were actively seeking new programming.<sup>1</sup> Early in their development, both networks paid substantial sums in order to induce MVPDs, including Comcast, to expand their carriage.<sup>2</sup> Today, both networks broadcast significant amounts of exclusive programming, and both are broadly distributed by most major MVPDs including Comcast.<sup>3</sup>

Tennis Channel came into existence years later, at a time of lessened demand for new programming networks.<sup>4</sup> It approached Comcast and sought carriage on Comcast's sports tier, which it asserted (to justify its fee demands) would yield Comcast [REDACTED].<sup>5</sup> In 2005, the parties entered a 15-year contract giving Comcast the right to carry Tennis Channel on any tier, including its sports tier.<sup>6</sup> Before and after

---

<sup>1</sup> Comcast Exh. 80 (Orszag Written Direct) ¶¶ 41–42, 44; Comcast Exh. 77 (Egan Written Direct) ¶¶ 12–13, 15; Comcast Exh. 75 (Bond Written Direct) ¶ 30.

<sup>2</sup> See Comcast Exh. 76 (Donnelly Written Direct) ¶ 18; Donnelly Direct, May 2, 2011 Tr. 2494:21–2495:17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 28–29; Bond Direct, Apr. 29, 2011 Tr. 1962:5–10.

<sup>3</sup> See Comcast Exh. 77 (Egan Written Direct) ¶¶ 40–43, 49–50, 63–64; Comcast Exhs. 1102, 1103; Rigdon Redirect, Apr. 28, 2011 Tr. 1905:6–1909:1; Rigdon Recross, Apr. 28, 2011 Tr. 1918:2–1919:7, 1920:3–22.

<sup>4</sup> Comcast Exh. 80 (Orszag Written Direct) ¶¶ 41–42, 44; Comcast Exh. 77 (Egan Written Direct) ¶¶ 14–15.

<sup>5</sup> Comcast Exh. 52.

<sup>6</sup> Comcast Exh. 84. “Sports tier” is an industry term for a package of mostly sports programming that is distributed only to subscribers who are willing to pay an additional monthly fee to receive it. Depending on the cable system, Comcast's sports tier (its Sports Entertainment Package) comprises 10 to 15 networks. Rigdon Direct, Apr. 28, 2011 Tr. 1810:22–1812:5.

signing its contract with Comcast, Tennis Channel also signed sports-tier contracts with Time Warner, Cox, and Charter, each of which continues to carry Tennis Channel on its sports tier.<sup>7</sup>

Shortly afterwards, Tennis Channel became dissatisfied with sports-tier carriage. It offered multiple MVPDs, including Comcast, equity in exchange for broader carriage. Dish Network and DirecTV accepted their offers,<sup>8</sup> but [REDACTED] and Comcast—in decisions that Tennis Channel concedes were not discriminatory—declined.<sup>9</sup> Comcast conducted a cost-benefit analysis and concluded that it would lose money if it accepted.<sup>10</sup>

Tennis Channel then conceived a plan to rewrite the parties' contract through litigation. In January 2007, it prepared a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>11</sup> In early 2009, it hired a consultant to prepare for litigation.<sup>12</sup> Pursuant to that plan, Tennis Channel presented Comcast with two options for broader distribution in May 2009, aware that each would increase Comcast's costs.<sup>13</sup> Comcast conducted a cost-benefit analysis and concluded that it would lose money under either proposal.<sup>14</sup> On the one hand, accepting

---

<sup>7</sup> Comcast Exhs. 165, 235, 120, 659.

<sup>8</sup> Comcast Exhs. 503, 701, 703, 704; Solomon Cross, Apr. 25, 2011 Tr. 353:6–10, 408:13–410:5, 413:11–16, 415:14–20, 419:3–420:10.

<sup>9</sup> Solomon Cross, Apr. 25, 2011 Tr. 341:8–343:13, 457:11–16; Comcast Exh. 75 (Bond Written Direct) ¶¶ 25–27; Comcast Exhs. 112, 320.

<sup>10</sup> Comcast Exh. 75 (Bond Written Direct) ¶¶ 25–27.

<sup>11</sup> Comcast Exh. 24.

<sup>12</sup> Comcast Exh. 24; Comcast Exh. 517 (Solomon Dep.) 252:6–257:14; Herman Cross, Apr. 26, 2011 Tr. 663:5–19.

<sup>13</sup> Comcast Exhs. 190, 467, 588; Comcast Exh. 646 (Simon Dep.) 43:4–12, 44:3–14.

<sup>14</sup> Comcast Exh. 75 (Bond Written Direct) ¶¶ 16–19; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 14–18; Bond Direct, Apr. 29, 2011 Tr. 2122:11–2125:9.

either proposal would have increased its payments to Tennis Channel by either [REDACTED], respectively.<sup>15</sup> On the other, the network already was available to Comcast customers who wanted it, and there was no evidence that broader distribution would attract or retain subscribers or that it would garner Comcast any other tangible benefit. Comcast accordingly elected to stand on its contract right to continue to carry Tennis Channel only on its sports tier.

Other MVPDs reacted similarly. In 2009 and 2010, [REDACTED] each declined similar proposals from Tennis Channel.<sup>16</sup> And, in 2011, Cablevision dropped the network altogether.<sup>17</sup> Its parent companies DirecTV and Dish Network provide [REDACTED] of its subscribers.<sup>18</sup> All major MVPDs—even DirecTV and Dish Network—distribute Tennis Channel to fewer subscribers than Golf Channel and Versus.<sup>19</sup>

In January 2010, more than a year after initiating negotiations to alter its existing carriage agreement with Comcast, Tennis Channel filed a carriage complaint under Section 616 against Comcast, claiming that Comcast discriminated against it on the basis of affiliation by distributing it less broadly than it distributes Golf Channel and Versus. The Media Bureau rejected Comcast's statute-of-limitations defense without taking any evidence and designated the matter

---

<sup>15</sup> Comcast Exh. 588; *see also* Comcast Exh. 467.

<sup>16</sup> Comcast Exhs. 31, 121, 201, 529, 534, 545, 632, 650.

<sup>17</sup> Comcast Supplemental Notice to Update Certain Record Evidence, App. (Sept. 12, 2011). Verizon also dropped Tennis Channel in 2011, and it only recently reinstated carriage in an agreement that reportedly involves limited distribution tiers. *See* Alex Sherman, *Verizon TV Users Gain Access to Tennis Channel as Dispute Ends*, BUSINESSWEEK, Jan. 17, 2012, <http://www.businessweek.com/news/2012-01-17/verizon-tv-users-gain-access-to-tennis-channel-as-dispute-ends.html>.

<sup>18</sup> Comcast Exh. 1103; Solomon Direct, Apr. 25, 2011 Tr. 247:13–19.

<sup>19</sup> Comcast Exhs. 1102, 1103; Rigdon Redirect, Apr. 28, 2011 Tr. 1905:6–1909:1; Rigdon Recross, Apr. 28, 2011 Tr. 1918:2–1919:7, 1920:3–22.

for a hearing before an Administrative Law Judge (“ALJ”).<sup>20</sup> On December 20, 2011, the ALJ issued an Initial Decision finding that Comcast violated Section 616.<sup>21</sup> The decision requires that Comcast carry Tennis Channel “at the same level of distribution” as Golf Channel and Versus. Although Tennis Channel did not seek a channel-placement remedy in its complaint, and adverted to any such issue only glancingly during the proceedings, the Initial Decision also directs Comcast to provide “equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement.”<sup>22</sup>

The Initial Decision provides no other specific terms of carriage. It declines to decide whether contract rates will apply to the compelled broader carriage, as Tennis Channel contended, or whether, as urged by Comcast, no additional payment can lawfully be required because Comcast will be providing such carriage by compulsion, not agreement. Indeed, the Initial Decision declines even the Enforcement Bureau’s submission that additional briefing be received on the appropriate market rate.

By its terms, the Initial Decision becomes effective “50 days after release if exceptions are not filed within 30 days thereafter.”<sup>23</sup> On January 13, 2012, however, contending that the ALJ erred in so suspending the effectiveness of his decision, Tennis Channel filed a petition to compel Comcast’s *immediate* compliance. Comcast has separately opposed Tennis Channel’s effort to have its exception to the Initial Decision adjudicated in advance of the Commission’s

---

<sup>20</sup> *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, 25 FCC Rcd 14149, 14154–59, 14163 ¶¶ 11–16, 24 (MB 2010) (*HDO*).

<sup>21</sup> *Tennis Channel, Inc. v. Comcast Cable Commc’ns*, 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*”).

<sup>22</sup> *Initial Decision* ¶¶ 119–20.

<sup>23</sup> *Initial Decision* ¶ 125 n.361.

adjudication of Comcast's exceptions, which were timely filed on January 19, 2012. In the event that the Commission grants Tennis Channel's petition, however, Comcast respectfully requests that the Commission also consider and grant the instant conditional stay petition.

**ARGUMENT**

If the Initial Decision is modified to become immediately effective, it will impose significant, immediate, and irreversible costs and burdens on Comcast, Comcast's customers, and other networks. Comcast's First Amendment rights will be infringed, as its ability to speak through its own networks will be conditioned on broader distribution of Tennis Channel, a condition that both usurps Comcast's editorial discretion and penalizes its own speech. Further, because Comcast is contractually committed to carry its own networks broadly, the Initial Decision effectively mandates broader-carriage and channel-placement remedies that will be time-consuming, complex, and costly to implement.

With respect to channel placement in particular, implementation will be complicated by the fact that Golf Channel and Versus are not always located near each other. Moreover, the slots available to place Tennis Channel in any significant proximity to Golf Channel and/or Versus are limited, particularly in the 1-99 channel range, where older and more established networks have long resided. Moving even one channel to create the "room" necessary to comply with the Initial Decision would likely set off a domino effect that would require moving others—a process that will have to be repeated for each of Comcast's channel line-ups and that will require navigating myriad contractual provisions governing the placement of various networks as well as applicable regulatory requirements, including must-carry obligations and notice and waiting periods imposed by thousands of local franchise authorities. Such changes create inevitable viewer confusion, requiring expenditures to give notice beforehand and higher

spending on customer service after the fact. And they are unfair to viewers and to the displaced networks, which have no involvement in this case.

These changes will be particularly difficult to unwind: Comcast will have to undertake extensive efforts to mitigate the viewer confusion—and resulting harm to the ratings and advertising revenues of affected networks—that could otherwise result when networks are relocated twice within a relatively short period of time. Extensive and costly efforts will also be required to mitigate the confusion and loss of goodwill that could otherwise occur if Tennis Channel were first moved to a more highly penetrated tier but then, due to a reversal of the Initial Decision, reassigned to an optional distribution tier. The burden of implementing the Initial Decision, therefore, would likely be compounded when, as is highly likely, Comcast ultimately prevails on review.

The APA prohibits the Commission from imposing these costs and burdens while Comcast is required to exhaust its administrative appeals and, therefore, mandates a stay at least pending the conclusion of the Commission's review. Moreover, a stay is independently warranted under the four-factor test regularly applied by the Commission and the courts. The Initial Decision imposes extreme and unprecedented burdens on constitutionally protected activity, and it does so on the basis of an implausible statutory analysis that no court previously has approved—and which every available precedent strongly suggests will *never* be approved. And, whereas Comcast will face immediate and likely irreversible harms and the public interest will be injured without a stay, granting a stay and delaying the Initial Decision's unprecedented remedies until their legality has been carefully vetted on review will not harm Tennis Channel at all. It will merely hold Tennis Channel to the bargain that it voluntarily struck in 2005, and

which every available market indication, including the more recent independent decisions of unaffiliated MVPDs, shows to be a fair reflection of non-discriminatory market realities.

**I. The APA Requires A Stay Pending Commission Review**

The APA leaves no doubt that the Initial Decision must remain inoperative pending the exhaustion of Comcast’s administrative remedies. The APA provides that—“[e]xcept as otherwise expressly required by statute”—an agency decision is “final” for purposes of judicial review notwithstanding an agency rule requiring exhaustion of agency appeals unless “the action meanwhile is inoperative.”<sup>24</sup> 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.<sup>25</sup>

This rule avoids “a fundamental inconsistency in requiring a person to continue “exhausting” administrative processes after administrative action has become . . . effective.”<sup>26</sup>

This provision applies with full force to this case. The Communications Act does not contain any provision authorizing the Commission to predicate judicial review of initial decisions on the exhaustion of administrative remedies. In fact, the exhaustion requirement that the Communications Act does contain specifically *exempts* initial decisions.<sup>27</sup> For the Commission both to alter the Initial Decision to make it immediately effective and deny a stay would be inconsistent with the APA.

---

<sup>24</sup> 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.”).

<sup>25</sup> *Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

<sup>26</sup> *Id.* at 148 (quoting S. Rep. No. 79-752, at 27 (1945)).

<sup>27</sup> *See* 47 U.S.C. § 155(c)(2), (c)(7).

## II. Comcast Is Entitled To A Stay Under The Four-Factor Test Applied By The Commission And The Courts

In any event, the Commission should grant a stay pending the conclusion of *all* review, including judicial review should the Commission ultimately affirm any part of the Initial Decision. The Commission enjoys “discretion” to grant a stay but typically exercises that discretion in light of the familiar four-factor test applied by both the Commission and the courts.<sup>28</sup> That test asks:

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? . . .<sup>29</sup>

While “no single factor is necessarily dispositive,”<sup>30</sup> each factor militates strongly in favor of a stay here.

### A. Comcast Is Likely To Prevail on the Merits

The likelihood-of-success inquiry does not require Comcast to demonstrate, or the Commission to believe, that Comcast ultimately will prevail. Rather, it is sufficient for the

---

<sup>28</sup> See *In re Comcast Cable Commcn’s, LLC*, 20 FCC Rcd 8217, 8217–18 ¶ 2 (MB 2005); see also 5 U.S.C. § 705 (providing that an agency may grant a stay pending judicial review when it “finds that justice so requires”).

<sup>29</sup> *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (1958); see, e.g., *Brunson Commc’ns, Inc. v. RCN Telecom Servs., Inc.*, 15 FCC Rcd 12883, 12883–84 ¶ 2 (CSB 2000 (citing *Virginia Petroleum* factors)).

<sup>30</sup> *In re AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 14508, 14515–16 (1998); see also *In re Comcast*, 20 FCC Rcd at 8217–18 ¶ 2 (explaining that the degree to which any one factor must favor a stay “will vary according to the Commission’s assessment of the other factors”).

Commission to recognize that “a serious legal question is presented,”<sup>31</sup> and that the issues raised by the petition “bear further analysis.”<sup>32</sup> Comcast’s showing here easily vaults that threshold.

As an initial matter, Tennis Channel’s claim is untimely under any reasonable view of the applicable regulations. Nonetheless, the Initial Decision builds on that untenable foundation to adopt an interpretation of Section 616 that is contrary to every indication of Congressional intent and in great tension with the Commission’s decision in *MASN*.<sup>33</sup> The Initial Decision engages in content-based analysis that runs contrary to the entire train of First Amendment authority, and it construes the competitive-restraint requirement of Section 616 in a manner that effectively reads that provision out of the statute, guaranteeing that the statute is not narrowly tailored to *any* important governmental interest. As a result, it places Section 616 in jeopardy of invalidation under the First Amendment. Most surprisingly, it does all this in the least deserving of cases: Tennis Channel has not shown that it is harmed by the purported discrimination, or that Comcast in fact is motivated by an invidious purpose. Against the backdrop of the First Amendment, it certainly “bears further analysis” whether the Commission should permit such an unprecedented and extreme decision to become effective before appellate scrutiny.

### **1. Tennis Channel’s Complaint Is Untimely**

Tennis Channel’s complaint should have failed at the outset, as it was filed years after the statute of limitations had expired. “Statutes of limitations are not simply technicalities.”<sup>34</sup> To the contrary, they serve important “policies of repose,” including upholding parties’ “settled

---

<sup>31</sup> *Wash Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

<sup>32</sup> *Brunson Commc’ns*, 15 FCC Rcd at 12885 ¶ 5.

<sup>33</sup> *Mid-Atlantic Sports Network v. Time Warner Cable LLC*, 25 FCC Rcd 18099 (2010) (“*MASN*”), appeal docketed, *TCR Sports Broadcasting Holding, LLP v. FCC*, No. 11-1151 (4th Cir. 2011).

<sup>34</sup> *Bd. of Regents of University of the State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980).

expectations.”<sup>35</sup> The Commission itself has recognized that Section 76.1302(f), the statute of limitations at issue here, serves the important purpose of “protect[ing] a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.”<sup>36</sup>

Section 76.1302(f) imposes a one-year statute of limitations that begins to run with any one of three mutually exclusive events: (1) an MVPD and programming vendor enter a carriage agreement that allegedly violates the program carriage rules; (2) an MVPD makes an offer of carriage that allegedly violates those rules; or (3) “a party has notified [an MVPD] that it intends to file a complaint . . . based on violations of one or more of [those] rules.”<sup>37</sup>

Under Subsection (f)(1), Tennis Channel’s one-year window opened in 2005, when it entered its still-operative carriage agreement with Comcast. That contract permits Comcast to carry Tennis Channel on the precise terms that Tennis Channel now deems discriminatory and inadequate. Tennis Channel had all the facts it needed to challenge those terms in 2005, when its network launched on a sports tier (as contract negotiations contemplated) even as Golf Channel and Versus already received the broader carriage that lies at the heart of Tennis Channel’s current complaint. After Tennis Channel allowed its one-year window to close, it was required

---

<sup>35</sup> *Id.*; see also *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (“[I]t is of no moment whether the proceeding . . . is a proceeding started in a court or in an agency. From the potential defendant’s point of view, lengthy delays upset ‘settled expectations’ to the same extent in either case.”).

<sup>36</sup> *In the Matter of 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, 11522–23 ¶ 38 (2011) (“2011 Report & Order”).

<sup>37</sup> 47 C.F.R. § 76.1302(f); see also *EchoStar Commc’ns Corp. v. Fox/Liberty Networks, LLC*, 13 FCC Rcd 21841, 21848 ¶ 18 (CSB 1998) (where one triggering event applies, claim is untimely if brought more than one year from the event, notwithstanding argument that some other, later, triggering event also applies).

to “operate under the terms [of the program carriage contract] or negotiate amendments thereto free of the program [carriage] specter.”<sup>38</sup> Instead, in 2010, Tennis Channel filed its complaint.

The Media Bureau found the complaint timely filed under the third triggering event, contained in Subsection (f)(3), because it was filed “within one year of [Comcast’s] allegedly discriminatory refusal to retier the Tennis Channel [in June 2009], as well as within one year of its pre-filing notice.”<sup>39</sup> But under this theory *every* long-dead claim can be resuscitated simply by asking to reopen settled negotiations.<sup>40</sup> Indeed, in this case, Tennis Channel’s 2009 proposal for broader carriage was a pretext intended to revive the claim at a point of perceived maximum regulatory leverage—a claim it could and should have brought within one year of its 2005 contract. This is evinced by newly discovered evidence demonstrating that Tennis Channel

[REDACTED]

[REDACTED].<sup>41</sup> Correspondence between Tennis Channel’s Chairman and CEO Ken Solomon and one of its directors shows that it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

<sup>38</sup> *EchoStar Commc’ns Corp. v. Fox/Liberty Networks, LLC*, 14 FCC Rcd 10480, 10486 ¶ 14 (CSB 1999). Although *EchoStar* involved the Commission’s program access rules, the Commission has recognized that the limitations periods for program access and program carriage complaints should be read in harmony. *1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, Report & Order, 14 FCC Rcd 418, 424 (1999); *see also id.*, Order on Reconsideration, 14 FCC Rcd 16433, 16435 (1999).

<sup>39</sup> *HDO*, 25 FCC Rcd at 14155–56 ¶ 11 (citing 47 C.F.R. 76.1302(f)(3)).

<sup>40</sup> *See 2011 Report & Order* ¶ 38.

<sup>41</sup> Comcast Exh. 24; *accord* Comcast Exhs. 136, 137, 271, 516, 522, 626.

██████.<sup>42</sup> Tennis Channel has offered no excuse for sitting on its claim for years before bringing suit.

Any interpretation of the rules that rewards—and invites repetition of—this kind of tactical behavior is untenable. Indeed, as the Commission has recognized, such an interpretation of Subsection (f)(3) would “undermin[e] the fundamental purpose of a statute of limitations” by permitting a party unilaterally to revive its claims by threatening to file a complaint.<sup>43</sup> The history of Subsection (f)(3) confirms that this was not remotely intended; this provision was meant to apply only where an MVPD has denied or refused to acknowledge a request to negotiate for carriage.<sup>44</sup> Properly confined to that original purpose, Subsection (f)(3) does not permit this complaint: An MVPD cannot be said to have denied a request for carriage or for carriage negotiations where, as here, the parties already have a governing carriage contract.

## 2. The Initial Decision Misapplies Section 616

Although Congress enacted Section 616 to foster and protect competition in the marketplace for content, the Initial Decision allows Tennis Channel to employ that provision to rewrite its carriage agreement to obtain terms—carriage as broad as, and on “equitable” placement terms with, Golf Channel and Versus—that *no one* in the market, including its own parent companies DirecTV and Dish Network, has been willing to afford it. This sweeping use of Section 616 disregards Congress’s purpose in enacting it, ignores Congress’s direction to “rely

---

<sup>42</sup> Comcast Exhs. 125, 126.

<sup>43</sup> *2011 Report & Order* ¶ 38.

<sup>44</sup> As originally promulgated, Subsection (f)(3) was expressly limited to those circumstances. See 47 C.F.R. § 76.1302(r)(3) (1993). The Commission amended the relevant language in 1994, but those conforming amendments were intended only to afford standing to MVPDs to file program carriage complaints. *Implementation of Cable Television Consumer Protection and Competition Act of 1992 Development of Competition & Diversity in Video Programming Distribution & Carriage*, 9 FCC Rcd 4415, 4418–19 (1994). Nothing suggests that those amendments were intended to alter Subsection (f)(3)’s substantive scope.

on the market” to the maximum extent feasible in implementing it, and places it on a wholly unnecessary collision course with the First Amendment.

Congress enacted Section 616 in 1992 to address a perceived threat to competition stemming from the “bottleneck, or gatekeeper, control” that Congress believed cable operators then possessed.<sup>45</sup> Congress thus directed the Commission to prevent MVPDs from “unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly by discriminating . . . on the basis of affiliation.”<sup>46</sup> In so doing, Congress endeavored to eliminate impediments to competition, not to replace the marketplace with governmental fiat; to the contrary, Congress directed the Commission to “rely on the marketplace to the maximum extent feasible” in implementing this provision.<sup>47</sup> And, Congress drew on well-established legal principles narrowly to target the perceived threat to competition while still preserving a reasonably unfettered marketplace for content: First, by requiring that a programmer show discrimination “on the basis of” affiliation, Congress adopted the standard for intentional, deliberate discrimination applicable under a host of familiar federal antidiscrimination statutes. And, second, Congress drew on anti-monopolization principles (including the “essential facilities” doctrine) developed in the antitrust context to address the rare instances in which market participants need access to a competitor’s facilities in order to better compete

---

<sup>45</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994) (“*Turner I*”); see also H.R. Rep. 102-628 (1992) (stating the “principal goal” of the legislation was “to encourage competition from alternative and new technologies, including competing cable system, wireless cable, direct broadcast satellites, and satellite master antenna television services”).

<sup>46</sup> 47 U.S.C. § 536(a)(3).

<sup>47</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(2), 106 Stat. 1460.

effectively.<sup>48</sup> As Congress was undoubtedly aware, the essential-facilities doctrine requires that a plaintiff demonstrate a “severe handicap” to its ability to compete in order to obtain such access.<sup>49</sup>

The Initial Decision fails to apply faithfully *either* of Congress’s limiting principles. It does not identify a “severe” limitation—or even *any* limitation at all—on Tennis Channel’s ability to compete. Comcast customers account for less than 24% of MVPD subscribers,<sup>50</sup> meaning Tennis Channel may reach the remaining 76% through other MVPDs, all of which operate in a highly competitive marketplace. And, any suggestion of competitive restraint is even more untenable in view of the fact that Comcast does, in fact, carry Tennis Channel. Most Comcast subscribers who want Tennis Channel can pay for it, and millions do; Tennis Channel is free to seek even broader distribution among Comcast subscribers by providing content that inspires more of them to choose Comcast’s sports tier. The Initial Decision’s contrary finding of competitive harm is based on the observation that broader distribution could secure additional viewers, and thus additional advertising revenue, for Tennis Channel.<sup>51</sup> But this will be true in *every case* in which a network invokes Section 616 to demand broader carriage, effectively rendering Section 616’s requirement of an “unreasonabl[e]” restraint a complete nullity.

---

<sup>48</sup> See, e.g., *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977). Subsequent to Section 616’s enactment, the Supreme Court has emphasized the emphatically narrow reach of the doctrine. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–09 (2004); see also *Pacific Bell Tel. Co. v. linkLine Commc’ns*, 555 U.S. 438, 448 (2009).

<sup>49</sup> *Hecht*, 570 F.2d at 992.

<sup>50</sup> See Tennis Channel Exh. 308, at 13.

<sup>51</sup> *Initial Decision* ¶ 116; see also *id.* ¶¶ 82–91.

The Initial Decision also fails to apply the proper analysis to determine whether Comcast deliberately discriminated “on the basis of” affiliation. Comcast’s carriage decision was based on its legitimate business analysis, not discrimination. Comcast made a “straight up financial”<sup>52</sup> decision to decline broader carriage: Accepting Tennis Channel’s 2009 proposal would have cost Comcast an additional [REDACTED] without any offsetting benefits, a fact Comcast confirmed by polling regional executives.<sup>53</sup> Although the Commission held in *MASN* that this kind of cost-benefit analysis is a “legitimate and non-discriminatory” basis to decline a broader-carriage request,<sup>54</sup> the Initial Decision nonetheless finds “discrimination” because Comcast failed to weigh the benefits of broader carriage.<sup>55</sup> Neither Tennis Channel nor the Initial Decision, however, has ever identified, much less quantified, *any* such benefits. Comcast can hardly be faulted for failing to weigh benefits that do not exist against costs that indisputably do.

Indeed, the Initial Decision wrongly disregards the most probative evidence available of non-discrimination—the carriage decisions of other market participants. The Commission recognized the highly probative value of this evidence in *MASN*: When multiple independent MVPDs make similar determinations regarding carriage, that fact provides “independent

---

<sup>52</sup> Bond Direct, Apr. 29, 2011 Tr. 2127:3–11.

<sup>53</sup> Comcast Exhs. 130, 588, 638; Comcast Exh. 75 (Bond Written Direct) ¶¶ 16–19; Bond Direct, Apr. 29, 2011 2110:15–2112:16, 2122:11–2125:9; Comcast Exh. 78 (Gaiski Written Direct) ¶¶ 14–16; Gaiski Direct, May 2, 2011 Tr. 2344:1–2369:5. Affiliation played no role in Comcast’s decision. Bond Direct, Apr. 29, 2011 Tr. 2127:3–11.

<sup>54</sup> *MASN*, 25 FCC Rcd at 18106, 18112–13 ¶¶ 12, 19.

<sup>55</sup> *Initial Decision* ¶ 76. The Initial Decision also cites Comcast’s failure to “make a written analysis” of additional subscribers or upgrades that might result from broader carriage of Tennis Channel, *id.*, but Comcast did in fact memorialize field reports showing an absence of any such benefits. See Comcast Exh. 130; Gaiski Redirect, May 2, 2011 Tr. 2462:10–2463:12. In any event, under Commission precedent, Comcast was not required to keep any written records of its cost-benefit analysis. See *MASN*, 25 FCC Rcd at 18114 ¶ 21.

evidence that [any one of the MVPDs] did not engage in discrimination.”<sup>56</sup> Here, *every* major MVPD—including Tennis Channel’s parent companies Dish Network and DirecTV—carries Golf Channel and Versus more broadly than Tennis Channel.<sup>57</sup> Four MVPDs, like Comcast, rejected broader-carriage proposals from Tennis Channel during the same time frame.<sup>58</sup> And, in 2011, Cablevision dropped the network entirely.<sup>59</sup> The Initial Decision disregards record evidence of the decisions of other MVPDs on the basis of its assertion that, “[b]ecause Comcast Cable is the largest MVPD in the United States, its carriage decisions have a strong influence on other MVPDs.”<sup>60</sup> The Initial Decision offers no evidence to support this speculative “lemming” theory of causation, which implausibly discounts experience and human nature: Market players do not ordinarily leave valuable opportunities on the table simply because others have not seized them.<sup>61</sup>

The common thread connecting these errors is the Initial Decision’s failure to follow Congress’s instruction to rely on the market “to the maximum extent feasible” when implementing Section 616. The Initial Decision inexplicably discounts the cost-benefit analysis made by Comcast, slights powerfully probative independent decisions by other market participants, and eschews any analysis of the effect of Comcast’s alleged discrimination on

---

<sup>56</sup> *MASN*, 25 FCC Rcd at 18111–12 ¶ 18.

<sup>57</sup> Comcast Exhs. 1102, 1103.

<sup>58</sup> Comcast Exhs. 32, 165, 201, 529, 534, 545, 632, 1103; Rigdon Direct, Apr. 28, 2011 Tr. 1798:15–1799:5, 1806:16–22.

<sup>59</sup> See Comcast Supplemental Notice to Update Certain Record Evidence, App. (Sept. 12, 2011). As noted, *supra* note 17, Verizon also dropped the network in 2011 and is reported to have subsequently entered into an agreement for limited distribution.

<sup>60</sup> *Initial Decision* ¶ 63.

<sup>61</sup> The Initial Decision’s unfounded theory also fails to explain how Comcast could have had a strong influence on other MVPDs (including at least two of the top ten MVPDs) that launched Tennis Channel on sports tiers almost two years *before* Comcast did so. See, e.g., Comcast Exh. 165, 235.

Tennis Channel's ability to compete in the marketplace for content. These errors allowed Tennis Channel to upend a contract that it voluntarily negotiated and thus secure a distribution breadth and placement comparable to those enjoyed by Golf Channel and Versus, a deal that Tennis Channel has been unable to secure from *any* major MVPD (affiliated or otherwise). The Initial Decision thereby confers on Tennis Channel, at no cost, a level of distribution that other networks (including Golf Channel and Versus) have paid substantial sums to obtain.<sup>62</sup> Because these errors severely distort the statutory scheme and place the Initial Decision on a collision course with a substantial wall of First Amendment authority, they assuredly "bear further analysis" before the Initial Decision is allowed to become effective.

### **3. The Initial Decision Violates Comcast's First Amendment Rights**

Remarkably, the Initial Decision fails even to grapple with the First Amendment issues raised by its interference with Comcast's editorial discretion regarding what networks to carry and how broadly. It refuses to conduct any First Amendment scrutiny at all because it asserts that the First Amendment is *not even implicated* by its decision. This palpably erroneous abdication of responsibility provides an additional, powerful reason to stay the Initial Decision. Comcast should not be forced to comply with the Initial Decision before that decision has been subjected to rigorous constitutional scrutiny.

According to the Initial Decision, Comcast's First Amendment rights are not even implicated because Comcast may choose the nature of the remedy: It can expand its carriage of Tennis Channel, curtail its carriage of Golf Channel and Versus, meet somewhere in the middle,

---

<sup>62</sup> See Comcast Exh. 76 (Donnelly Written Direct) ¶ 18; Donnelly Direct, May 2, 2011 Tr. 2494:21–2495:17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 28–29; Bond Direct, Apr. 29, 2011 Tr. 1962:5–10.

or drop all three networks entirely.<sup>63</sup> This reasoning is squarely precluded by controlling precedent, which establishes that government cannot circumvent the First Amendment merely by giving a speaker a choice between ceasing his speech, altering its message, or facing penalties for it.<sup>64</sup> To the extent the Initial Decision gives Comcast any choice at all,<sup>65</sup> it is a choice between compelled speech (broader distribution of Tennis Channel) and censorship (narrower distribution of its own networks). This “choice” simultaneously restricts Comcast’s editorial discretion as to what networks to carry and abridges its freedom to speak without penalty through its own networks.<sup>66</sup> *Each* of these government mandates would undoubtedly be unconstitutional if imposed on its own; compelling Comcast to choose among them does not improve their legality.

The First Amendment analysis the Initial Decision *should* have conducted shows that Comcast is likely to succeed on the merits of its claim. In light of the Initial Decision’s “similarly situated” analysis, the restriction it imposes is undoubtedly content-based; under governing Supreme Court precedent, a restriction is content-based if, for instance, it requires “enforcement authorities . . . [to] examine the content of the message that is conveyed” to

---

<sup>63</sup> *Initial Decision* ¶¶ 102–03.

<sup>64</sup> *See Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818–20 (2011); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 739 (2008). The principle that government may not impose a “choice” among alternatives it cannot impose separately is settled and generally applicable law. *See New York v. United States*, 505 U.S. 144, 176 (1992) (“A choice between two unconstitutionally coercive regulatory techniques is no choice at all.”).

<sup>65</sup> Comcast is contractually obligated to carry Golf Channel and Versus broadly. *See Tennis Channel Exh. 155 at 2.c.i*; *Tennis Channel Exh. 164 at 5.6(a) & Ex. A*. And even if it could curtail or drop its carriage of either network, doing so might lead to customer confusion, dissatisfaction, and a loss of goodwill.

<sup>66</sup> *See Turner I*, 512 U.S. at 636; *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010); *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733, 2737 n.4 (2011); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

determine whether it is “uniformly devoted to religion or sports.”<sup>67</sup> Here, the Initial Decision’s analysis compares the content of the three networks, including their “genre” and “image,” and relies on the fact that all three are devoted to sports.<sup>68</sup> The Supreme Court has never upheld a content-based restriction of this sort in a comparable context.<sup>69</sup> In fact, the entire train of First Amendment doctrine stands for the proposition that such content-based restrictions are subject to strict scrutiny.<sup>70</sup> Strict scrutiny is, of course, ordinarily fatal in fact; for this reason, courts routinely find a likelihood of success on the merits whenever strict scrutiny is to be applied.<sup>71</sup>

Even if strict scrutiny were not required, and the regulation were subject to intermediate scrutiny, Comcast *still* would be highly likely to succeed on the merits. Although the interests Section 616 was designed to serve—promoting competition and diversity in the programming

---

<sup>67</sup> *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (internal quotation marks omitted).

<sup>68</sup> *See Initial Decision* ¶ 106; *see also id.* ¶¶ 25, 27, 29–36. The Initial Decision discusses other factors, such as advertising, but its analysis makes clear that these, too, ultimately relate to the networks’ content. For example, the Initial Decision’s reliance on a modest number of common advertisers among the three networks is based on the fact that advertisers “allocate advertising dollars into different budgets that are based upon different types of program content, *e.g.*, sports, general lifestyle, and news,” and the three networks “directly compete against each other for advertising specifically funded from budgets allocated to sports programming.” *Id.* ¶ 47.

<sup>69</sup> *Turner I*, 512 U.S. at 643–52; *id.* at 643–44 n.6 (reserving judgment on whether must-carry provision that did depend partly on content is content-based); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 223–24 (1997) (“*Turner IP*”) (same); *see also Time Warner v. FCC*, 93 F.3d 957, 969, 977–78 (D.C. Cir. 1996), *reh’g denied*, 105 F.3d 723 (D.C. Cir. 1997).

<sup>70</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (stating that “[c]ontent-based regulations are presumptively invalid”); *see also United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812–13 (2000); *Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984) (“Only rarely are statutes sustained in the face of strict scrutiny. . . . [S]trict-scrutiny review is strict in theory but usually fatal in fact.” (internal quotation marks omitted)).

<sup>71</sup> *See, e.g., Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 250 (D.P.R. 2002) (“Because regulations subject to strict scrutiny almost never survive that analysis, Plaintiffs have thus shown a likelihood of success on the merits.”).

market<sup>72</sup>—were once regarded as “important,”<sup>73</sup> both have since become less substantial. The importance of those interests was premised on the “bottleneck, or gatekeeper, control” of cable operators,<sup>74</sup> but today “[c]able operators . . . *no longer have*” such “bottleneck power.”<sup>75</sup> To the contrary, many viewers can choose between multiple MVPDs, including nationwide distributors DirecTV and Dish Network. If an MVPD could gain a competitive advantage by broadly distributing Tennis Channel, it would do so. And, to the extent that there are still situations where cable companies *do* enjoy significant bottleneck power, the Initial Decision’s lax interpretation of Section 616’s competitive-restraint element, if upheld by the Commission, would deprive the provision of the narrow tailoring essential to its constitutionality even in those situations.<sup>76</sup>

These constitutional infirmities are the direct result of the Initial Decision’s aggressive and unprecedented construction of Section 616. Under a proper interpretation of that statute, an analysis of *intentional* discrimination would substitute for the Initial Decision’s content-based analysis, and a rigorous application of the statute’s competitive-restraint requirement would

---

<sup>72</sup> *2011 Report & Order*, 26 FCC Rcd at 11517–18 ¶ 32.

<sup>73</sup> *Turner II*, 520 U.S. at 189–90; *Time Warner*, 93 F.3d at 969.

<sup>74</sup> *Turner I*, 512 U.S. at 656.

<sup>75</sup> *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (emphasis added).

<sup>76</sup> *Cablevision v. FCC*, 649 F.3d 695, 711 (D.C. Cir. 2011) (under intermediate scrutiny, government must show that its restriction “will in fact advance [the government’s] interests” and “will in fact alleviate” the “harms” to those interests “in a direct and material way” (internal quotation marks omitted)). The restriction also fails narrow-tailoring analysis because it is poorly designed to advance any competitive harm purportedly suffered by Tennis Channel. So far as the Initial Decision is concerned, Comcast can drop Tennis Channel altogether, so long as it also abandons Golf Channel and Versus. *Initial Decision* ¶ 103. Far from enhancing competition and diversity, a remedy under which Comcast can exclude Tennis Channel entirely from its systems, so long as it also excludes additional networks, would undermine those interests—potentially depriving Comcast’s subscribers of *three* networks. That restriction may serve some conceivable purpose, but it is not narrowly tailored to the interests that Section 616 was designed to serve.

ensure that it was more narrowly tailored to the goal of promoting competition. Yet the Initial Decision casually brushes these limitations on Section 616 aside. It applies the statute to remedy an illusory injury, engages in an openly content-based analysis, and ultimately places a dramatic limitation on Comcast’s protected speech—all as a penalty for exercising its constitutional speech and press rights. This result should not be allowed to go into effect without the Commission first conducting a proper First Amendment analysis.

**4. The Initial Decision Imposes An Indefinite Remedy That Fails To Make Clear The Limits Of Comcast’s Obligation**

Finally, even if the Commission upholds the Initial Decision’s finding of discrimination, despite its many errors, the Commission should certainly pause at the remedy, which is remarkable both for its sweep and for its failure to provide expressly that there can be no increase in the aggregate license fee that Comcast already pays Tennis Channel.

The latter failure is directly attributable to the Initial Decision’s mistaken belief that Comcast may “choose” not to provide wider carriage by limiting its own speech.<sup>77</sup> Here, even assuming that the Initial Decision properly applies Section 616, Tennis Channel’s purported injury would be fully cured by providing it the broader distribution it claims to need to compete effectively, without compelling Comcast to pay additionally for a level of carriage that it has not agreed to and must provide solely by dint of governmental compulsion. And the Initial Decision’s separate requirement that Tennis Channel be given “equitable” channel placement vis-à-vis Comcast’s affiliates is likewise unconnected from the supposed competitive injury, while being especially onerous to implement and very likely to affect adversely the rights of

---

<sup>77</sup> See *Initial Decision* ¶ 121 n.359 (finding it “not necessary for this order to contain any prescription of license fees in this case” because the order does not order Comcast “to carry . . . Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers” (internal quotation marks omitted)).

innocent third parties. Because, contrary to the Initial Decision’s apparent understanding, Golf Channel and Versus are not located near each other in every Comcast system, this equitable placement remedy will also raise intractable questions regarding how best to comply.<sup>78</sup> At the very least, the channel-placement aspect of the remedy should be stayed pending appellate review of the Initial Decision’s errors.

**B. Comcast Will Be Irreparably Harmed Absent A Stay**

If the Initial Decision is allowed to go into effect, Comcast will suffer significant, immediate, and irreparable injuries, beginning with a violation of its First Amendment rights. “It has long been established that the loss of constitutional freedoms, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’”<sup>79</sup> The Initial Decision impermissibly conditions Comcast’s speech through its own networks on broader carriage of Tennis Channel. Regardless of whether Comcast chooses to restrict its own speech or engage in compelled speech (and, in reality Comcast has no choice), its rights will be irretrievably lost. A later reversal of the Initial Decision might stop that violation prospectively, but it cannot undo the loss of valuable freedoms that has already occurred.

The negative effects of the decision on Comcast’s business will also be momentous and impossible to undo.<sup>80</sup> The complexity and cost of implementing the Initial Decision will be driven, in part, by Comcast’s unique history and size. Comcast serves 22.5 million customers

---

<sup>78</sup> Declaration of Jennifer Gaiski (“Gaiski Decl.”) ¶¶ 22, 25 (attached as Exhibit A).

<sup>79</sup> *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

<sup>80</sup> See, e.g., *In the Matter of CBS Commc’ns Servs., Inc. & Centennial Wireless PCS License Corp.*, 13 FCC Rcd 4471, 4479–80 ¶ 19 (1998) (“[T]he threat of unrecoverable economic loss does qualify as irreparable harm.” (internal quotation marks omitted)); see also, e.g., *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010).

located in 39 states and the District of Columbia.<sup>81</sup> Because Comcast, unlike some other MVPDs, grew through acquisition of multiple cable systems, its cable systems are remarkably diverse.<sup>82</sup> Comcast’s cable systems have more than [REDACTED] different channel configurations.<sup>83</sup> And, they differ considerably in their mix of analog and digital signals.<sup>84</sup> Comcast’s cable systems are also regulated by over 6,450 local franchise authorities,<sup>85</sup> leading to a complex patchwork of applicable regulations.

Comcast could not comply with the Initial Decision by narrowing its distribution of Golf Channel and Versus without irritating subscribers and causing a loss of goodwill, as both are popular networks that are broadly distributed by competing MVPDs, that attract substantial numbers of viewers, and that have been broadly distributed for a long period of time. And, in any event, Comcast is contractually obligated to carry Golf Channel and Versus broadly. Comcast therefore will have no choice but to comply with the Initial Decision by providing Tennis Channel with similarly broad distribution that endeavors to place Tennis Channel “equitabl[y]” with respect to those two channels.<sup>86</sup>

The process of moving a network to a broad level of distribution, referred to as “melting,” involves significantly more than “flipping a switch.”<sup>87</sup> Engineers would have to, at a minimum, “remap” more than [REDACTED] of Comcast’s channel lineups across the country and update multiple databases, while Comcast would have to take steps to comply with local

---

<sup>81</sup> Gasiki Decl. ¶ 7.

<sup>82</sup> Gaiski Decl. ¶ 13.

<sup>83</sup> *Id.*; Declaration of Jay Kreiling (“Kreiling Decl.”) ¶ 21 (attached as Exhibit B).

<sup>84</sup> Gaiski Decl. ¶ 12.

<sup>85</sup> Kreiling Decl. ¶ 12.

<sup>86</sup> *See* Bond Cross, Apr. 29, 2011 Tr. 2160:10–2161:17; Tennis Channel Exh. 139 (Bond Dep.) 220:8–24.

<sup>87</sup> Kreiling Decl. ¶ 5.

regulations that require waiting periods and particular types of notice to those affected.<sup>88</sup>

Networks often pay substantial fees to induce MVPDs to undergo this process, and yet the Initial Decision would effectively compel Comcast to provide this benefit to Tennis Channel for free.<sup>89</sup>

The Initial Decision’s mandate of “equitable” channel placement multiplies the burden on Comcast many times over. Contrary to the Initial Decision’s apparent assumption, Golf Channel and Versus are not always located near each other.<sup>90</sup> And, the majority of Comcast’s digital systems have assigned Golf Channel and Versus to channel numbers between 1 and 99, the channel range where the oldest and most established networks are generally located.<sup>91</sup> Few if any usable, vacant slots remain in the 1-to-99 range in most systems, and where they exist they may be nowhere near Golf Channel or Versus, let alone both.<sup>92</sup> Consequently, if the Initial Decision’s requirement of “equitable” channel placement is interpreted to require that Tennis Channel be placed *near* Golf Channel and Versus, Comcast may be required to displace some of those older, more established networks to make room.<sup>93</sup> In some systems these established channels cannot be moved at all because they have contractual rights to their channel positions or “must-carry” rights conferred by statute that dictate their channel positioning.<sup>94</sup> The combination of these difficulties would leave few options for creating space for Tennis Channel, with each move creating a “domino effect” of cascading ramifications as every displaced channel

---

<sup>88</sup> Gaiski Decl. ¶ 28; Kreiling Decl. ¶ 6.

<sup>89</sup> See Comcast Exh. 76 (Donnelly Written Direct) ¶ 18; Donnelly Direct, May 2, 2011 Tr. 2494:21–2495:17; Comcast Exh. 75 (Bond Written Direct) ¶¶ 28–29; Bond Direct, Apr. 29, 2011 Tr. 1962:5–10.

<sup>90</sup> Gaiski Decl. ¶¶ 22, 25.

<sup>91</sup> Gaiski Decl. ¶¶ 16–17.

<sup>92</sup> Gaiski Decl. ¶¶ 18–19, 22–24.

<sup>93</sup> Gaiski Decl. ¶ 19.

<sup>94</sup> Gaiski Decl. ¶¶ 20–21, 24.

must be relocated to another channel position.<sup>95</sup> This process must then be repeated for each unique channel lineup.

Comcast will be required to expend significant time and resources to mitigate the negative effects of this process on customers and programming vendors. Mass rearrangement of channels may lead both to customer confusion and harm to displaced networks, which risk lower viewership and decreased advertising revenue when casual and loyal viewers alike are unable easily to find them where they have come to expect those networks to be.<sup>96</sup> In addition to complying with minimal notice requirements set by regulators, Comcast will have to launch extensive advertising initiatives to explain the changes to viewers.<sup>97</sup> Even despite such efforts Comcast may witness a surge in calls from confused customers, in turn degrading the quality of customer-service and drastically increasing Comcast's customer-service costs: Each customer-service call on average costs Comcast ██████████, and Comcast also must prepare its tens of thousands of customer-service representatives to address the specific questions customers likely will have about the channel changes in each system, meaning the potential aggregate expense may be in the millions.<sup>98</sup> And, even with those steps, consumer confusion, and a concomitant loss of goodwill, may inevitably result.<sup>99</sup> Further adding to these burdens, more than 100 Comcast employees must update multiple databases, directories, and channel guides, and provide

---

<sup>95</sup> Gaiski Decl. ¶¶ 16, 19.

<sup>96</sup> Gaiski Decl. ¶¶ 6, 17, 19.

<sup>97</sup> Kreiling Decl. ¶¶ 9, 11–17; Gaiski Decl. ¶ 26.

<sup>98</sup> Kreiling Decl. ¶¶ 18–19; Gaiski Decl. ¶ 28.

<sup>99</sup> Kreiling Decl. ¶¶ 9, 18; Gaiski Decl. ¶¶ 17, 19; *see also* *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 13 (1st Cir. 2000) (“Because injuries to goodwill and reputation are not easily quantifiable, courts often find this type of harm irreparable.”).

updated data to private media-guide vendors.<sup>100</sup> Each affected network also must be remapped in every system, and physical engineering work may be required.<sup>101</sup>

All of these changes will be exceedingly difficult to unwind when, as is likely, the Initial Decision is overturned or modified on review. The entire process would need to be repeated in reverse, meaning all these costs would be at least *doubled*.<sup>102</sup> Comcast would have to take even more costly and extensive steps to maintain its relationships with other programming networks, some of which could be displeased to be relocated yet again. And, additional steps would be required to mitigate a heightened strain on customer relations and to minimize disruption to subscribers. Absent adequate customer outreach, those who now subscribe to the expanded basic tier—even those who currently have no interest in Tennis Channel—could be displeased if access to Tennis Channel, or any other channel that is currently distributed on an optional tier, were granted and then rescinded.<sup>103</sup> The cost of engaging in the necessary careful and sensitive outreach will compound the burden to Comcast.

Moreover, these costs will be magnified considerably if the Initial Decision is ultimately held to require that Comcast pay additional license fees to Tennis Channel. Comcast is aware of no mechanism under which it could recover those fees if the Initial Decision was ultimately reversed. And, those license fees may require increases in the price of service that, unless properly mitigated, threaten to undermine customer goodwill.

---

<sup>100</sup> Kreiling Decl. ¶ 20.

<sup>101</sup> Gaiski Decl. ¶ 26; Kreiling Decl. ¶¶ 20–21.

<sup>102</sup> Gaiski Decl. ¶¶ 31–34.

<sup>103</sup> Gaiski Decl. ¶¶ 32–33.

**C. Tennis Channel Would Not Be Injured By A Stay**

While withholding a stay would impose severe and irreversible harms on Comcast, Tennis Channel will suffer *no* injury if a stay is granted. A stay will do nothing more than maintain the status quo pending Commission review.<sup>104</sup> Tennis Channel is not injured by the status quo: Tennis Channel affirmatively bargained for the status quo in 2005 and did not file a legal challenge to it until 2010. Tennis Channel itself claims that it has thrived in the interim, and its subscriber count on Comcast has *grown* since it filed its complaint, despite carriage on Comcast’s sports tier. There is no argument that its “continued placement on the Sports Tier threatens its ability to survive.”<sup>105</sup> Tennis Channel cannot plausibly assert that it will be irreparably injured if it is held to the terms of its own voluntary agreement pending review—terms that are consistent with those that Tennis Channel has been able to obtain in the competitive marketplace. Holding a party to the terms of its contract can hardly constitute irreparable harm.

**D. The Public Interest Favors A Stay**

The public interest favors a stay because “it is always in the public interest to prevent a violation of a party’s constitutional rights.”<sup>106</sup> This is particularly true in the context of the First Amendment, as the public has a substantial interest in limiting government intrusion in the marketplace for content. The First Amendment’s premise is that the public interest is best served when content can rise or fall on the basis of individual preference, rather than governmental fiat.

---

<sup>104</sup> *Nat’l Treasury Employees Union v. FLRA*, 712 F.2d 669, 671 (D.C. Cir. 1983 (explaining that the “sole purpose” of a stay “is to preserve the status quo while an appeal is in the offing or in progress”).

<sup>105</sup> *Initial Decision* ¶ 92.

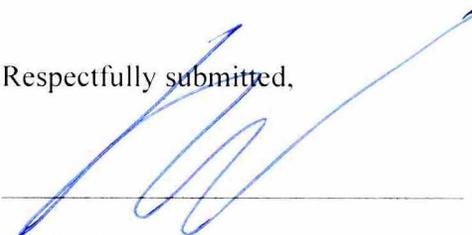
<sup>106</sup> *See Déjà Vu of Nashville, Inc. v. Metro. Gov’t of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001).

Absent a stay, the Initial Decision will also impose severe and unwarranted burdens on Comcast's customers and on unaffiliated networks that have no part in this dispute. As noted above, the practical difficulties in "melting" Tennis Channel, and particularly the difficulties attendant to compliance with the Initial Decision's "equitable placement" direction, will not merely inflict steep and unwarranted burdens upon Comcast, but are also likely to be felt by subscribers. When viewers are unable to find channels where they expect them to be located, they will be forced to spend time and energy (including, potentially, calling customer service) to understand the change. Unnecessary confusion and frustration will result. Other networks, displaced to make room for Tennis Channel, may also suffer damage to their business as a result of decreased viewership and advertising revenue. The public interest suffers when such inconvenience, disruption and expense is foisted upon the public on the basis of so weak an analytical foundation as the Initial Decision provides here.

### **CONCLUSION**

For the foregoing reasons, Comcast requests that the Commission stay the effectiveness of the Initial Decision pending the conclusion of any and all review, including, if the Commission affirms the Initial Decision, review by the courts. At minimum, however, the APA requires the Commission to stay the Initial Decision pending the exhaustion of Comcast's administrative remedies.

Respectfully submitted,



Dated: January 25, 2012

Kathryn A. Zachem  
*Regulatory Affairs*

Lynn R. Charytan  
*Legal Regulatory Affairs*

COMCAST CORPORATION  
300 New Jersey Avenue, Suite 700  
Washington, D.C. 20001  
(202) 379-7134

Michael P. Carroll  
David B. Toscano  
DAVIS POLK & WARDWELL LLP  
450 Lexington Avenue  
New York, N.Y. 10017  
(212) 450-4000

James L. Casserly  
Michael D. Hurwitz  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, NW  
Washington, D.C. 20006  
(202) 303-1000

David H. Solomon  
J. Wade Lindsay  
WILKINSON BARKER KNAUER, LLP  
2300 N Street, NW, Suite 700  
Washington, D.C. 20037  
(202) 783-4141

Miguel A. Estrada  
Cynthia E. Richman  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 955-8500

*Attorneys for Defendant Comcast  
Cable Communications, LLC*

**CERTIFICATE OF SERVICE**

I, David B. Toscano, do hereby certify that on this 25<sup>th</sup> day of January, 2012, I caused the foregoing Conditional Petition for Stay to be served upon the following individuals by hand-delivery and electronic mail.

Stephen A. Weiswasser  
Paul W. Schmidt  
Robert M. Sherman  
Leah E. Pogoriler  
Covington & Burling LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004

C. William Phillips  
Covington & Burling LLP  
620 Eighth Avenue  
New York, New York 10018

Gary Oshinsky  
Investigations and Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, SW, Suite 4-C330  
Washington, DC 20554

William Knowles-Kellett  
Investigations and Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, Pennsylvania 17325



David B. Toscano

# **Exhibit A**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC

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	)	

**DECLARATION OF JENNIFER GAISKI**

1. My name is Jennifer Gaiski. My business address is One Comcast Center, Philadelphia, Pennsylvania 19103.
2. I am Senior Vice President of Content Acquisition for Comcast Cable Communications, LLC (“Comcast Cable” and, together with its affiliates, “Comcast”). I have held that title since 2007.
3. In my position at Comcast, I am responsible for reviewing carriage proposals from video programming networks (or channels), negotiating and administering carriage agreements with those networks, and coordinating operations and communications with local Comcast cable systems.
4. I make this declaration in support of Comcast’s Conditional Stay Petition. The statements herein are based on personal knowledge or information I obtained during my employment by Comcast, and my review of certain documents. I am not a lawyer, and I do not purport to speak to what the Initial Decision would require. Instead, I address what I understand to be actions possibly required by that decision.

## **I. Summary**

5. As I discuss below, changing Tennis Channel's channel placement and level of carriage, and launching Tennis Channel on some systems, would impose a heavy burden on Comcast, harm Comcast's customers, and disrupt the carriage of other programming networks carried by Comcast.

6. More specifically, making these changes would require Comcast to comply with notice requirements as required by law and by company practice, train customer service representatives, update websites and electronic guides, and remap more than [REDACTED] digital channel lineups across the country. Comcast also would have to dislocate networks from long-established channel positions, which would harm those networks and confuse consumers – ultimately damaging Comcast's relationship with both. Comcast could be forced to find bandwidth in already overtaxed systems to support launches of Tennis Channel or its high-definition ("HD") feed. Should a court eventually determine that Comcast should not have been required to make these costly and burdensome changes, Comcast most likely would seek to unwind them, which would make all the initial costs pointless, and which would impose the same costs a second time.

## **II. Background**

7. Comcast Cable is a multichannel video programming distributor ("MVPD"). MVPDs are entities engaged in the business of making multiple channels of video programming available to subscribers or customers. Examples include traditional cable operators such as Comcast, satellite distributors such as DirecTV and Dish Network, and phone companies such as AT&T U-Verse and Verizon FiOS. Comcast serves approximately 22.5 million video subscribers in 39 states and the District of Columbia. Comcast's cable systems have a wide

range of channel capacities, from systems with 35 channels to systems with more than 300 channels.

8. Comcast, like other MVPDs, offers different bundles – also known as tiers or packages – of service to customers. Each package contains a different selection of networks that customers receive in exchange for a monthly subscription fee. Because MVPDs pay license fees to networks that typically are based on how many subscribers receive the network each month, offering a variety of packages allows customers who want access to more channels to pay for them, while controlling costs for other customers.

9. By law, all subscribers to Comcast receive at least the level of service referred to as Broadcast Basic or B1, which contains the broadcast networks (e.g., CBS, Fox), and frequently contains home shopping networks, religious channels, and certain governmentally mandated programming. Expanded Basic or B2 refers to a level of analog service that contains many of the cable networks launched in the 1980s and 1990s as a result of cable deregulation, including Golf Channel and Versus (which was recently rebranded as NBC Sports Network). For systems on which this tier has been digitized, it is commonly referred to as Digital Starter, but can also be referred to as Digitized Expanded Basic or D0. Approximately [REDACTED] of Comcast's 22.5 million subscribers receive at least Expanded Basic or Digital Starter along with Broadcast Basic.

10. The Digital Preferred or "D1" level of service, which allows access to approximately 65 more networks than Digital Starter, is received by approximately [REDACTED] of Comcast subscribers, *i.e.* [REDACTED] subscribers. Subscribers who opt for the Digital Preferred level of service generally pay approximately \$18 dollars extra per month for that tier or package of services, depending on the system and other factors.

11. The Sports Tier or Sports Entertainment Package (“SEP”) is a group of approximately 14-18 mostly sports-related channels, which Comcast makes available to almost all of its subscribers for an additional monthly fee of approximately \$7-9 per month. Tennis Channel is generally offered on SEP, which approximately [REDACTED] of Comcast subscribers have chosen to receive, *i.e.* [REDACTED] either because they have specifically purchased the Sports Tier as part of their package of services or because they have purchased the “Premier” video package, which includes the Sports Tier as well as a number of additional services. Some Comcast systems have also chosen to carry Tennis Channel on D1, and some do not carry Tennis Channel at all. In total, Tennis Channel is carried to a total of approximately [REDACTED] Comcast subscribers.

12. Channel signals can be transmitted to customers in either analog or digital form. Currently, approximately [REDACTED] of Comcast subscribers receive their channels only in a digital format. The vast majority of subscribers, however, are served by systems delivering a combination of analog and digital signals.

13. Comcast has more than [REDACTED] different channel configurations, also known as “lineups.” This large number of different channel lineups results from a number of factors, but is mainly due to Comcast’s acquisition of cable systems over the past fifteen years. In order to avoid disruption to customer viewing habits and expectations, Comcast rarely makes large-scale changes to channel placements on the lineups of acquired systems, and, thus, as system capacity has increased, new networks have been more likely added at higher channel numbers rather than displacing existing channel placements. Additionally, the channels on which newly launched networks are placed are generally decided by each individual local cable system. In practice, this means that one Comcast customer might find a network, such as ESPN, on channel 33, while

across town, another Comcast customer would watch ESPN on channel 24. In contrast, many of Comcast's competitors, such as DirecTV and AT&T U-verse, did not form or expand their platforms in the same manner due to factors such as their more recent entrances into the marketplace and different technology. (For example, DirecTV and Dish Network beam their signals to subscribers from a constellation of satellites in space.) Thus these competitors are able to display largely uniform nationwide channel lineups; for example, Verizon FiOS carries ESPN on channel 70 uniformly across the country in each of the communities it serves. Those competitors can also effect channel changes to all (or most of) their customers with one change. By contrast, Comcast, with its community-based lineups, cannot implement an omnibus channel placement change across its systems. Each individual lineup must be changed separately.

14. Many networks, including Tennis Channel, Golf Channel and Versus provide Comcast with two different feeds of their programming, one in standard definition ("SD") and one in HD. An HD feed is a digital transmission of video programming with substantially improved video and audio quality as compared to the SD feed of the same network. As a result, Comcast can put 10-12 SD signals, or 2-3 HD signals, in the same amount of bandwidth.<sup>1</sup>

15. When assigning channel numbers to a network, local cable systems assign at least one channel number to a network's SD feed and a second, higher channel number to that network's HD feed. In some cases, an SD feed is carried in more than one package of services (for example, in several Comcast markets, Tennis Channel is carried on both D1 and the Sports Tier), and, as a result, the SD feed will actually be placed on more than one channel number.

---

<sup>1</sup> Bandwidth is the capacity available for delivery of content (voice, video and data) through a cable system to the customer's home. Although Comcast has rebuilt the cable systems serving approximately [REDACTED] of its subscribers such that they can deliver a greater number of channels in a more efficient manner, the launch of new technologies such as HD, 3-D, video on demand, and high speed internet "eats" away at that bandwidth such that only a limited number of channels can actually be carried, even by a "rebuilt" system.

Comcast generally carries the SD and HD feeds for Golf Channel and Versus, and as a result, on most systems, each of these networks appears on two different channels – one for its SD feed, and one for its HD feed. Tennis Channel HD is also carried in the majority of Comcast systems.

**III. Assigning Tennis Channel a New Channel Number on Hundreds of Cable Lineups Would Be Burdensome to Comcast, and Would Be Disruptive to Customers and Other Networks**

16. Changing Tennis Channel’s channel number would be a complex, time-consuming, and costly undertaking even on channel lineups where there are open slots that might accommodate a new placement for Tennis Channel. In cases where there are no blank slots for Tennis Channel, we would have to displace another network in favor of Tennis Channel, which could lead to a chain reaction, or “domino effect” of channel changes that would be highly disruptive for Comcast’s customers. Adding even a single network to a channel block that has no unoccupied display channels could require the relocation of multiple additional networks as each displaced network has to find a new home. As discussed below, this is particularly problematic in channel positions 1–99 – where Golf Channel and Versus are located on the vast majority of Comcast systems – because Comcast has the least flexibility to move networks in this range, and viewers have the most settled expectations about these channels. Tennis Channel, like Golf Channel and Versus, can be carried on up to three channels in some systems, however, and might need to be moved from all of those positions to channels near Golf Channel or Versus. This would only multiply the burden on Comcast, the confusion to consumers and the disruption to the relocated programming networks.

17. In general, channel realignments are disfavored by customers because they interfere with established viewing patterns and customer expectations. Changing networks’ channel placement confuses viewers accustomed to finding networks in particular locations, and causes them to be dissatisfied with the cable operator when they cannot easily find their favorite

networks. Thus, moving networks from their customary positions has the potential to cause significant confusion to Comcast's customers as they are no longer able to find their favorite networks in their expected locations. Therefore, Comcast strives to keep channel changes to a minimum, and even where a network moves from one tier to another, it is atypical for its channel location to change. In the vast majority of systems, the SD feeds of Golf Channel and Versus are assigned to channels in the 1–99 range, and thus placing Tennis Channel near Golf Channel and Versus would likely require moving Tennis Channel into this range as well. Yet local systems specifically try to avoid changing channel placements in the 1–99 range as much as possible for the reasons set forth below.

18. First, networks that launched years or decades ago already have taken up most, if not all, of the channel positions in the 1–99 range on many channel lineups. By 2005, when Comcast launched Tennis Channel on many systems, older networks already occupied most of the channel positions in the 1–99 channel range. Many of these older networks are the most established and popular networks, and consumers have come to expect them at a particular channel position. Local cable systems generally avoid relocating these networks from their established channel positions – even when other networks offer financial or other incentives to do so – due to the fact that such moves cause customer confusion and frustration.

19. As a result of the lack of open space in the 1–99 range, channel realignments in that range can cause a “domino effect” throughout a cable system's lineups, as the cable operator has to find a place for channels that are moved to make room for the newly realigned channel. For Comcast to move Tennis Channel into a channel position below 100, it might have to displace and relocate another network in the 1–99 range, and Comcast would then in turn need to find room for that displaced network somewhere in the 1–99 range, and so forth. The more

networks that change channel position, the more customer confusion would result. Additionally, programming networks also have told me that moving a network from its long-established channel position can have a negative effect on the network's Nielsen ratings, which could result in a possible advertising revenue loss for the network. These results would damage our relationships with such networks, harm the networks' relationships with their viewers, and hurt Comcast's relationship with our customers.

20. Further complicating any efforts to place Tennis Channel in the 1–99 range, the SD channels in the 1–99 range include broadcast channels that have “must-carry” rights (established by federal statute) and are required to be carried in their over-the-air channel positions or other positions where they have had historical carriage, as well as public, educational and government (“PEG”) channels carried at channel positions specified or expected by local franchise authorities (“LFAs”).<sup>2</sup>

21. Additionally, a number of networks, including broadcasters and home shopping networks, have a contractual right or commitment to their current channel placement in the 1–99 range and/or pay Comcast for certain channel placement. Additionally, many networks (mostly sports networks) prohibit us from moving their channel location more than once a year, and sports networks often prohibit us from moving their channel placement at all during their season (including during post-season playoff games). This both makes it difficult to place a network in a specific location in the 1–99 range and obligates Comcast to determine whether moving Tennis Channel to a particular channel number would conflict with any programmers' rights to that channel number. Even if changing a network's channel placement would not conflict with a specified contractual obligation or commitment, Comcast most likely would have the

---

<sup>2</sup> LFAs are local or state units of government that regulate cable television, including Comcast's cable systems.

administrative burden of informing any networks displaced by Tennis Channel of changes to their channel positions in the 1–99 range (in addition to the burdens of informing subscribers discussed below).

22. Further, in many channel lineups, it would be impossible for Comcast to place Tennis Channel next to *both* Golf Channel and Versus in the 1–99 range simply because Golf Channel and Versus are not located adjacent or even close to each other. For such lineups, Comcast would need to determine what networks are located in between Golf Channel and Versus to understand what the best placement might be, with the risk that Tennis Channel might disagree with Comcast’s choice. Additionally, Golf Channel and Versus have a second channel placement at a higher channel number for their HD feeds. In these higher channel ranges, Golf Channel and Versus also are not always located near each other. Comcast would thus have to determine which channel placement might be best for Tennis Channel’s HD feed in the channel ranges above 100, again running the risk that Tennis Channel would disagree with Comcast’s judgment.

23. By way of example, in an Atlanta, Georgia lineup, channel positions 44 through 49 on Comcast’s systems are occupied by Versus, Comcast Sports Southeast, ESPN, ESPN2, FOX Sports South, and Golf Channel, respectively. To the extent the Initial Decision could be read to require Comcast to place Tennis Channel adjacent to this channel grouping, it could very well require Comcast to displace either FX (at 43) or MTV (at 50), which are both highly watched networks. Moving these networks may, in turn, require moving other networks, which would lead to the displacement and relocation of additional networks and further disruption to customers. This process is burdensome both in terms of work required and in terms of the required dealings with consumers and affected networks.

24. Additionally, in an Albuquerque, New Mexico and a Portland, Oregon lineup, Golf Channel and Versus are directly adjacent, but the nearest vacant channel positions are, respectively, 40 and 28 channel positions away. Likewise, in a Baltimore, Maryland lineup, Golf Channel and Versus are adjacent with the closest vacant channel position 51 channels away. And in a Prince William County, Virginia lineup, Versus is located at channel 13, Golf Channel at channel 38, and channel 67 is the nearest vacant channel. (*See* Exh. 1, attached hereto.) To the extent the Initial Decision could be read to require Comcast to place Tennis Channel adjacent to Golf Channel or Versus, it could require Comcast to displace local affiliates of broadcast networks – which Comcast may not be permitted to do – or require Comcast to breach existing contractual commitments (or to avoid such a breach, move several channels to make room for only Tennis Channel), or displace established networks like ESPN or TBS from their long-standing channel positions.

25. Even if these complexities were worked out in the 1–99 range, Comcast could also have to repeat the same exercise for every other spot on its lineups where Golf Channel or Versus are located, with many of the same issues. For example, in West Palm Beach, Florida and North Potomac, Maryland systems, Golf Channel and Versus are more than 300 channel numbers apart, with a variety of sports, news, and general interest networks in between them.

26. To execute these changes across its lineups, Comcast would be forced to bear a number of costs in order to follow local laws, maintain customer satisfaction, and avoid confusion. For example, Comcast is required by LFA agreements and other regulators to provide advance notice to customers when a network changes tiers (even if the network will be more broadly distributed) or when a network changes channel position. Several thousand separate LFAs regulate Comcast's systems, and their notice requirements vary widely. In addition,

Comcast would also engage in its own notification efforts to minimize customer confusion in connection with channel placement changes. Both forms of notice are described in detail in Jay Kreiling's Declaration. (*See* Declaration of Jay Kreiling dated Jan. 24, 2012 ("Kreiling Decl.") ¶¶ 9, 11-17.) Further, Comcast would have to produce new rate cards, update websites and electronic guides, and have engineers remap more than [REDACTED] digital channel lineups. (*See* Kreiling Decl. at ¶¶ 20-21.)

**IV. Moving Tennis Channel to Digital Starter or Launching Tennis Channel or Its HD Feed in Certain Systems Would Be Costly and Could Require Comcast to Drop Programming**

27. Moving Tennis Channel from the Sports Tier to the Digital Starter tier (which, in industry terminology, is called "melting")<sup>3</sup> – or launching Tennis Channel for the first time on the Digital Starter tier – would be a complicated and burdensome process, as well.

28. As with channel placement changes, I would give notice of any tier changes to local systems at least 90 days in advance to allow for all of the work that must be undertaken in order for customers to be properly notified pursuant to LFAs requirements. Further, in order to prevent customer confusion and to mitigate disruption to consumers during the process of melting Tennis Channel, Comcast would need to train approximately 25,000 customer service representatives to respond to calls about the channel changes for each of the 25-30 channel lineups for which they may be individually responsible, and update websites and electronic guides. Comcast would also have to have engineers remap more than [REDACTED] digital channel lineups across the country.

29. Moreover, approximately [REDACTED] digital systems, representing [REDACTED] subscribers, do not carry Tennis Channel at all, and approximately [REDACTED] HD-enabled systems

---

<sup>3</sup> When a network is moved from a less penetrated tier of service to a more highly penetrated tier, it is referred to as a "melt" or "melting" the network.

do not carry Tennis Channel's HD feed. If Comcast were required to launch the network, or at least its HD feed, on those systems, the cost to Comcast would be even higher and the burden even more onerous. While some Comcast systems have bandwidth available to launch new networks, others have very little, and finding sufficient bandwidth is significantly more complicated when launching an HD feed in addition to an SD feed. As previously explained, an HD network feed takes up approximately four times as much bandwidth as the digital network SD feed.<sup>4</sup> The most common way to create extra bandwidth in systems where there is very little is to postpone the scheduled launch of new networks or new technology (such as faster high speed internet, interactive television, video-on-demand, or 3-D television), sometimes for years. Ultimately, some systems might be so bandwidth strapped that long-standing networks may need to be dropped to launch a new one, SD or HD.

30. Additionally, [REDACTED] of the systems that do not yet carry Tennis Channel, representing [REDACTED] subscribers, have little to no bandwidth left to launch new channels. Systems such as those have a very small plant capacity and may be located in rural areas or serve one apartment building, and may serve as few as 15 subscribers. Many of those systems are not connected to Comcast's main fiber optic backbone, and instead receive their cable signals through other means. As a result, those systems have launched all of the channels they can support and are frozen with their existing channel lineups until such time as they might be rebuilt to increase their channel capacity. Rebuilding these systems would require Comcast to make a large economic investment, which frequently would not be economically feasible because of the small number of subscribers typically served by each of these systems. (*See* Kreiling Decl. ¶ 24.)

---

<sup>4</sup> An analog network feed requires 2 to 3 times the bandwidth required for an HD network feed.

**V. It Would Be Difficult, Costly, and Disruptive to Consumers to Undo Changes to Tennis Channel's Tier and Channel Placement**

31. If the Initial Decision were reversed on grounds that Comcast is not required to do more than it had been doing under its contract with Tennis Channel, then Comcast would have the right to change Tennis Channel's distribution back to the Sports Tier and to restore Tennis Channel's channel number to be adjacent to other sports tier networks, as it generally is today. It would be extremely difficult and costly, however, to unwind the changes described above.

32. First, Comcast would have to contend with multiple changes to Tennis Channel's channel placement, and would have to struggle with a way to minimize customer confusion and frustration. Other networks might also need to be moved again, and those networks would thus be dislocated from their then-current (and known) channel number once more, a frustrating process for all involved but most significantly for the customer.

33. Second, reverting back to Comcast's contractually permitted packaging arrangement would be a tricky process, because customers as a general rule do not like services being removed from their packages. Once customers believe a network is part of the cable package that they pay for, any removal of that network to a higher tier has to be handled sensitively and can spark protest from some consumers. Thus, Comcast would have to bear the costs of customer education about carrying Tennis Channel to fewer subscribers – costs that would be even more onerous than when Comcast made its initial changes to Tennis Channel's placement because Comcast would be withdrawing a service from Digital Starter as opposed to adding one.

34. Finally, Comcast would be required to once again analyze and effectuate any notice requirements, produce new channel lineups, update web sites and channel guides, and train approximately 25,000 customer service representatives.

**REDACTED VERSION**

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Dated: Philadelphia, PA  
January 24 2012

  
Jennifer Gaiski

# Exhibit 1

### Sample Comcast Channel Lineups\*

**Albuquerque, NM**

2	KASA-AN
3	QVC
4	KOB-AN
5	KNME-AN
6	KWBQ-AN
7	KOAT-AN
8	ESPN2
9	ESPN
10	FSN-NM
11	KCHF-AN
12	KASY-AN
13	KRQE-AN
14	KTFQ-AN
15	KLUZ-AN
16	RES-VID
17	KQDF-LP
18	KTEL-AN
19	TVGSS
20	HSN
21	RES-VID
22	KAZQ-AN
23	KNAT-AN
24	EWTN
25	CSPAN
26	CSPAN2
27	PUBACC
28	WGN SATV
29	GALA
30	MSNBC
31	CNBC
32	CNN HN
33	CNN
34	FOXNEWS
35	TWC
36	GOLF
37	NBC Sports
38	SPEED
39	FX
40	TRU TV
41	USA
42	TNT
43	TBS
44	BRAVO
45	A&E
46	HISTORY
47	SPIKE
48	COMEDY
49	GSN
50	G4
51	SYFY
52	NATGEO
53	RES-VID
54	DSC
55	OWN
56	TRAVEL
57	TLC
58	APL
59	ABC FAM
60	DISNEY
61	CARTOON
62	NICK
63	TV LAND
64	TCM
65	AMC
66	HALLMARK
67	LIFE
68	HGTV
69	FOOD
70	STYLE
71	E!
72	BET
73	MTV
74	VH1
75	CMT
76	GAC
77	VACANT

**Baltimore County, MD**

1	TVGI
2	NBC Sports
3	GOLF
4	MASN
5	ESPN2
6	ESPN
7	CSN-MA
8	TCN MA
9	USA
10	ABC FAM
11	JEWELRYTV
12	WMAR-AN
13	QVC
14	WNUV-AN
15	WBFF-AN
16	CSPAN
17	MASN2
18	HSN
19	WHUT-SD
20	ION
21	WBAL-AN
22	WMPB-AN
23	WJZ-AN
24	WUTB-AN
25	GOVTACC
26	WETA-SD
27	AMC
28	TCM
29	BRAVO
30	TNT
31	TBS
32	FX
33	SYFY
34	SPIKE
35	A&E
36	LIFE
37	HISTORY
38	DSC
39	TLC
40	APL
41	OWN
42	CARTOON
43	DISNEY
44	NICK
45	TV LAND
46	HGTV
47	TRAVEL
48	FOOD
49	STYLE
50	EWTN
51	TBN
52	VH1
53	MTV
54	VACANT

**Portland-East, OR**

1	VOD
2	KATU-AN
3	KRCW-AN
4	TVGSS
5	KPXG-AN
6	KOIN-AN
7	DSC
8	KGW-AN
9	WGN SATV
10	KOPB-AN
11	PUBACC
12	KPTV-AN
13	KPDX-AN
14	JEWELRYTV
15	TV MART
16	QVC
17	HSN
18	HALLMARK
19	SHOPNBC
20	KNMT-AN
21	PUBACC
22	PUBACC
23	PUBACC
24	CSPAN
25	CSPAN2
26	TELEMUNDO
27	EDACC
28	EDACC
29	PUBACC
30	GOVTACC
31	KUNP-AN
32	NBC Sports
33	GOLF
34	CSN-NW
35	ESPN
36	ESPN2
37	CSN-NW
38	TLC
39	ABC FAM
40	NICK
41	DISNEY
42	CARTOON
43	APL
44	CNN
45	CNN HN
46	CNBC
47	TWC
48	FOXNEWS
49	NWCN
50	HISTORY
51	TRU TV
52	A&E
53	FX
54	TNT
55	TBS
56	BET
57	SPIKE
58	USA
59	SYFY
60	COMEDY
61	VACANT

**Prince William County, VA**

1	TV DATA
2	LOCORG
3	WDCW-SD
4	WRC-SD
5	WTTG-SD
6	QVC
7	WJLA-SD
8	News Ch8
9	WUSA-SD
10	CSN-MA
11	ESPN
12	ESPN2
13	NBC Sports
14	WFDC-SD
15	WMDQ-SD
16	WPXW-SD
17	HSN
18	EDACC
19	WHUT-SD
20	WDCA-SD
21	TCN MA
22	WMPT-SD
23	GOVTACC
24	CSPAN
25	MASN2
26	WETA-SD
27	TWC
28	CNN HN
29	CNN
30	MSNBC
31	CNBC
32	FOXNEWS
33	FX
34	TRU TV
35	USA
36	MASN
37	SPEED
38	GOLF
39	TBS
40	TNT
41	HISTORY
42	A&E
43	BRAVO
44	TCM
45	LIFE
46	TV LAND
47	NICK
48	DISNEY
49	CARTOON
50	ABC FAM
51	APL
52	TLC
53	DSC
54	TRAVEL
55	HGTV
56	FOOD
57	E!
58	STYLE
59	VH1
60	MTV
61	BET
62	SPIKE
63	COMEDY
64	SYFY
65	EWTN
66	WZDC-SD
67	VACANT

\* Lineups continue beyond the portions excerpted above.

# **Exhibit B**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC

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	)	

**DECLARATION OF JAY KREILING**

1. My name is Jay Kreiling. My business address is One Comcast Center, Philadelphia, Pennsylvania 19103.
2. I am Vice President, Video Services, of Comcast Cable Communications, LLC (“Comcast Cable” and, together with its affiliates, “Comcast”). I have held that title since 2007, prior to which I was Vice President, Product Management, West Division.
3. In my position at Comcast, I am responsible for a variety of video product management initiatives, working closely with the Cable Division’s headquarters, as well as division and regional management, to implement initiatives to achieve the objectives of the video business unit.
4. I make this declaration in support of Comcast’s Conditional Stay Petition. My statements are based on personal knowledge or information obtained while employed by Comcast, and on my review of certain documents. In this declaration, I do not intend to address what steps the Initial Decision would require, but instead to discuss certain steps that I understand potentially may be required.

**I. Summary**

5. Changing Tennis Channel's channel position or moving the network from the Sports Tier to the Digital Starter tier<sup>1</sup> could not be achieved by simply "flipping a switch."

6. Instead, those changes would require Comcast to undertake numerous measures which would be disruptive to its customers and to other networks, as well as burdensome and costly to implement. As detailed below, repositioning Tennis Channel would require Comcast to (i) draft and provide notice to its customers in accordance with the differing requirements of thousands of local franchise authorities and other governing bodies, as well as supplemental and repeated notice that Comcast gives its customers to avoid confusion; and (ii) update interactive programming guides, channel directories, and databases. In addition, if Comcast were required to launch Tennis Channel (or at least the network's high-definition ("HD") feed) in the cable systems that do not presently carry it (as discussed in detail in the accompanying declaration of Jennifer Gaiski, *see* Declaration of Jennifer Gaiski dated Jan. 24, 2012 ("Gaiski Decl.") ¶¶ 29-30), then those launches would require Comcast to identify bandwidth in already bandwidth-constrained systems (including the potential of displacing services currently available to customers, and/or degrading the quality of existing services), and to provide advance notice to customers as it did in connection with repositioning Tennis Channel.

7. Together, these tasks would require Comcast to allocate hundreds of hours of manpower. The burdens on Comcast, including providing notice to customers, would not be undone by a reversal on appeal, but would be compounded by more channel changes and customer notices.

---

<sup>1</sup> Moving a network from a less penetrated tier of service to a more highly penetrated tier of service is referred to as a "melt" or "melting" the network.

**II. Channel Relocations Can Result in Significant Disruption to Comcast, Affected Programming Networks, and Customers**

8. As explained in the accompanying declaration of Jennifer Gaiski, the changes to Tennis Channel's channel placement would cause confusion and disruption for Comcast's customers. (*See* Gaiski Decl. ¶¶ 17, 19.)

9. As discussed below, in connection with these disruptive changes, Comcast is required by law to give to its customers advance notice of changes to our channel lineups. In addition, in order to mitigate confusion to Comcast customers, Comcast also would engage in supplemental communication efforts to ensure that its customers were aware of and prepared for the changes. Even with both of these forms of notice, channel lineup changes would still cause confusion and disruption, leading to a potential spike in call volume to Comcast's customer care centers, which can be expensive and burdensome for Comcast and its customers.

10. Finally, once Comcast locates channel placements for Tennis Channel and any other networks displaced by Tennis Channel, Comcast must engage in the time-consuming and burdensome task of updating its internal databases and remapping lineups to reflect those changes.

**A. In Addition to Providing Its Customers with Notice as Required by Law, Comcast Would Provide Additional Notice to Customers to Avoid Confusion and Disruption**

11. Comcast's notice requirements in connection with channel placement changes can be divided into two categories: (1) notice required by law, and (2) supplemental and repeated notice to educate customers about the changes and where to find networks that may have moved in their lineups.

12. First, Comcast is required by the Federal Communications Commission ("FCC") and local franchise authorities ("LFAs") to notify its customers of channel placement changes.

Comcast's cable systems are regulated by 6,450 different LFAs (local units of government), save for those jurisdictions in which the state serves as the LFA. LFAs have the ability to establish the amount of advance notice that must be given to customers of service changes and channel position changes. For instance, the FCC's rules and Comcast's agreements with LFAs require Comcast to provide a minimum of thirty days' written notice to the LFAs and customers before it changes the channel location or tier of any network. LFAs may adopt longer notice periods if they choose. Failure to adhere to these notice requirements could lead to enforcement actions by LFAs and/or the FCC, and parties found to have violated these rules can be fined. *See, e.g.,* Linda Moss, New Jersey and New York Government Authorities Being Pulled into Cablevision-Scripps Dispute, *NewJerseyNewsroom.com* (Jan. 21, 2010)<sup>2</sup>; FCC Upholds Order Forcing Time Warner to Air NFL Network, *First Amendment Center* (Aug. 8, 2006).<sup>3</sup>

13. The process of drafting written notices in compliance with these rules and agreements has a number of discrete and important steps. Where changes are being made to how a network is carried on a national basis, employees of Comcast Cable headquarters will work to draft the notice to be sent out by the individual systems. Drafting requires the input of several departments, including programming, government affairs, public affairs, legal, and the marketing departments, among others.

14. After receiving the notice language, each system must determine how much advance notice is required under the circumstances for each LFA it serves. Because a system can serve numerous LFAs, it is not unusual for a system to have multiple dates for giving notice, so a

---

<sup>2</sup> Available at [www.newjerseynewsroom.com/movies/new-jersey-and-new-york-government-authorities-being-pulled-into-cablevision-scripps-dispute](http://www.newjerseynewsroom.com/movies/new-jersey-and-new-york-government-authorities-being-pulled-into-cablevision-scripps-dispute).

<sup>3</sup> Available at [www.firstamendmentcenter.org/fcc-upholds-order-forcing-time-warner-to-air-nfl-network](http://www.firstamendmentcenter.org/fcc-upholds-order-forcing-time-warner-to-air-nfl-network).

system will generally use the longest required amount of notice for the entire system. Once the proper notice period is ascertained, the systems must then provide notice by the required means. For some systems, Comcast may be permitted to place notices in newspapers or purchase ad space in local publications instead of providing individual notice. Systems permitted to give notice through customer bills would work with their billing vendors to have the notices printed and inserted in customers' bills, or in the case of customers who have elected to receive paperless bills, to email them copies of the bills and accompanying notices.

15. Second, in addition to required notice, and because of the disruptive nature of relocating networks, Comcast has in the past adopted a multi-pronged strategy for communicating with its customers about channel realignments. This strategy minimizes disruption and can save Comcast money as a result of fewer customer service calls after channel placement changes are implemented.

16. When there are numerous changes being made to a channel lineup, Comcast has found it is preferable to communicate with customers multiple times using different tactics over a period of months prior to the channel changes. This helps educate customers on the reasons for the changes being made, along with associated customer benefits, and it also helps minimize call volume from customers seeking information after the changes are made. Outreach in advance of channel changes has been accomplished through numerous complementary means, examples of which include direct mail, email, bill inserts, bill messages, channel crawls, door hangers, and community public relations efforts. Customer communications about broad lineup changes can begin months before the changes take place, with the frequency of communications increasing as the dates for changes approach.

17. In my view, extensive advance outreach is especially important to reducing customer disruption resulting from channel realignments affecting channels 1–99, where viewership habits are most established. While this outreach would help to minimize damage to Comcast’s customer relationships, it is an additional burden created by channel realignments. In fact, this form of “notice” would be more costly and more burdensome to execute than the notice required by law.

18. Even with advance outreach to Comcast’s customers, the confusion created by relocating long-standing and popular networks in order to place Tennis Channel in a specific spot in a lineup may cause a spike in customer care call center volume as customers call with questions about channel changes. The average call-handling cost in our call centers is approximately [REDACTED]. As an example, if only [REDACTED] of our customers contact Comcast as result of the changes to their channel lineup, Comcast would take over [REDACTED] incremental phone calls at a cost of over [REDACTED] million.

19. Such spikes in customer care call center volume could degrade the quality of customer service that Comcast is able to offer because customer service representatives engaged in answering questions regarding new channel placements would be unable to respond to calls with more conventional billing questions or servicing issues. At a minimum, a spike in call volume would mean that any customer who calls Comcast customer care following a channel realignment—whether to question the realignment or for another reason—would need to wait longer than usual to speak to a customer care representative. These effects of a channel change would be burdensome to Comcast and would have the potential to damage its relationships with its customers.

**B. Updating Interactive Programming Guides, Channel Directories, and Databases Would Be Burdensome**

20. Once new channel positions had been located for Tennis Channel and any other displaced networks, more than 100 Comcast employees would have to input the new channel placement data into a number of different databases and computer systems, and each network's feed would have to be individually "mapped" to its new channel number on each applicable system. Comcast also would have to update its programming guides, channel directories, and other databases in every lineup for every channel change, as well as inform media guide companies, such as Rovi Corporation and Tribune Media Services, about the changes.

21. Additionally, channel realignment requires Comcast to perform physical engineering work at affected system headends.<sup>4</sup> Thus, given the number of unique channel lineups Comcast has [REDACTED] even a single change to those lineups requires multiple updates to be made across lineups, further adding to Comcast's burden.

**III. Moving Tennis Channel to a More Broadly Distributed Tier – or in Some Cases, Launching Tennis Channel for the First Time on a System – Would Be Costly and Burdensome**

**A. Required Customer Notifications and Responding to Increased Call Center Volume Would Be Burdensome**

22. On digital systems that have Tennis Channel on the Sports Tier, the principal burden that would be entailed in melting the network arise from the LFAs' notification requirements and the supplemental notification efforts in which Comcast would engage. As discussed above in connection with making channel placement changes, satisfying those requirements would be time-consuming and costly, as would responding to increased calls to Comcast's customer service representatives.

---

<sup>4</sup> A headend is a local facility containing equipment that collects satellite signals, decodes them and then retransmits such multichannel video programming to the customer.

**B. Launching Tennis Channel Would Be Burdensome**

23. As explained in the accompanying declaration of Jennifer Gaiski (*see* Gaiski Decl. ¶ 29) there are a number of systems that do not yet carry Tennis Channel or, at a minimum, do not carry its HD feed. Identifying the required bandwidth to support carrying the network (or at least its HD feed) would be time-consuming and costly for a number of reasons, including the fact that, to reallocate extra bandwidth in systems where there is little to none available, engineers must in some cases make physical alterations to distribution plants and equipment.

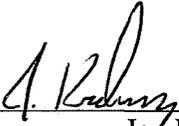
24. Moreover, when there is little to no bandwidth available on a system, Comcast has three choices if it is forced to launch a new network on that system: Comcast can (1) further compress the content already provided by the system to free up spectrum for the new content, thereby degrading the quality of the current content; (2) drop content already carried by that system to create room for the new content; or (3) rebuild the plant's infrastructure so that it can support more bandwidth, at a cost of millions of dollars, even for systems serving very small numbers of subscribers. In the markets that are more bandwidth constrained, the decision on doing a "rebuild" has already been extensively evaluated, and the required investment cannot be cost justified (or the market would have already been rebuilt).

**C. Updating Interactive Programming Guides, Channel Directories, and Databases Would Be Burdensome**

25. As when a network's channel number is changed, changing Tennis Channel's tier or launching Tennis Channel or its HD feed would require Comcast to update multiple internal and external databases, including addressable digital controllers (which are used to deliver channels to set-top boxes), guide databases, customer care databases, and other reference resources (print guides, newspaper TV listings, online TV listings, etc.).

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Dated: Philadelphia, PA  
January 24, 2012

  
\_\_\_\_\_  
Jay Kreiling