

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

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

FILED/ACCEPTED  
FEB 6 2012  
Federal Communications Commission  
Office of the Secretary

To: The Commission

**ENFORCEMENT BUREAU'S COMMENTS ON  
CONDITIONAL PETITION FOR STAY**

1. On January 25, 2012, Comcast Cable Communications, LLC (Comcast) filed a Conditional Petition for Stay (Petition) of the Initial Decision (ID) in this proceeding.<sup>1</sup> The Chief, Enforcement Bureau (Bureau), by her attorneys, hereby submits the following comments.

2. In its Petition, Comcast requests that the Commission exercise its discretion by staying the ID pursuant to the four-prong test articulated in *Va. Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2D 921, 925 (1958) (*Virginia Petroleum Jobbers*).<sup>2</sup> The Bureau's comments below are limited to the fourth prong of the *Virginia Petroleum Jobbers* test which is directed to whether the issuance of a stay would serve the public interest.

3. Comcast claims that a stay of the ID would serve the public interest in two ways. Comcast contends that a stay would prevent a violation of Comcast's constitutional rights.

<sup>1</sup> Comcast acknowledges that, on January 13, 2012, The Tennis Channel, Inc. (Tennis Channel) filed a petition requesting that the Commission issue an order (1) concluding that the ID is now, and has been since it was released, effective, and (2) ordering Comcast to immediately comply with the ID. Accordingly, Comcast conditions its instant Petition upon the Commission granting Tennis Channel's request for relief.

<sup>2</sup> Comcast also argues in the alternative that the Administrative Procedure Act mandates a stay of the ID. See Petition, at p. 7. The Bureau takes no position on this argument.

Comcast also argues that a stay would eliminate the confusion and frustration that Comcast viewers might otherwise experience if Comcast were required immediately to alter its channel lineup to accommodate Tennis Channel.<sup>3</sup>

4. There is no merit to Comcast's constitutional claim. Applying intermediate scrutiny, the D.C. Circuit rejected a First Amendment challenge by cable operators to the leased access provision of the 1992 Cable Act, finding that there are substantial governmental interests in promoting diversity and competition in the video programming market.<sup>4</sup> Based on that precedent, the Commission has determined that "[t]he same conclusion applies to the program carriage provision of the 1992 Cable Act."<sup>5</sup> The Commission found that its program carriage regulations are not "content based," and in fact promote the public interest by preserving competition and promoting diversity in program carriage.<sup>6</sup> "Thus, like the leased access rules, the program carriage rules would be subject to, and would withstand, intermediate scrutiny."<sup>7</sup>

5. Moreover, Congress specifically mandated that the Commission assess on a case-by-case basis whether conduct amounting to discrimination on the basis of affiliation has the effect of "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly."<sup>8</sup> Congress also directed the FCC to adopt procedures for expedited review – and presumably prompt resolution and remediation of – program carriage complaints.<sup>9</sup> In sum, the courts, the Commission and Congress have spoken on the subject of the compelling public

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<sup>3</sup> See Petition at pp. 27-28.

<sup>4</sup> *Time Warner Entertainment Company v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996).

<sup>5</sup> See *Revision of the Commission's Program Carriage Rules and Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42 and 11-131, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Rcd 11494, 11517-18 ¶ 32 (2011) (2011 Program Carriage NPRM). See also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2656 (1993).

<sup>6</sup> See 2011 Program Carriage NPRM, 26 FCC Rcd at 11517-18, ¶ 32.

<sup>7</sup> *Id.*

<sup>8</sup> 2011 Program Carriage NPRM, 26 FCC Rcd at 11517 ¶ 31 quoting 47 U.S.C. 536(a)(3).

<sup>9</sup> See 47 U.S.C. § 536(a)(4).

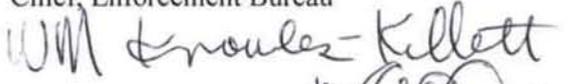
interest in ensuring competition in program carriage. If anything is to be drawn from their collective voice, it is that where a cable carrier has been found to have engaged in affiliation-based discrimination, the public interest manifestly requires an immediate remedy notwithstanding Comcast's claim to the contrary.

6. Similarly, there is no merit to Comcast's claim that frustration and confusion among its viewers supports a stay of the ID. Whether there would be any such confusion or frustration at all is speculative, given that cable companies modify their channel lineups with relative frequency. Additionally, even assuming, *arguendo*, that Comcast's viewers were inconvenienced, any such difficulty would be temporary at best. Any short-term disruption that Comcast viewers might experience is outweighed by the long-term benefits they would enjoy from the diversity in programming brought about by implementing the ID.

7. The public interest would be served by providing broad public access to additional cable programming where, as here, there has been a sufficient showing of discrimination. Comcast was afforded its due process by participating in a full and fair adjudicatory proceeding, and it is now the public's turn to get that to which it is entitled. A stay of the ID would serve only Comcast's pecuniary interests. As such, under the public interest prong of *Virginia Petroleum Jobbers*, Comcast's Petition is fatally flawed.

8. For the foregoing reasons, the Bureau believes Comcast's request for a stay of the ID should be denied.

Respectfully submitted,  
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February 6, 2012

**CERTIFICATE OF SERVICE**

Tamika Parker, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 6th day of February, 2012, sent by first class United States mail or hand delivery, as noted, copies of the foregoing "Enforcement Bureau's Comments On Conditional Petition For Stay" to:

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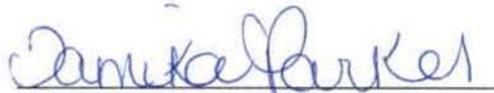
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