

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

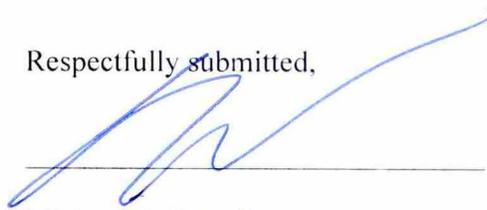
In the Matter of)	
)	
The Tennis Channel, Inc.,)	
Complainant)	MB Docket No. 10-204
v.)	File No. CSR-8258-P
Comcast Cable Communications, LLC,)	
Defendant)	

MOTION FOR ACCEPTANCE OF COMCAST’S REPLY TO TENNIS CHANNEL’S OPPOSITION TO COMCAST’S CONDITIONAL PETITION FOR STAY

Comcast Cable Communications, LLC (“Comcast”) hereby requests permission to file the attached Reply to the Opposition to Comcast’s Conditional Petition for Stay filed by The Tennis Channel, Inc. (“Tennis Channel”) on February 6, 2012, to respond to new arguments, authorities, and evidence that Comcast has not previously had an opportunity to address. Comcast does not seek leave to file any reply pleadings in further support of its Exceptions or its Application for Review. Although Comcast believes that Tennis Channel’s responsive pleadings, like its stay opposition, distort the applicable law and the record evidence, Comcast is confident that its prior submissions and the Commission’s thorough review of the record will swiftly bring the overwhelming majority of those errors to light. Comcast believes, however, that the Commission would be aided by permitting Comcast to file its Reply regarding certain specific legal arguments and factual assertions, presented for the first time in Tennis Channel’s stay opposition, that do not fairly characterize the authorities and new evidence on which they rely. Comcast thus respectfully requests that its Reply, attached as Exhibit A, be accepted for filing to assist the Commission in considering Comcast’s Conditional Petition for Stay.¹

¹ See, e.g., *In re Comcast of Potomac, LLC*, 24 FCC Rcd 8919, 8921 ¶ 7 (2009) (granting motion asking to file surreply “because, although the surreply does repeat some previously made

Respectfully submitted,



Dated: February 10, 2012

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points, it also illuminates several specific points in response to matters raised for the first time in the Reply”); *In re World Satellite Network, Inc. v. Tele-Communications, Inc.*, 14 FCC Rcd 13242, 13243 ¶ 3 & n.11 (1999) (granting motion to file surreply because complainant added “specific factual allegations” absent from complaint and raised “new issues”); *In re The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 14 FCC Rcd 4843, 4847 ¶ 5 n.19 (1999) (granting motion for surreply comments and associated responses to ensure a complete record); *In re Consumer Satellite Systems, Inc. v. United Video Satellite Group, Inc.*, 11 FCC Rcd 7428, 7428 ¶ 1 (1996) (granting leave to file surreply in price-discrimination proceeding); *In re Comark Cable Fund III v. Nw. Ind. Tel. Co.*, 100 F.C.C.2d 1244, 1246 ¶ 4 n.4 (1985) (permitting response to reply where reply “presented new factual evidence for consideration”), *remanded on other grounds*, 824 F.2d 1205 (D.C. Cir. 1987).

Exhibit A

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The Tennis Channel, Inc.,)	
Complainant)	MB Docket No. 10-204
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**COMCAST’S REPLY TO TENNIS CHANNEL’S
OPPOSITION TO COMCAST’S CONDITIONAL PETITION FOR STAY**

Comcast Cable Communications, LLC (“Comcast”) respectfully submits this Reply to call the Commission’s attention to three misstatements of law and fact contained in arguments presented for the first time by The Tennis Channel, Inc. (“Tennis Channel”) in its Opposition to Comcast’s Conditional Petition for Stay.

1. In asserting that the Administrative Procedure Act (“APA”)¹ permits the Commission to make the Initial Decision immediately effective even while agency review is ongoing, Tennis Channel misstates the law and mischaracterizes the very authorities on which it relies. As Comcast has previously explained, Section 704 forbids federal agencies—absent an *express, statutory* exhaustion requirement—from making initial decisions operative while simultaneously requiring aggrieved parties to exhaust administrative remedies before seeking judicial review.² Because the Communications Act does *not* expressly require Comcast to appeal the Initial Decision within the agency as a precondition to judicial review,³ but the Commission’s rules *do*,⁴

¹ 5 U.S.C. § 704.

² See Comcast’s Conditional Pet. for Stay at 7; see also Comcast’s Opp. to Tennis Channel’s Pet. to Compel Compliance with Initial Decision at 9-12.

³ See 47 U.S.C. § 155(c)(7) (“The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or

the Initial Decision must remain “inoperative” until the review required by the Commission’s rules is complete.⁵

Tennis Channel’s response to this straightforward analysis distorts the law by conflating initial decisions with actions taken pursuant to delegated authority.⁶ But orders issued pursuant to delegated authority *are expressly* subject to the Act’s exhaustion requirement.⁷ In stark contrast, the Communications Act explicitly *exempts* the Initial Decision from the exhaustion requirement.⁸ For that reason, both of the appellate decisions Tennis Channel cites (for the first time) in its Opposition—*Committee to Save WEAM v. FCC*,⁹ and *Cablevision Systems Corp. v. FCC*¹⁰—have no bearing here.

taken pursuant to a delegation under paragraph (1) of this subsection.”); *id.* § 155(c)(2) (“As used in this subsection the term ‘order, decision, report, or action’ does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b) of this title.”); *see also id.* § 409 (establishing procedures for review of initial decisions permitting but not requiring the filing of exceptions).

⁴ *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report & Order*, 9 FCC Rcd 2642, 2656 ¶ 34 (1993) (“[a] ruling on the merits by the ALJ must be appealed directly to the Commission”), *modified on other grounds*, 9 FCC Rcd 4415 (1994).

⁵ 5 U.S.C. § 704; *see Darby v. Cisneros*, 509 U.S. 137, 152 (1993). Incredibly, in its Comments on Comcast’s Conditional Petition, the Enforcement Bureau expressly declines to address this threshold issue at all; despite opposing Comcast’s request for a discretionary stay, the Bureau insists that it “takes no position on” the threshold issue whether the APA requires that the Initial Decision remain inoperative. Enforcement Bureau Cmt. at 1 n.2.

⁶ *See* Tennis Channel’s Opposition to Comcast’s Conditional Petition for Stay (“Opp.”) at 6-8 & n.29.

⁷ 47 U.S.C. § 155(c)(7).

⁸ *Id.* § 155(c)(2).

⁹ 808 F.2d 113 (D.C. Cir. 1986).

¹⁰ No. 11-4104 (2d Cir. Nov. 9, 2011) (Doc. 85).

As Tennis Channel itself notes,¹¹ *Committee to Save WEAM* and *Cablevision* both involved an exercise of delegated authority under Section 155(c), *not* an initial decision like the one at issue here.¹² Thus, as the Commission explained in opposing a stay in *Cablevision*, Section 704’s bar on agencies’ making their actions effective while simultaneously requiring exhaustion of administrative remedies was inapplicable because exhaustion was expressly mandated by statute—namely, Section 155(c)(7).¹³ Neither *Committee to Save WEAM* nor *Cablevision* confronted the key issue here of whether an *initial decision* may take effect while an agency appeal mandated by Commission rules is ongoing.¹⁴ Tennis Channel’s assertion that these decisions—or the Commission’s position in *Cablevision*—somehow neutralize the APA’s command with respect to the Initial Decision here is simply wrong.¹⁵

¹¹ Opp. at 6-7.

¹² See *Committee to Save WEAM*, 808 F.2d at 114; *Cablevision*, No. 11-4104 (Doc. 85).

¹³ FCC’s Opp. to Emer. Req. for Stay Pursuant to All Writs Act at 18, *Cablevision*, No. 11-4104 (Doc. 51) (“By its terms, the statutory language [of Section 704] on which *Cablevision* relies does not apply where (as here) a statute expressly requires a litigant who seeks judicial review of an intermediate agency order to exhaust its administrative remedies before the agency.”).

¹⁴ Indeed, *Committee to Save WEAM* did not address an APA challenge at all, but only an argument that a provision of the Communications Act itself, 47 U.S.C. § 155(c)(3), requires that actions taken pursuant to delegated authority remain inoperative once Commission review commenced. See 808 F.2d at 119. The passage Tennis Channel quotes (Opp. at 6) concerned *that* argument. The petitioner in *Cablevision*, advancing the same argument, invoked the APA only briefly, contending that Section 155(c)(3) “codified” the principle that Section 704 embodies. Pet’r’s Emer. Req. for Stay Pursuant to All Writs Act at 11, *Cablevision*, No. 11-4104 (Doc. 1-1).

¹⁵ For the same reason, Tennis Channel’s claim that Comcast’s position would disrupt Commission practice, including by barring decisions issued under delegated authority from taking effect pending review, is incorrect. Opp. at 5, 7. Indeed, Comcast’s position applies only to certain Part 76-related initial decisions, which themselves depart from the Commission’s general rule that “the timely filing of exceptions . . . shall stay the effectiveness of the initial decision until the Commission’s review thereof has been completed.” 47 C.F.R. § 1.276(d).

Tennis Channel’s efforts to defend its misreading of the Communications Act compound its error. Its *ipse dixit* assertion that “an initial decision issued after extensive discovery and a full evidentiary hearing is entitled to at least as much weight and effectiveness as a bureau order”¹⁶ not only is unsupported by any authority, but completely misunderstands the APA standard: *Only a command from Congress that parties exhaust administrative remedies before seeking judicial review satisfies Section 704*. A trial record, however voluminous, is not enough. Tennis Channel also claims that “initial decisions are (like bureau decisions) subject to a statutory exhaustion requirement.”¹⁷ But it fails to cite any such statutory provision.¹⁸ And the provision it presumably has in mind—Section 616 of the Communications Act,¹⁹ which merely directs the Commission to “provide for expedited review of any complaints made by” programmers in program-carriage cases²⁰—does not even *imply*, let alone “*expressly require*[],” that a party must appeal an Initial Decision to the Commission before going to court.²¹

Tennis Channel’s final, fleeting attempt to elide the distinction between initial decisions and actions under delegated authority fares no better. Tennis Channel asserts that the Initial Decision here “is clearly an exercise of delegated authority” because it was “release[d] . . . after the issuance of [a Hearing Designation Order]”²²—that is, because it was handed down on the heels of *another* agency decision that *was* an exercise of delegated authority. That contention is as incorrect as it is irrelevant. The ALJ’s authority to issue the Initial Decision stemmed *not*

¹⁶ Opp. at 7 n.27.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See id.* at 6 n.23.

²⁰ 47 U.S.C. § 536(a)(4).

²¹ 5 U.S.C. § 704 (emphasis added).

²² Opp. at 8 n.29.

from a Commission delegation of authority under Section 155(c), but rather from 47 U.S.C. § 409 and Section 7 of the APA.²³ In any event, the only relevant question here is whether the Act “expressly require[s]” exhaustion as a prerequisite to judicial review²⁴—and, in the case of an Initial Decision, this test is not met. Tennis Channel’s new claims and authorities, in short, do nothing to show that the Initial Decision *can* be given immediate effect consistent with the APA, and if anything they further confirm that it *cannot*.

2. Tennis Channel likewise misstates the law and the record in urging the Commission to ignore the powerfully probative evidence submitted by Comcast in support of its Conditional Petition for Stay of the harm that it, its customers, third-party networks, and the public will face if the Initial Decision takes effect. Far from forbidding parties from submitting such evidence, the Commission routinely considers it in ruling on requests for stays or similar relief,²⁵ and indeed has faulted parties for failing to present proof of irreparable injury.²⁶ The same is true in

²³ See 47 C.F.R. § 0.201(a)(2) Note (“Interlocutory matters which are not delegated to the Chief Administrative Law Judge are ruled on by the presiding officer by virtue of the authority vested in him to control the course and conduct of the hearing. This authority stems from section 7 of the Administrative Procedure Act and section 409 of the Communications Act rather than from delegations of authority made pursuant to section 5(c) of the Communications Act.”).

²⁴ 5 U.S.C. § 704.

²⁵ See, e.g., *In re Application of Liberty Prods.*, 16 FCC Rcd 18966, 18968, 18972 ¶¶ 7, 15 (2001); *In re Lifeline and Link Up Reform and Modernization*, 26 FCC Rcd 2770, 2787 ¶ 49 n.83 (2011); *In re New Part 4 of Comm’n’s Rules Concerning Disruptions to Commc’ns*, 19 FCC Rcd 25039, 25042-43 ¶¶ 5-9 (2004); *In re WATS Related & Other Amendments of Part 69 of Comm’n’s Rules*, 2 FCC Rcd 245, 247-48 ¶¶ 25-26, 30 (1987); *In re Int’l Record Carriers’ Scope of Operations in Continental United States*, 78 F.C.C.2d 1213, 1215-16 ¶¶ 7-8 (1980).

²⁶ See *In re Application of Stockholders of Rust Commc’ns Group, Inc.*, 65 F.C.C.2d 688, 689-90 ¶ 6 (1977) (“Finally, James River has failed to substantiate its claim of irreparable injury. . . . In attempting to gain the extraordinary relief sought here, James River has failed to establish by affidavit or otherwise that it will in fact suffer any financial losses or be harmed in any other manner.”).

the courts of appeals, which not only will consider such evidence in support of a request to stay agency action,²⁷ but *require* such proof, by affidavit if necessary, to establish the stay factors.²⁸

Contrary to Tennis Channel’s claim, the Hearing Designation Order (“HDO”) does not demonstrate that Comcast’s submission of such evidence here amounts to an “improper attempt . . . to supplement the record.”²⁹ The passage of the HDO it quotes merely made clear that the merits of Tennis Channel’s claim, including the appropriate remedy, would be before the ALJ.³⁰ Comcast offered the Gaiski and Kreiling declarations *not* to bolster its challenges to the Initial Decision on the merits—indeed, its Exceptions to the Initial Decision did not rely upon either declaration (which were not filed until days later)—but instead to address issues *outside* the scope of the hearing record, *i.e.*, the irreversible injuries that the remedy ultimately ordered by the Initial Decision would impose on Comcast, uninvolved third parties, and the public. Nothing in the HDO required, or realistically could have required, Comcast to present during the hearing before the ALJ evidence of the harms that Comcast and others would suffer, *if* Comcast

²⁷ See, e.g., *Am. Petrol. Inst. v. EPA*, No. 94-1502, 1994 WL 803264, at *1 (D.C. Cir. Sept. 13, 1994) (per curiam); *Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972, 977 (D.C. Cir. 1985) (per curiam); *Hess & Clark, Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975, 989 n.42 (D.C. Cir. 1974).

²⁸ See Fed. R. App. P. 18(a)(2)(B)(ii)-(iii) (requiring a party seeking a stay of agency action to submit—in addition to “relevant parts of the record”—“originals or copies of affidavits or other sworn statements supporting facts subject to dispute”); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); see also *Superior Trucking Co. v. United States*, 614 F.2d 481, 486 (5th Cir. 1980) (“[T]he applicant [for a stay] must state the reasons for his request, the facts relied upon, and if the facts are in dispute, the application must be supported by affidavits or other sworn statements. Relevant parts of the record must be submitted as well.” (citing Fed. R. App. P. 18)); *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987) (“In order for the reviewing court to adequately balance these [stay] factors, the party seeking a stay must address each of the factors regardless of its strength, and provide us with facts and affidavits supporting these assertions.”).

²⁹ Opp. at 27.

³⁰ See *id.*

did not prevail and as a result of a remedy that the ALJ had not yet even devised—and on which he bypassed briefing and argument.

3. Tennis Channel also misleads in attempting to minimize the difficulties that Comcast would face in implementing the Initial Decision’s “equitable” channel-placement remedy.³¹ Tennis Channel presents new data that it claims show that Comcast “routinely” rearranges channel positions.³² That claim is simply wrong, and the statistics Tennis Channel cites regarding aggregate numbers of channel relocations tell only half the story. The same data on which Tennis Channel relies show that a majority of the relocations from January 2010 to January 2012 occurred on just ██████████ of Comcast’s headends.³³ The same data show that ██████████ of Comcast’s headends experienced no channel relocations in the 1-99 range over the two-year period, and ██████████ of its headends witnessed no relocations *at all*.³⁴ Thus, contrary to Tennis Channel’s claim, across-the-board channel relocations affecting Comcast’s lineups nationwide are by no means “business-as-usual.”³⁵

Tennis Channel paints a similarly inaccurate and misleading picture of the difficulty of finding suitable channel slots—both for Tennis Channel, and for other networks displaced due to

³¹ See Opp. at 31-34.

³² *Id.* at 32. The Enforcement Bureau echoes Tennis Channel’s claim but cites no supporting evidence. Enforcement Bureau Cmt. at 3.

³³ MediaCensus C 2012 MediaBiz (Feb. 2012). By discussing the new data on which Tennis Channel relies in its Opposition, Comcast does not endorse those data or Tennis Channel’s assessments based upon them. Comcast refers to the new data only to highlight that, even on their face, those data demonstrate that channel relocations are limited and that widespread changes are uncommon.

³⁴ *Id.*

³⁵ Opp. at 32.

the domino effect.³⁶ While underscoring the existence of open slots in Comcast's lineups,³⁷ Tennis Channel glosses over the critical fact that even where such slots exist, they may be nowhere near Golf Channel or Versus, let alone both. As Ms. Gaiski explained, and as the examples she provided aptly illustrate, the closest available slot may be dozens of channel positions away.³⁸ The ease and simplicity of repositioning networks that Tennis Channel describes is an illusion.

CONCLUSION

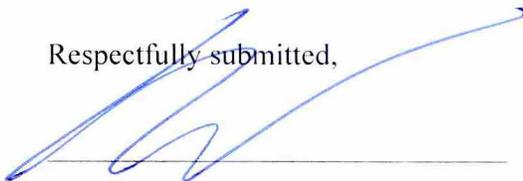
For the foregoing reasons, Comcast requests that the Commission grant Comcast's Conditional Petition for Stay.

³⁶ *Id.* at 33.

³⁷ *Id.*

³⁸ Comcast's Conditional Pet. for Stay, Ex. A ¶¶ 22-25 & Ex. 1.

Respectfully submitted,



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CERTIFICATE OF SERVICE

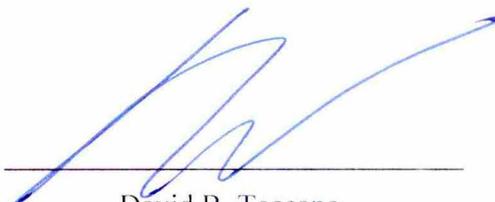
I, David B. Toscano, do hereby certify that on this 10th day of February, 2012, I caused the foregoing Motion for Acceptance of Comcast's Reply to Tennis Channel's Opposition to Comcast's Petition for Stay to be served upon the following individuals by hand-delivery and electronic mail.

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