

These findings were bolstered by Comcast documents showing that it views the channels as comparable.⁶² And they were reinforced by the Presiding Judge's conclusions that the expert testimony Comcast offered from Michael Egan in an effort to distinguish the networks was "not credible," "inconsistent," and "concocted for this case."⁶³

The Initial Decision Properly Found Discriminatory Treatment. Comcast also faults the Initial Decision for "fail[ing] to apply the proper analysis to determine whether Comcast deliberately discriminated 'on the basis of' affiliation."⁶⁴ But as demonstrated in Tennis Channel's Reply to Comcast's Exceptions, the Presiding Judge properly found that Comcast deliberately discriminates on the basis of both affiliation and non-affiliation.⁶⁵

First, as the Presiding Judge found, the record provides ample evidence of discrimination.⁶⁶ Versus and Golf Channel enjoy the broadest carriage from Comcast, reaching [REDACTED] of Comcast's customers, and they have received this broad carriage specifically because Comcast wanted its affiliated networks to succeed, even when they were struggling.⁶⁷ Similarly, when Comcast has acquired equity interests in other sports networks, it

⁶² See Reply to Exceptions at Sections I.B.5 - I.B.6; Tennis Channel Ex. 82, at COMTTC 00010949; Egan Tr. at 1744:5-18; Tennis Channel Ex. 39, at COMTTC 00009009; [REDACTED]; Donnelly Tr. at 2547:14-2548:1; Tennis Channel Ex. 67; see also Donnelly Tr. at 2549:8-2550:2.

⁶³ Initial Decision ¶¶ 27-36; Reply to Exceptions at Section I.B.6.

⁶⁴ Stay Petition at 15.

⁶⁵ See generally Reply to Exceptions at Section I.C.

⁶⁶ See generally Reply to Exceptions at Sections I.C.1 & I.C.3.

⁶⁷ Initial Decision ¶¶ 54, 55 n.192 (citing Tennis Channel Exs. 61 & 21); *id.* ¶ 58; Orszag Tr. at 1275:8-19; Bond Tr. at 2225:21-2228:8, 2234:15-2235:7; 2297:12-20; Gaiski Tr. at 2419:2-5.

has promptly expanded their carriage.⁶⁸ Comcast carries Tennis Channel, meanwhile, on its narrowly distributed sports tier — a tier to which no Comcast-affiliated channel has ever been relegated.⁶⁹ Comcast also gives its networks the most favorable channel placement, while it has often restricted Tennis Channel to channel numbers in the 700s.⁷⁰

This different treatment, the Presiding Judge found, is motivated by Comcast’s decision to act on its “clear economic incentive to retain popular *unaffiliated* networks on the sports tier” and to “protect its affiliated sports networks.”⁷¹ The record provided ample evidence proving that Comcast acted on this incentive, showing that Comcast repeatedly took special steps for its channels only: it treats them like “siblings” instead of “strangers,”⁷² and it grants them special benefits by virtue of affiliation.⁷³ Comcast’s incentive to discriminate against Tennis Channel is has been heightened by its desire to acquire tennis programming for Versus that Tennis Channel also sought.⁷⁴ Comcast itself acknowledged that Tennis Channel’s “distribution issues” — caused in large part by Comcast — harmed the network’s ability to compete with Comcast for this very content.⁷⁵

⁶⁸ Initial Decision ¶ 59.

⁶⁹ *Id.* ¶¶ 54, 27, 77 & n.256. *Cf.* Tennis Channel Ex. 9, *NFL Enters. LLC v. Comcast Cable Comms., LLC*, Tr. of R. at 1911:16-1912:6 (testimony of Jeffrey Shell that that carriage on the sports tier is “not viable” for an advertising-supported network).

⁷⁰ *Id.* ¶¶ 53, 61.

⁷¹ *Id.* ¶¶ 79-80.

⁷² *Id.* ¶¶ 55, 60-61.

⁷³ *See id.* ¶¶ 60-61.

⁷⁴ *See, e.g., id.* ¶ 26; Tennis Channel Exs. 32, 34, 35, 40, 41, 179; Orszag Tr. at 1407:3-9; Donnelly Tr. at 2626:19 - 2627:17.

⁷⁵ *Id.*

Comcast's response is a futile attempt to redefine the discrimination standard.⁷⁶ It does so by glaringly ignoring its favorable, cost-is-no-object treatment of its affiliated networks; by inventing a smoking-gun standard of proof of "deliberate discrimination" that could rarely be met and that is contrary to the law⁷⁷; and (as Tennis Channel has shown) by incorrectly suggesting that the affiliation agreement between it and Tennis Channel negates its obligation to comply with Section 616.⁷⁸

Comcast also seeks to justify its carriage of Tennis Channel by comparing its carriage level to those of only selected MVPDs.⁷⁹ But the Presiding Judge correctly rejected this argument, holding that this analysis is defective because it "ignore[s] a sizable segment of the industry, *e.g.*, telephone companies and satellite MVPDs — indeed, the very MVPDs that Comcast has recognized to be its chief competitors."⁸⁰ When Comcast's market test is properly applied, and *all* of the major MVPDs in the industry are considered, Comcast's discrimination is plain: Comcast's penetration rate for Tennis Channel is dwarfed by the industry average; at the same time, its favoritism for Golf Channel and Versus is clear.⁸¹ Even Comcast's internal

⁷⁶ See generally Reply to Exceptions at Section I.C.2.

⁷⁷ In its *Second Report and Order*, the Commission recognized that direct "documentary evidence . . . may not exist at all," *Second Report & Order* ¶¶ 12-13, and that an unaffiliated network can show affiliation-based discrimination "by providing . . . circumstantial evidence of discrimination," *id.* ¶¶ 12-14 (permitting complainants to establish affiliation-based discrimination by "provid[ing] evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD" and that "the defendant MVPD has treated . . . the complainant . . . differently than the similarly situated [affiliate] with respect to the selection, terms, or conditions of carriage").

⁷⁸ See generally Tennis Channel Opp. to Comcast App. for Review (Feb. 6, 2012).

⁷⁹ Exceptions at 14-16, 18-19.

⁸⁰ Initial Decision ¶ 68; see generally Reply to Exceptions at Section I.C.3.

⁸¹ Singer Written Direct ¶ 54, tbl. 6; see also Initial Decision ¶ 66 (citing Mr. Orszag's acknowledgment that Comcast's penetration rates for Golf Channel and Versus are (continued...))

variation in its carriage of Tennis Channel establishes discrimination: it discriminates less [REDACTED] in markets where it faces greater competition, and where there is a market penalty for discriminating, and it discriminates more [REDACTED] [REDACTED] where it is not subject to competition.⁸²

Finally, the Presiding Judge properly rejected as pretexts Comcast's attempts to justify its discrimination.⁸³ Comcast claims to have rejected Tennis Channel's request for fair carriage because it would have cost Comcast too much to carry it broadly, but Comcast has never considered or questioned the much greater costs it incurs to carry the similarly-situated Golf Channel and Versus at this level of distribution.⁸⁴ The Presiding Judge also rejected Comcast's claim that its rejection was motivated by a supposed "cost-benefit analysis,"⁸⁵ finding no credible evidence that Comcast had performed any evaluation at all of the benefits associated with Tennis Channel's proposal,⁸⁶ and no evidence that Comcast performed a cost-benefit analysis in deciding where to carry Versus and the Golf Channel when it launched them or renewed their carriage arrangements around the same time.⁸⁷ The Presiding Judge concluded that Comcast's "field test" — where it claimed to survey the field regarding interest in Tennis Channel (without, again, ever requiring a field test for Golf Channel or Versus, and without

approximately [REDACTED] percent higher, respectively, than the rest of the market); *id.* ¶ 67 (citing Dr. Singer's data which show that Tennis Channel's average penetration rate among large MVPDs other than Comcast is almost [REDACTED] times Tennis Channel's penetration rate on Comcast).

⁸² Initial Decision ¶ 59 n.205 (citing Singer Written Direct ¶ 22).

⁸³ See generally Reply to Exceptions at Section I.C.4.

⁸⁴ Initial Decision ¶ 77 & n.257.

⁸⁵ Exceptions at 17.

⁸⁶ Initial Decision ¶ 76.

⁸⁷ *Id.* ¶ 77; Bond Tr. at 2225:21-2228:8.

waiting for the field's response before rejecting Tennis Channel's request for enhanced carriage) — was merely a “ploy” to avoid liability and not a reflection of *bona fide* consideration of Tennis Channel's proposal.⁸⁸ Finally, the Presiding Judge rejected Comcast's “date test” — its argument that Tennis Channel simply launched too late — because this argument would grandfather Comcast's affiliated networks into favored status regardless of their quality, because Comcast has since broadened carriage of other, later-launched sports networks as it acquires an equity interest in them, and because it has unquestioningly renewed broad carriage of Versus and Golf Channel during this time period.⁸⁹

Comcast's Harm Arguments Lack Merit. Much of Comcast's merits argument amounts to a claim that even the largest MVPD in the country is too small to competitively harm Tennis Channel.⁹⁰ As set forth in more detail in Tennis Channel's Reply to Comcast's Exceptions, this theory does not withstand any meaningful scrutiny, and the Presiding Judge properly rejected it.⁹¹

As an initial matter, it strains credibility for Comcast to assert that its decision to deny ██████████ subscribers to Tennis Channel imposes no significant harm on the network because there are other subscribers to whom Comcast does not control access. The number of subscribers Comcast denies to Tennis Channel, but freely grants the channels it owns, is more than the total subscriber base of all but one other MVPD in the United States.

⁸⁸ Initial Decision ¶ 22.

⁸⁹ Initial Decision ¶¶ 72-74.

⁹⁰ Stay Petition at 13-14.

⁹¹ See *generally* Reply to Exceptions at Section I.A.

In any event, the record clearly showed, and the Presiding Judge properly found, that Tennis Channel is harmed in its ability to compete by Comcast's discrimination.⁹² As the Initial Decision states, Comcast's limited distribution of Tennis Channel restricts its subscriber revenues, making it difficult for Tennis Channel to make programming and other investments.⁹³ This limited distribution, along with poor channel placement, hinders Tennis Channel's ability to attract viewers.⁹⁴ It also prevents Tennis Channel from securing "certain valuable programming rights,"⁹⁵ from selling advertising to many advertisers, and from making as much revenues as it otherwise could on the advertising it does sell.⁹⁶

Furthermore, the Presiding Judge correctly held that because of the "ripple effect," a phenomenon recognized by Comcast in its own internal documents, Comcast's suppression of Tennis Channel's carriage has a market-wide impact, further multiplying the competitive harms caused by Comcast's discrimination.⁹⁷ But while Comcast now belittles this consequence of its discrimination, the hearing record shows that Comcast was [REDACTED]

[REDACTED] — specifically because the action of one distributor could adversely affect the carriage decisions of

⁹² See generally Reply to Exceptions at Section I.A.1.

⁹³ Initial Decision ¶ 83 (citing Solomon Written Direct & Singer Written Direct).

⁹⁴ *Id.* ¶ 85.

⁹⁵ *Id.* ¶¶ 87-88.

⁹⁶ *Id.* ¶¶ 90-71.

⁹⁷ *Id.* ¶¶ 65, 82; Tennis Channel Ex. 38, at COMTTC_00052319; see also Orszag Tr. at 1388:1-5, 1391:8-20; Rigdon Tr. at 1903:3-1904:10.

others — and even [REDACTED]

[REDACTED]⁹⁸

Unable to rebut these findings of competitive harm to Tennis Channel, Comcast seeks to create a standard of harm that is foreign to Section 616. It claims that Congress intended Section 616 to impose the “essential facilities” antitrust standard, under which it could never be liable under Section 616, because networks can survive and limp along by obtaining fair carriage on other distributors. This argument is incorrect as a matter of law, and as explained in Tennis Channel’s Reply to Comcast’s Exceptions, it has been rejected by the Commission.⁹⁹ The same can be said of Comcast’s suggestion that the competitive concerns underlying Section 616 no longer exist, and that the standard of harm under Section 616 is now so high that it could virtually never be met.¹⁰⁰

Taken together, Comcast’s merits arguments are grounded in its mistaken belief that the Commission should simply read the program carriage rules and Section 616 out of existence — a suggestion the Commission has rejected time and time again, most recently last summer, when it held that the substantial government interests underlying Section 616 remain and that Congress’s finding that MVPDs have the “incentive and ability to favor their affiliated

⁹⁸ See Initial Decision ¶ 63; Tennis Channel Ex. 38 at COMTTC_00053219; Tennis Channel Ex. 140, Deposition of Gregory Rigdon, at 113:21-114:16; Orszag Tr. at 1388:1-5, 1391:8-20; Rigdon Tr. at 1903:3-1904:10.

⁹⁹ See generally Reply to Exceptions at Section I.A.2. As the Presiding Judge found, Tennis Channel is not going out of business because of Comcast’s discrimination — a fact that itself establishes the value that Tennis Channel offers to distributors and advertisers — but that level of market foreclosure or competitive harm is not required for the Commission to find that Comcast violated Section 616. Initial Decision ¶ 92; see also *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd. 15783, ¶¶ 30-31 (MB 2008) [hereinafter “TCR”], *rev’d on other grounds*, 25 FCC Rcd. 18099, ¶ 11 (FCC 2010).

¹⁰⁰ See generally Reply to Exceptions at Section II.C.

programming vendors” still stands.¹⁰¹ Indeed, even when it approved the Comcast-NBC Universal merger, the Commission noted that the transaction would “result in an entity with increased ability and incentive to harm competition in video programming,” “highlighting the continued need for an effective program carriage complaint regime.”¹⁰²

3. The Initial Decision Is Consistent With The First Amendment.

As explained in more detail in Tennis Channel’s Reply to Comcast’s Exceptions,¹⁰³ Comcast’s final effort to undermine the Initial Decision is to repeat the very First Amendment argument that the Commission and the courts have repeatedly rejected. Here, Comcast faces the additional challenge that, whatever its *theoretical* dispute may be with the program carriage rules, the Initial Decision *in this case* does not, as Comcast argues, implicate First Amendment interests of the kind at issue in *Tornillo*, a case involving a requirement that a newspaper make space available for a political candidate to respond to critical or adverse editorializing.¹⁰⁴ Unlike *Tornillo*, in this case, there is no suggestion that Comcast is being required to carry or prohibited from carrying any particular content. To the contrary, as Comcast repeatedly has asserted, “Comcast makes Tennis Channel available to nearly all of its subscribers who are willing to purchase access to the network.”¹⁰⁵

Because Comcast has carried Tennis Channel for many years and, far from desiring to discontinue that carriage, has sought to acquire Tennis Channel’s content for itself,

¹⁰¹ *Second Report & Order* ¶ 33.

¹⁰² *NBCU Order* ¶ 116; *Second Report and Order* ¶ 33.

¹⁰³ *See Reply to Exceptions*, Part II.

¹⁰⁴ *See Exceptions* at 30-31 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974)).

¹⁰⁵ *Id.* at 9.

this is not a case about whether Comcast should be required to carry particular content. Instead, the critical question is whether Comcast can engage in discrimination by charging its customers more to access Tennis Channel than to access the affiliated networks with which Tennis Channel competes. Comcast's desire to charge high, discriminatory prices to its customers is not a protected First Amendment interest.¹⁰⁶

Even if the First Amendment were implicated, Comcast is wrong to suggest that the decision should be subject to strict scrutiny — a suggestion that courts and the Commission repeatedly have rejected. As the D.C. Circuit concluded in another case involving the Commission's authority to regulate cable carriage, “[a]lthough the [Initial Decision] ‘might in a formal sense be described as content-based’ given that [it considers] whether the programming at issue involves sports, there is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas” or that the Presiding Judge adopted the Initial Decision for that purpose.¹⁰⁷ Accordingly, though the Initial Decision referred to content — which is, after all, the “product” being distributed by Comcast — that is no basis for triggering a strict scrutiny requirement.¹⁰⁸

¹⁰⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (quoting Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *Vand. L. Rev.* 265, 270 (1981)) (The First Amendment “does not protect the right to ‘fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.’”).

¹⁰⁷ *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (quoting *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998)).

¹⁰⁸ *Second Report & Order* ¶ 32 (citing *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996)) (“The D.C. Circuit has already decided that the leased access provision of the 1992 Cable Act is not content-based [and] does not favor or disfavor speech on the basis of the ideas contained therein; rather it regulates speech based on affiliation with a cable operator.”).

The courts repeatedly have found the governmental interests furthered by Section 616 — promoting diversity and competition in the video programming market — to be important interests for the purpose of the intermediate scrutiny analysis.¹⁰⁹ And, even if Comcast were, *arguendo*, correct that the Initial Decision imposes an incidental burden on its speech, that burden would be far more limited than the more expansive cable carriage regulations that the courts have upheld under the intermediate scrutiny test.¹¹⁰ Accordingly, Comcast’s First Amendment argument lacks merit, and it should, yet again, be rejected.

B. Comcast Makes No Serious Showing That It Would Suffer Irreparable Injury If It Were Forced To Comply With The Initial Decision.

The Initial Decision ordered Comcast to remedy its discrimination by providing equal carriage treatment “as soon as practicable.”¹¹¹ Comcast has not shown that this requirement, which by its terms gives Comcast a reasonable amount of time to comply, is unduly burdensome. Comcast should not be given a stay, permitting it to escape any compliance responsibility, where the order it complains of requires it only to comply “as soon as practicable.”

1. Comcast Improperly Seeks To Supplement A Closed Record With Untested Testimony That Should Have Been Introduced At Trial.

As an initial matter, to support its Stay Petition Comcast seeks to introduce declarations from executives Jennifer Gaiski and Jay Kreiling, who assert that it would be

¹⁰⁹ See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Time Warner, supra*. As described in Tennis Channel’s Reply to Comcast’s Exceptions, Comcast’s suggestion that a requirement of nondiscrimination does not promote diversity or competition is fundamentally nonsensical. See Reply to Exceptions Section II.C.

¹¹⁰ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 215-16 (1997) [hereinafter “*Turner IP*”]; *Time Warner*, 93 F.3d at 967-71; *Time Warner Entm’t Co., L.P. v. U.S.*, 211 F.3d 1313, 1323 (D.C. Cir. 2000).

¹¹¹ Initial Decision ¶¶ 119, 127.

burdensome for Comcast to comply with the Initial Decision.¹¹² The proposed declarations are an improper attempt by Comcast to supplement the record with new evidence well after the Presiding Judge closed the record in this case.¹¹³ The question of whether Comcast should be ordered to modify Tennis Channel's carriage arrangements was raised specifically in the Complaint¹¹⁴ and was expressly designated for hearing by the Media Bureau, which directed the Presiding Judge

to determine whether Comcast should be required to carry The Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers and, if so, the price, terms, and conditions thereof; and/or whether Comcast should be required to implement such other carriage-related remedial measures as are deemed appropriate.¹¹⁵

The designation order thus clearly contemplated that evidence would be taken on the level of carriage Comcast should afford to Tennis Channel, and the conditions of that carriage. If Comcast had wanted to introduce evidence designed to support a remedy it deemed practical, or to challenge allegedly impractical remedies, it was free to do so; instead, it waived the right to

¹¹² Stay Petition, at Exs. A & B.

¹¹³ Comcast earlier sought to improperly supplement the record with new and untested evidence, *see* Comcast's Supplemental Notice to Update Certain Record Evidence (Sept. 9, 2011) — an effort with the Presiding Judge correctly rejected. Initial Decision ¶ 70; *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 11M-26 (rel. Sept. 26, 2011).

¹¹⁴ The complaint specifically discussed Comcast's discrimination with respect to channel placement and the harms arising from such discrimination, *see* Compl. ¶¶ 71-73, and it broadly requested relief in the terms and conditions of carriage, *see id.* ¶ 101. The Media Bureau recognized channel placement as an issue Tennis Channel had raised, *see* HDO ¶ 19, and Tennis Channel further reiterated its request for relief from channel-placement discrimination in its pre-trial briefing, *see* Trial Brief of The Tennis Channel, Inc., at 25 n.101 (Apr. 15, 2011); *see also id.* at 14-15. Thus, Comcast was amply put on notice of the issue before the hearing.

¹¹⁵ HDO ¶ 24(b). The HDO also designated for hearing the issue of "whether a forfeiture should be imposed on Comcast." *Id.* ¶ 24(c).

present this evidence when it chose not to present this evidence at the hearing.¹¹⁶ Having chosen not to offer any evidence at the time on that subject, it should not now be permitted to supplement the record with testimony that has been neither presented to the Presiding Judge nor tested by discovery and cross-examination.¹¹⁷

Accordingly, Tennis Channel requests that the untested declarations offered by Ms. Gaiski and Mr. Kreiling, and any portion of Comcast's Stay Petition relying on the assertions contained therein, be stricken in their entirety and not be given any consideration by the Commission.¹¹⁸

¹¹⁶ Comcast's witnesses could have been called on this subject. Comcast makes no effort to explain why it could not have offered Mr. Kreiling as a witness at trial. And Ms. Gaiski gave both written and oral testimony on the other issues, including at a deposition and at the hearing. The facts contained in her Stay Petition declaration are not newly discovered; they could have been included in her prior testimony.

Significantly, the Commission will only "entertain a request to reopen a proceeding after the close of the record" where the petitioner's contentions are based on "newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier." *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Mem. Op. & Order, 26 FCC Rcd 8971, 8986 ¶ 46 (2011) [hereinafter "*WealthTV*"] (internal citations omitted). In *WealthTV*, Comcast opposed WealthTV's request for the Commission to reopen the record. See *WealthTV, Herring Broad., Inc. d/b/a/ WealthTV v. Comcast Corp.*, Opposition To Motion To Reopen The Record For Further Hearing, MB Docket No. 08-214, File No. CSR-7907-P (Mar. 15, 2010). As it argued in that proceeding, Comcast's attempt to introduce new testimony here is "nothing more than an attempt to divert the Commission's attention from [the Presiding Judge's] well-reasoned decision." *Id.* at 2.

¹¹⁷ Given the serious flaws that the Presiding Judge identified in Ms. Gaiski's prior testimony in this proceeding, see Initial Decision ¶¶ 21-22, it would be particularly unfair to accept Ms. Gaiski's assertions without subjecting them to thorough examination.

¹¹⁸ In the alternative, if the Commission concludes it should grant a stay and intends to rely on Comcast's submission of additional testimony, Tennis Channel requests that it be given the same opportunity to introduce supplemental testimony on the issue of remedy and to subject that given by Ms. Gaiski and Mr. Kreiling to cross-examination by deposition prior to the ruling.

2. Comcast's Purported Burdens Are Insufficient To Constitute Irreparable Injury And Are Belied By The Record.

Even as shored up by the extra-record declarations, the purported “burdens” that Comcast cites as a justification for a stay are little more than the day-to-day tasks it regularly encounters in the normal course of its business. They are plainly insufficient to justify the extraordinary relief it seeks. The routine expenditures of money, time, and energy that Comcast identifies are simply not of the magnitude or type of harm that the Commission generally considers irreparable.¹¹⁹

The Presiding Judge determined that the nondiscriminatory carriage required here encompasses two separate components: (1) carriage at the same level of distribution as Golf and Versus; and (2) nondiscriminatory channel placement.¹²⁰ Notwithstanding Comcast's efforts to conflate these two separate remedial steps, they raise distinct issues.

As to the first, Comcast is in fact able to begin distributing Tennis Channel to the same number of homes as Golf Channel and Versus almost immediately. That is because the Tennis Channel signal is already present on the vast majority of Comcast systems. Comcast could implement a change in tiering electronically and with very little effort. As the ALJ found, “The vast majority of Comcast's systems carry Tennis Channel,”¹²¹ and on these systems,

¹¹⁹ See *Auction of Interactive Video and Data Service Licenses Scheduled To Begin Feb. 18, 1997*, Order, DA 97-13, 12 FCC Rcd 19, 21 (1997).

¹²⁰ Initial Decision ¶¶ 119-20.

¹²¹ Initial Decision ¶ 17; see also Bond Tr. at 1988:17-1990:22. Comcast itself acknowledges that it makes its Sports Entertainment Package available to “almost all of its subscribers.” Stay Petition at Ex. A, Declaration of Jennifer Gaiski, ¶ 11 [hereinafter “Gaiski Declaration”]. The Tennis Channel signal is not illuminated on the set-top boxes of customers who have not paid the extra sports tier fee, but it is already part of the signal delivered to these subscribers' set-top boxes. See Tennis Channel Ex. 137, Deposition of Jennifer Gaiski, at 197:15-21 [hereinafter “Gaiski Dep.”] (in systems where Tennis Channel is already carried on (continued...))

Comcast faces neither bandwidth constraints nor tiering obstacles in granting Tennis Channel broader digital carriage.¹²² Nothing in Comcast's Stay Petition or in the attached declarations refutes these basic facts.¹²³

Even for the remaining few subscribers who are on systems that do not currently offer Tennis Channel programming, Comcast only suggests, but fails to demonstrate in a concrete way, that particular systems lack sufficient capacity to carry Tennis Channel but do have the capacity to carry Golf Channel and Versus broadly. To the extent that such systems *are* capacity-constrained, the Presiding Judge has held that Comcast need not displace existing networks in order to find a place for Tennis Channel, provided Comcast actually establishes capacity constraints.¹²⁴

the sports tier, moving it to a more widely distributed digital tier would require [REDACTED] extra bandwidth).

¹²² See Gaiski Dep. at 33:5-19; Tennis Channel Ex. 139, Deposition of Madison Bond, at 76:11-17; Orszag Tr. at 1428:16-1429:1.

¹²³ Comcast states that local franchise authorities require it to provide advance notice to customers before illuminating Tennis Channel on the Digital Starter tier. It also claims that it would need to train approximately 25,000 customer service representatives to respond to calls and to update websites and electronic guides to reflect the changes. Gaiski Declaration ¶ 28.

Presumably, these are necessary considerations in any tiering change, and there is no evidence that they are so difficult that changes cannot be made. In fact, Comcast makes these changes as a routine part of its business. At most, they might in some markets affect the speed at which changes can be phased in and do not on their face suggest why the obligation to take on this task should be stayed.

Even to the extent that there are certain local franchise authorities that would require Comcast to notify consumers in this circumstance and/or other administrative costs associated with illuminating Tennis Channel, Comcast's suggestion that these costs are undue is simply wrong. Channel placement changes are routine, business-as-usual costs for Comcast.

¹²⁴ Initial Decision ¶ 119 n.353. In any event, Comcast has elsewhere indicated that it would complete its company-wide digital migration by the end of 2011. See Comcast, General Electric Co. & NBC Universal, Inc., *In re Applications for Consent to the Transfer of Control of Licenses: General Electric Co., Transferor, to Comcast Corp., Transferee, Applications & Public Interest Stmt.*, at 112. If that is true, and Comcast has completed or has nearly completed (continued...)

Moreover, all of Comcast's claims about the burden of expanding Tennis Channel's carriage are contradicted by clear evidence, already in the record, which establishes that Comcast can and does order nationwide distribution changes virtually at-will. For instance, the record demonstrates that, after Comcast settled its program carriage dispute with the NFL Network in May 2009, Ms. Gaiski told her field representatives that [REDACTED]

[REDACTED]
 [REDACTED]¹²⁵ [REDACTED]
 [REDACTED]
 [REDACTED]

[REDACTED]¹²⁶ And significantly, when Comcast signed a carriage contract with its partially-owned MLB Network in June 2009, Ms. Gaiski instructed local systems to [REDACTED]

[REDACTED]
 [REDACTED]¹²⁷ [REDACTED]

[REDACTED] In other words, when Comcast wants to modify network carriage within relatively short timeframes, it is able to do so as part of its routine business operations.

A second, separate issue involves Comcast's implementation of the nondiscriminatory channel placement requirement. In its Stay Petition, Comcast significantly exaggerates the burden of nondiscriminatory channel placement and fails to acknowledge that it

its digital migration, Comcast's analog bandwidth capacity concerns are moot or nearly moot, in any event.

¹²⁵ Tennis Channel Ex. 72, at COMTTC_00047603.

¹²⁶ *Id.*

¹²⁷ Tennis Channel Ex. 74, at COMTTC_00015609.

routinely incurs such burdens during the normal course of its business. Indeed, according to one source, between January 2010 and January 2012, Comcast made [REDACTED] standard-definition channel number changes across its systems.¹²⁸ [REDACTED] [REDACTED] were changes made to the programming on channels 1-99, which is where Golf Channel and Versus are often carried.¹²⁹ An additional [REDACTED] changes were made in Comcast's high-definition lineup.¹³⁰ In light of the routine, business-as-usual nature of these lineup changes, Comcast's suggestion that it will suffer "momentous" negative effects if required to carry Tennis Channel on nondiscriminatory terms is simply not credible.

Like most cable operators, Comcast routinely updates its channel lists, websites, and internal databases; routinely notifies consumers of such updates, in accordance with regulatory obligations; routinely trains call service representatives on the repackaging of channels; and routinely responds to consumer inquiries. And the record in this case shows that Comcast raises no burden concerns when it comes to its own channels: for example, as part of Comcast's centralized efforts to ensure that local systems were in [REDACTED]

¹²⁸ MediaCensus C 2012 MediaBiz (Feb. 2012) (commissioned analysis based on Comcast's February 2012 channel lineups and third-quarter 2011 subscribership figures). Media Business Corporation, or "MediaBiz," is an industry-leading analytics consultancy that, among other matters, tracks programming distribution and packaging by MVPDs. Tennis Channel cites this data, which was not presented at the hearing, only in the event Comcast is allowed to introduce evidence not allowed at the hearing. Tennis Channel continues to maintain that no extra-record evidence should be considered, meaning that Comcast has no basis for arguing that the channel placement remedy entails any unusual burden.

¹²⁹ *Id.*

¹³⁰ *Id.*

[REDACTED]

[REDACTED]¹³¹

Comcast does not make a factual demonstration that it would be overly difficult to place Tennis Channel near Golf Channel and Versus in most systems. Many Comcast systems have one or more vacant channels between channels 1 and 99. All four of the “Sample Comcast Channel Lineups” that were included as Exhibit 1 to Ms. Gaiski’s Declaration include such gaps.¹³² Indeed, [REDACTED] [REDACTED] have at least two open channels between channels 2 and 60.¹³³ The availability of these vacant channels raises serious and unanswered questions about why Comcast is unable to place Tennis Channel near Versus and/or Golf Channel without displacement of other networks.

In the circumstances in which nondiscriminatory channel placement does require Comcast to move an existing network to a different channel position, Comcast overstates the burden associated with such a move. Although it refers to the possibility that some networks may have “contractual rights to their channel positions,”¹³⁴ it has not shown that such contractual provisions are common enough to create any real hindrance to providing equitable channel placements for Tennis Channel, Golf Channel, and Versus. Indeed, despite the fact that many of

¹³¹ See Tennis Channel Ex. 55, at COMTTC 00052327 [REDACTED]
[REDACTED]; see also Tennis Channel Ex. 54.

¹³² Gaiski Declaration, at Ex. 1.

¹³³ MediaCensus C 2012 MediaBiz.

¹³⁴ Stay Petition at 24. Comcast also refers to “must-carry” rights, but such rights apply only to broadcast stations, not to the many cable networks that form the majority of Comcast’s lineup.

Comcast's carriage agreements have been introduced into the record in this case, it has not pointed to even one that specifies a particular channel number on which Comcast is required to carry a network. In any event, MVPDs may not contract around Section 616 compliance¹³⁵ — a principle that clearly would be implicated if Comcast could point to its contractual relationships with other networks, and particularly its affiliated sports networks, to avoid nondiscriminatory channel placement with respect to Tennis Channel.

Significantly, Tennis Channel has already acknowledged to Comcast that, if nondiscriminatory channel placement raises issues not raised by the move of Tennis Channel to broader tiers, it is willing to work with Comcast on those issues. Comcast has not yet provided Tennis Channel with a reasonable plan to implement nondiscriminatory channel placement (or, for that matter, to implement broader carriage), as it had indicated to Tennis Channel representatives it would, nor has it otherwise met its burden of showing which systems may raise unique issues that warrant delay. But even if such unique issues do exist in some systems, they would not warrant Comcast's refusal to comply with the Initial Decision's order as to the vast majority of systems for which Comcast does not face them.

Finally, Comcast relies on the argument that all of its costs "would be at least doubled" in the event that the Initial Decision is overturned or modified on review and it "unwinds" its changes to Tennis Channel's carriage and channel placement.¹³⁶ This argument simply is not a basis for a stay.¹³⁷ If it were, courts and the Commission would not consider a

¹³⁵ See *Omnibus HDO* ¶¶ 70-72, 105.

¹³⁶ Stay Petition at 26.

¹³⁷ See *Capital Network Systems, Inc., et al.*, Order, 7 FCC Rcd 906, 907 (rel. Jan. 24, 1992) (rejecting argument of petitioners who argued that "Commission or a reviewing court is likely to reverse the Bureau's imposition" of the requirement that was subject to stay petition).

stay a form of “extraordinary relief.”¹³⁸ Moreover, as noted above, Comcast routinely makes changes to its packages and channel placement — in the order of thousands of such changes each year.¹³⁹ These expenses, which Comcast regularly encounters in the normal course of its business, are plainly insufficient to justify the extraordinary relief sought by Comcast in this proceeding.

C. Tennis Channel Would Continue To Suffer Significant Harm If Comcast Were Permitted To Continue Its Discriminatory Conduct.

Comcast’s position appears to be that “Tennis Channel will suffer *no* injury if a stay is granted.”¹⁴⁰ That view disregards the competitive world in which unaffiliated programmers operate. In that real world, Tennis Channel has been and continues to be injured every day by Comcast’s ongoing, discriminatory conduct. And by seeking to maintain its discrimination while it continues to litigate, Comcast is pursuing a strategy that would perpetuate the competitive disadvantage that Tennis Channel faces, to the benefit of its own channels. As the Presiding Judge expressly found, Comcast has “depressed the number of Tennis Channel subscribers, diminished the amount of license fees, reduced [Tennis Channel’s] ability to procure valuable programming rights, and made it more difficult for Tennis Channel to sell

¹³⁸ *Tropical Radio Telegraph Co. Authorization To Acquire and Operate One Satellite Voice Circuit for the Rendition of Record Services Between the United States and Italy and Beyond*, 36 F.C.C.2d 648, 648 ¶ 3 (1972).

¹³⁹ See *supra* notes 125-130. Comcast’s related public interest arguments fail for the same reason. Because these changes are routine and made in the order of thousands a year, customers are used to having signals added and subtracted. It is thus difficult to credit Comcast’s concerns regarding loss of goodwill, let alone elevate those concerns to the level of impediments to compliance with Section 616.

¹⁴⁰ Stay Petition at 27.

advertising.”¹⁴¹ Tennis Channel will continue to endure these substantial competitive harms for as long as Comcast continues its discriminatory conduct. These harms arise from Tennis Channel’s loss of [REDACTED] Comcast subscribers — a number larger than the total subscriber base of all but one other MVPD in the United States — but also from the ripple-effect impact that Comcast’s carriage decisions have in terms of suppressing Tennis Channel’s ability to obtain improved carriage from other MVPDs.¹⁴² Given the severity of the harm that restriction to the sports tier causes, it is not surprising that Comcast’s senior executives admit that carriage on that tier is “not viable” for an advertising-supported network.¹⁴³

Moreover, Tennis Channel has no obvious way to recover lost subscriber fees, advertising revenues, or other monetary relief under the applicable program carriage rules. Its sole remedy is to obtain prospective nondiscriminatory carriage of its programming. The lack of any monetary recovery means that each day Comcast is permitted to continue its discriminatory treatment of Tennis Channel is another day in which Tennis Channel is harmed without any possibility of being made whole. After being forced to devote the resources necessary to obtain relief — even as it struggles to thrive with limited distribution — and after having persuaded

¹⁴¹ Initial Decision ¶ 81. Comcast’s restriction of Tennis Channel’s carriage *and* its depression of Tennis Channel’s ability to collect license fees leads to harm, including decreased ability to pay for programming rights. *Id.* ¶ 83. For this reason, and because [REDACTED], Comcast’s claim that Tennis Channel’s injury would be “fully cured” by broader carriage at no additional cost to Comcast, Stay Petition at 21, must be rejected. [REDACTED] Comcast’s claim, in any event, would create a reward of free content for distributors that discriminate.

¹⁴² Initial Decision ¶ 65; *see also* Reply to Exceptions, Section I.A.1.

¹⁴³ Tennis Channel Ex. 9, *NFL Enters. LLC v. Comcast Cable Comms., LLC*, Tr. of R. at 1911:16-1912:6 (testimony of Jeffrey Shell); *see also* Tennis Channel Ex. 51; Bond Tr. at 2289:4-2291:8.

three separate agency bodies of the merits of its complaint, it should not be required to endure additional harm while Comcast pursues an appeals strategy of indefinite length.¹⁴⁴ To further delay relief would be contrary to Congress’s clear intent to provide for “expedited review”¹⁴⁵ of program carriage complaints, an admonition grounded in its recognition of the serious and harmful effects of discrimination.

D. The Public Interest Would Be Disserved By Allowing Comcast To Continue To Violate The Law.

Comcast also fails to show that a stay would serve the public interest, as required in order to justify the “extraordinary relief” it seeks. Indeed, as Congress found expressly in adopting the 1992 Cable Act, of which Section 616 was a part, the public interest would be affirmatively disserved by permitting Comcast to continue its discriminatory treatment of Tennis Channel.¹⁴⁶ By guarding viewers and independent networks against the anticompetitive incentives of vertically integrated MVPDs, the program carriage rules protect the public’s interest in ensuring diversity and competition in the video programming market.¹⁴⁷ Comcast’s continued violation of the program carriage rules not only harms Tennis Channel but also

¹⁴⁴ Comcast is, of course, fully entitled to exercise its appeal rights. But it is not entitled to perpetuate its discrimination while it exercises those rights, particularly when Section 616 is designed to ensure prompt going-forward relief to independent networks that establish discrimination.

¹⁴⁵ See 47 U.S.C. § 536(a)(4).

¹⁴⁶ Pub. L. No. 102-385, 106 Stat. 1460, § 2 (1992).

¹⁴⁷ See *Second Report & Order* ¶ 32; *Turner*, 512 U.S. at 663. In adopting Section 616, Congress recognized that vertically integrated cable operators with significant market power vis-à-vis unaffiliated content providers threaten to “disrupt[] the crucial relationship between the content provider and the consumer” and thus to undermine diversity and competition in the video programming market. *Tennis Channel Ex. 1, Cable Television Consumer Protection and Competition Act of 1992*, S. Rep. No. 102-92, at 24 (1991); see also *NBCU Order* ¶ 119 (“[T]he loss of a substitute product by itself can harm competition by reducing a competitive constraint, with an adverse effect that increases with perceived substitutability.”).

fundamentally undermines the public interest goals Congress and the Commission sought to promote in adopting the program carriage framework.¹⁴⁸

Comcast fails even to acknowledge that its Stay Petition would compromise these long-standing and fundamental public interest goals. Instead, it makes only the conclusory and largely unsupported suggestion that compliance with the program carriage rules would “impose severe and unwarranted burdens on Comcast’s customers and on unaffiliated networks.”¹⁴⁹

It simply is not credible for Comcast to suggest that broader carriage of Tennis Channel would cause any sort of “confusion or frustration” or other harm to viewers. Illuminating Tennis Channel on the digital basic tier would provide an additional channel — and programming choice — for Comcast subscribers. And as explained above, Comcast has vacant channel slots and has not demonstrated that it could not provide nondiscriminatory channel placement using them. Even to the extent that nondiscriminatory channel placement would require channel lineup changes for certain Comcast systems, Comcast’s efforts to show that such changes will cause “inconvenience, disruption and expense” are belied by the fact that Comcast routinely makes such changes to its channel lineups, particularly for its own channels.¹⁵⁰ In any event, Tennis Channel has indicated its willingness to work with Comcast to resolve any issues that do arise, rendering the extraordinary relief of a stay wholly inappropriate to the circumstances.

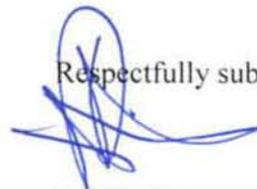
¹⁴⁸ *Second Report & Order* ¶ 25.

¹⁴⁹ Stay Petition, at 28.

¹⁵⁰ See Section II.B.2, *supra*.

CONCLUSION

For the reasons set forth above, the Commission should deny Comcast's Conditional Petition for Stay and order Comcast to comply fully and promptly with the Initial Decision by carrying Tennis Channel, Golf Channel, and Versus on non-discriminatory terms and conditions.

Respectfully submitted,


Stephen A. Weiswasser
C. William Phillips
Paul W. Schmidt
Robert M. Sherman
Leah E. Pogoriler
Elizabeth H. Canter
Neema D. Trivedi
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Counsel to The Tennis Channel, Inc.

February 6, 2012

CERTIFICATE OF SERVICE

I, Leah E. Pogoriler, hereby certify that on this 6th day of February, 2012, I caused a true and correct copy of the foregoing Opposition to Comcast's Conditional Petition for Stay to be served by electronic mail upon:

Michael P. Carroll
David B. Toscano
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, New York 10017

James L. Casserly
Michael D. Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, D.C. 20006

David H. Solomon
J. Wade Lindsay
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, D.C. 20037

Miguel A. Estrada
Cynthia Richman
Gibson Dunn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel to Comcast Cable Communications, LLC

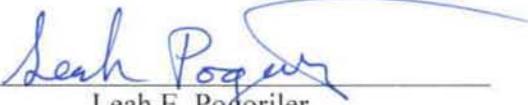
Gary Oshinsky
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Suite 4-C330
Washington, D.C. 20554

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

Counsel to the Enforcement Bureau

Joel Kaufman
Associate General Counsel
Office of the General Counsel
Administrative Law Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Lee Martin
Associate General Counsel
Office of the General Counsel
Administrative Law Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554


Leah E. Pogoriler