

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

In the Matter of)
)
THE TENNIS CHANNEL, INC.)
)
 v.)
)
COMCAST CABLE COMMUNICATIONS, LLC)
)
To: The Commission

MB Docket No. 10-204
File No. CSR-8258-1

FILED/ACCEPTED

FFR - 6 2012

Federal Communications Commission
Office of the Secretary

**OPPOSITION TO APPLICATION FOR REVIEW
OF COMCAST CABLE COMMUNICATIONS, LLC**

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ARGUMENT

In 2005, The Tennis Channel, Inc. (“Tennis Channel”) signed a carriage agreement with Comcast Cable Communications, LLC (“Comcast”) that allowed Comcast flexibility as to the tier on which Tennis Channel — then a relatively new service — would be carried.¹ Since launching Tennis Channel, Comcast has carried the network on its pay-extra sports tier to a fraction (now about ██████████) of its subscribers.² During the four years after the affiliation agreement was signed, Tennis Channel worked to expand and improve its quality and service, signing broader carriage agreements with a large number of other distributors, gaining rights to virtually all of the most valuable tournaments and other content in the sport (including portions of all four Grand Slam tournaments), and making other critical technical and content upgrades.³ After completing these efforts with its first-time acquisition of U.S. Open distribution rights for 2009, Tennis Channel approached Comcast in the spring of 2009 to negotiate improved carriage on Comcast systems commensurate with the improvements it had made.⁴

On June 9, 2009, after several meetings and exchanges, Comcast denied this request without making a serious counteroffer, ending the negotiations.⁵ On December 10, 2009, Tennis Channel served Comcast with the requisite prefiling notice of its intention to file a complaint

¹ See Program Carriage Complaint ¶ 10 (Jan. 5, 2010) [hereinafter “Compl.”]; Tennis Channel Ex. 137, Deposition of Jennifer Gaiski, at 44:6-45:14; Tennis Channel Ex. 144 §§ 5.1.3, 6.2.1; Bond Tr. 1985:20-1986:3, 2158:18-2159:18.

² Tennis Channel Ex. 16, Written Direct Testimony of Hal Singer, ¶ 20 tbl. 1; Tennis Channel Ex. 130; Bond Tr. 1988:17-1990:22; Gaiski Dep. 19:17-21, 19:25-20:3.

³ See Compl. ¶¶ 11, 36-44; Tennis Channel Ex. 14, Written Direct Testimony of Ken Solomon ¶¶ 5, 11-15 [hereinafter “Solomon Written Direct”]; Solomon Tr. 261:13-264:14, 267:1-271:6; Bond Tr. 2172:15-2178:15, 2203:16-2204:3.

⁴ See Compl. ¶¶ 45-48; Solomon Written Direct ¶¶ 15, 20-21, 26-27; Tennis Channel Ex. 70, Solomon Tr. 263:18-20, 266:9-11, 270:16-18.

⁵ Compl. ¶ 51; Solomon Written Direct ¶ 28; Bond Tr. 2215:9-11; Gaiski Tr. 2413:1-16.

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under Section 616 of the Communications Act and the Commission's rules.⁶ A month later, and approximately seven months after Comcast had terminated the negotiations regarding enhanced carriage, Tennis Channel filed its program carriage complaint.⁷

As the Media Bureau specifically found, the complaint was filed within a year of Tennis Channel's notification to Comcast "that it intend[ed] to file a complaint with the Commission based on violations of one or more of the rules [implementing Section 616]," as explicitly provided in 47 C.F.R. § 76.1302(f)(3).⁸ Thus, the timeliness of the complaint was expressly established by the plain language of the applicable rule. But Comcast seeks to redraft that language, arguing that it applies only to "a refusal to deal and other similar conduct that is not expressly covered" by other tests under the rule.⁹ That is not what the rule says, however, and its history makes clear that is not what it is intended to say.¹⁰

Comcast also argues that Tennis Channel should have filed its complaint within a year of the 2005 carriage agreement between the parties, because, it says, Section 76.1302(f)(1) requires

⁶ Compl. ¶ 7 & Ex. 29; *see also* 47 C.F.R. § 76.1302(b), (f)(3).

⁷ Compl.; *see id.* ¶ 52.

⁸ 47 C.F.R. § 76.1302(f)(3); *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, MB Docket No. 10-204, File No. CSR-8258-P, DA 10-1918, ¶ 11 & n.47 (rel. Oct. 5, 2010) [Hereinafter "HDO"]; *see also Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Mem. Op. & Hearing Designation Order, 23 FCC Rcd 14787, at ¶¶ 38, 70, 105 (2008) [Hereinafter "*Omnibus HDO*"]. Section 76.1302(f) has since been moved unaltered to Section 76.1302(h).

⁹ App. for Review, at 2-3 (Jan. 19, 2012).

¹⁰ Section 76.1302(f)(3) was originally limited to a complainant's notice of its intent to file a complaint "based on a request for carriage or to negotiate for carriage . . . that has been denied or unacknowledged." *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, App. D (1993) ["1993 Second Report and Order"]. But in 1994, the Commission eliminated this language; there is no sign it did so inadvertently. *See Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*, FCC 11-119, ¶ 38 n.159 (rel. Aug. 1, 2011).

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complaints to be filed within a year of the contract date and “Tennis Channel had all the facts it needed” to bring its claim in 2005.¹¹ But the demands of Section 76.1302(f) are met when a complaint meets *any* of the three tests it contains, and the complaint here clearly satisfies the third. Moreover, the record before the Media Bureau at the time of the HDO, and the record before the ALJ at the hearing, have established and confirmed that neither Tennis Channel nor Comcast “had all the facts . . . needed” within a year of the contract. Rather, Tennis Channel used the time between 2005 and 2009 to make significant programming and technical changes that brought the network at least equal to — and in fact well above — the competitive quality level of similarly situated Comcast services. Tennis Channel’s decision to approach Comcast for extended carriage was predicated on its achievement of that service level and the expectation that Comcast would exercise its discretion to expand Tennis Channel’s carriage because of it.

Comcast’s invocation of the contract date simply ignores Tennis Channel’s position, which is that it was not and is not challenging the validity of the affiliation agreement between the parties in any respect.¹² Rather, as the Media Bureau found, the contract is, as a legal matter, irrelevant to this dispute:

Whether or not Comcast had the right to [make a particular tiering decision] pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules.¹³

¹¹ App. for Review, at 1-2; Comcast’s Conditional Pet’n for Stay, at 10 (Jan. 25, 2012).

¹² See, e.g., Reply ¶¶ 61, 64; see also Tr. 2854:9-20 (seeking price set forth in contract).

¹³ *Omnibus HDO* ¶ 72; see also *id.* ¶ 105 (a contract may “commit[] . . . carriage decisions . . . to Comcast’s ‘discretion,’” but that does not mean the network has “waived its statutory program carriage rights with respect to Comcast’s exercise of such discretion” or that the limitations period begins running as of the date of the contract); *id.* ¶ 70; HDO ¶ 15. Because the contract permits Comcast to act consistently with Section 616, and because it does not include a (continued...)

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Simply put, a distributor's "exercise of [contractual] discretion is subject to the MVPD's obligations under the program carriage statute."¹⁴

Indeed, Comcast appears to contemplate a system in which any distributor would be free to engage in program carriage discrimination in violation of Section 616 as long as it waits until a year after entering into a carriage agreement to do so.¹⁵ But as the Media Bureau also found:

Under Comcast's interpretation . . . , a programmer would be forever barred from bringing a discrimination claim unless the claim is brought within one year from the date the contract was executed. While . . . such an interpretation would provide certainty to MVPDs, it would also preclude programmers from bringing legitimate claims regarding allegedly discriminatory actions occurring more than one year after a contract was executed.¹⁶

Recognizing the inherent flaw in its position, Comcast argues as a fallback that Tennis Channel in fact "believed it had a 'fully baked' program carriage claim as early as April 2008, but chose to wait to file this claim for tactical litigation reasons."¹⁷ It proffers no theory as to

waiver by Tennis Channel of its rights under Section 616 (or even [REDACTED], there is no evidence that the parties have "agree[d] to acts that violate the Act or rules." But even if they had, Section 616, not the contract, would control. *Omnibus HDO* ¶ 72.

¹⁴ HDO ¶ 15; *see also id.* ("a complainant may have a timely program carriage claim in the middle of a contract term if the basis for the claim is an allegedly discriminatory decision made by the MVPD, such as tier placement, that the contract left to the MVPD's discretion").

¹⁵ Comcast's timeliness argument is one of many examples of the barrage it has launched against the very existence of Section 616. *See Reply to Exceptions Sections I.A, I.B, I.C.2.*

¹⁶ HDO ¶ 15 n.82 (internal citations omitted). Comcast has suggested no basis to disregard the principle that a federal agency has the authority to interpret its own rules. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Despite the agency's clearly relevant interpretation, Comcast relies on inapplicable decisions. The authorities cited by Comcast concern the limitations provision relating to first-time offers of carriage; they do not alter or apply 47 C.F.R. § 76.1302(f)(3), which is the limitations provision relevant here. *See 1998 Biennial Regulatory Review—Part 76—Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418, 424, ¶ 18 (rel. Jan. 8, 1999); *id.*, Order on Reconsideration, 14 FCC Rcd 16433 (rel. Sept. 29, 1999); *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, Mem. Op. & Order, 13 FCC Rcd 21841 (rel. Oct. 28, 1998).

¹⁷ App. for Review, at 5.

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why Tennis Channel would have done so. And the claim is built upon mischaracterized trial testimony of Tennis Channel's CEO and on irrelevant documents that suggest no more than that Tennis Channel was aware of the remedies under Section 616 but concluded that it should first build its service and approach Comcast for relief from inadequate carriage.¹⁸

Comcast's theory does appear to assume that the limitations period for Section 616 can be measured from the time when an independent network has reason to believe that it is entitled to relief from discrimination under Section 616. As to that question, the Media Bureau correctly and consistently with precedent found that the Tennis Channel complaint was timely because it was filed within seven months of June 2009, when "Comcast informed The Tennis Channel . . . that it would not relocate the network to a more widely distributed programming tier."¹⁹

In sum, Tennis Channel took precisely the steps a programmer should be expected to take: it made substantial improvements to its quality; offered a business case to Comcast for expanded carriage; and, only after these negotiations failed, availed itself of a legal remedy that protected it against the discrimination that the ALJ has now found was the motivation for Comcast's decision.

For the reasons stated above, Tennis Channel requests that the Commission hold that the complaint was timely, affirm the HDO, and deny the Application for Review.

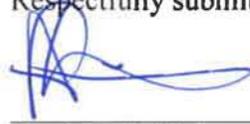
¹⁸ What Mr. Solomon actually said in the hearing passage cited by Comcast is that once Tennis Channel had "closed the deal for the U.S. Open towards the fourth quarter of '08" and announced its contract for on-air work with Jimmy Connors in 2009, "the cake was fully baked" for the business case for enhanced carriage that Tennis Channel then promptly made to Comcast. Solomon Tr. 269:20-271:6. As noted above, [REDACTED]

[REDACTED] As Comcast has noted, "[t]here is nothing wrong with . . . considering the legal ramifications of a course of conduct." Exceptions to Initial Decision, at 17 (Jan. 19, 2012).

¹⁹ HDO ¶ 11; *see also Omnibus HDO* ¶¶ 69-70, 102-105.

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CERTIFICATE OF SERVICE

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