

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)	

COMCAST'S PETITION FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

The Commission’s July 24, 2012 Order largely affirming the ALJ’s Initial Decision imposes a wholly unprecedented burden on Comcast and its customers based on a fundamental misunderstanding of the controlling statute, the First Amendment, and the evidentiary record. The Order impermissibly permits Tennis Channel to rewrite its carriage contract years after the fact and to secure preferential treatment from Comcast under the guise of avoiding discrimination. And it does so at the expense of Comcast’s speech and press freedoms and concrete injuries to Comcast’s business and the public. As Commissioners McDowell and Pai recognize in their Joint Dissenting Statement, the Commission’s misapplication of Section 616 will have a “broader impact,” and ultimately will result in “additional programming costs [that] will come out of the pockets of consumers.” *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, Memorandum Opinion and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78, at 47 (rel. July 24, 2012). Comcast intends to seek judicial review of the Commission’s Order, and Comcast respectfully submits that neither it nor its customers should be compelled to suffer such severe, irreparable harms before a court rules on the validity of that Order.

Indeed, as the Commission itself recognized in staying the Initial Decision pending its own review, “[t]his is the first program carriage adjudication in which an initial decision requires the defendant to carry the complainant’s programming, and it presents important issues that are likely to recur in future program carriage adjudications.” *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-50, at 3 (rel. May 14, 2012) (footnote omitted). And “preserv[ing] the status quo” while it considered the merits, the Commission observed, would “avoid potential disruption to consumers and any affected third-party programmers,” and would not unduly burden Tennis Channel. *Id.* at 4. The Commission did not rule then on the merits of Comcast’s request for a stay pending judicial review, instead dismissing it as “moot” and inviting Comcast to renew its request after the Commission ruled on Comcast’s exceptions to the Initial Decision. *Id.* at 4 n.25. But the reasons the Commission identified for staying the Initial Decision then, and those set forth in Comcast’s briefing in support of its prior stay request, compel the same conclusion now. Comcast therefore respectfully requests that the Commission immediately stay its Order pending the completion of judicial review for the reasons set forth below, in the Stay Order, and in Comcast’s Conditional Petition for Stay and its Reply, which Comcast incorporates herein by reference.

Comcast reiterates in this petition the reasons that a stay of the Order pending judicial review should be granted under the traditional test applied by the Commission and the courts. Comcast is likely to succeed on the merits in challenging the Order. As an initial matter, Tennis Channel’s complaint is plainly time-barred under 47 C.F.R. § 76.1302(f)(1) because it challenges decisions made pursuant to the parties’ 2005 agreement. The Order rules that Tennis Channel’s 2010 complaint is timely under Section 76.1302(f)(3), but that ruling renders subsections (f)(1) and (f)(2) superfluous and fundamentally undermines the purpose of the statute of limitations by permitting Tennis Channel to revive its stale claim long after the relevant carriage decision was made.

The Order also severely errs in ruling that Comcast violated Section 616. That statute addresses only specific, severe threats to competition, prohibiting (1) “unreasonabl[e]

restrain[ts]” that result from (2) intentional discrimination “on the basis of affiliation.” 47 U.S.C. § 536(a)(3). The Order nullifies the “unreasonable restraint” element of the statute by finding a competitive harm that will be present in *every* case brought under Section 616—that Tennis Channel could obtain more subscribers and advertising revenue, either in absolute terms or relative to Golf Channel and Versus, through broader carriage. The Order also finds that Comcast unlawfully discriminated against Tennis Channel only by arbitrarily dismissing critical evidence that Comcast’s decision to deny Tennis Channel’s proposal for broader carriage was based not on Tennis Channel’s non-affiliation, but on an unbiased assessment that broader carriage would come at a substantial cost with no offsetting benefits—a conclusion also reached by *every other major MVPD*, all of which, including Tennis Channel’s affiliated companies, carried Golf Channel and Versus more broadly than Tennis Channel at the time.

The Order also violates the First Amendment by denying Comcast its right to exercise editorial discretion and penalizing Comcast for its speech. These burdens on Comcast’s speech and press rights are content-based—the Order infers discrimination based on a “similarly situated” analysis that turns on a comparison of programming content—and are therefore subject to strict scrutiny. And even if intermediate scrutiny applied, the Order still would violate Comcast’s First Amendment rights because it purports to further a government interest that is no longer important—ameliorating the effects of “bottleneck power” that cable operators no longer have. The Order also is not narrowly tailored: Far from serving any legitimate government interest in promoting competition and diversity in the content market, it simply singles out Comcast based on its size and requires it to grant special privileges to another market participant.

A stay is also necessary to prevent irreparable harm to Comcast and the public interest. Absent a stay, the Order will violate Comcast’s First Amendment rights, which is *never* in the public interest, and which constitutes irreparable injury to Comcast. The Order also will impose significant burdens on Comcast’s business and its customers. To provide broader carriage to Tennis Channel, Comcast will be forced, among other things, to provide notice to customers required by law and by company practice; update websites, electronic programming guides, and internal and external databases; print new digital channel lineup cards and produce new local rate cards; have engineers reprogram channel lineup maps; provide information to approximately 30,000 customer-service representatives so that they can respond to calls regarding the change; and engage in the onerous process of reallocating scarce bandwidth in its already overtaxed systems. Comcast’s customers will also suffer disruptions, degradation of service, and confusion, and Comcast will suffer a corresponding loss of goodwill. And these burdens on Comcast and the public will only be magnified when the Order is overturned and Comcast is required to repeat this process in reverse to return Tennis Channel to the sports tier. Tennis Channel, in contrast, will suffer no harm from a stay, which will merely maintain the status quo. Indeed, having *sought* and *secured* the status quo of sports-tier carriage in 2005, Tennis Channel cannot plausibly assert that it will be irreparably injured if held to the terms of its own bargain.

Comcast respectfully requests that the Commission issue a ruling on this stay petition no later than August 7, 2012. The Order requires Comcast to “complete remediation” within 45 days, and an expedited ruling is therefore necessary to allow Comcast sufficient time, if the Commission denies this stay petition, to seek a judicial stay as soon as reasonably practicable. If the Commission does not issue a ruling on this petition on or before August 7, Comcast expects to seek a judicial stay promptly thereafter.

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BACKGROUND

As explained in Comcast's previous filings, this action arises from an attempt by Tennis Channel to rewrite a now seven-year-old contract with Comcast under the guise of a discrimination claim under Section 616 of the Communications Act of 1934, 47 U.S.C. § 536. The two companies entered an agreement in 2005 that allowed Comcast to carry Tennis Channel on any tier of Comcast's choosing, 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 on three occasions (in 2006, 2007, and 2009), Comcast each time weighed the costs, found no offsetting benefits, and declined. After Comcast stood on its contract right to carry Tennis Channel on the sports tier for the third time, Tennis Channel sought the Commission's assistance, through this litigation, to revise the contract. It claimed that Comcast violated Section 616 by distributing its network less broadly than Golf Channel and Versus (now NBC Sports Network), two networks affiliated with Comcast.

Section 616 is a narrow provision that prohibits multichannel video-programming distributors ("MVPDs") from (1) "unreasonably restrain[ing]" the ability of an unaffiliated network "to compete fairly" by (2) intentionally discriminating "on the basis of affiliation."¹ Tennis Channel, however, failed to carry its burden of proof on either element. And record evidence affirmatively demonstrates that Comcast did not unreasonably restrain Tennis Channel's ability to compete or discriminate on the basis of affiliation. Comcast's carriage of Tennis Channel on its sports tier does not preclude Tennis Channel from competing with other networks; if anything, it *helps* Tennis Channel by providing the network with its [REDACTED] largest source of subscribers, after only [REDACTED]. And Comcast's denial of

¹ 47 U.S.C. § 536(a)(3).

Tennis Channel's proposal for broader carriage was based, not on unlawful discrimination, but an unbiased cost-benefit analysis—the results of which were consistent with the carriage decisions of every other major MVPD, *all* of whom, including two of Tennis Channel's affiliated owners, carried Golf Channel and Versus more broadly than Tennis Channel.

Disregarding this evidence, the ALJ's Initial Decision concluded that Comcast had violated Section 616.² On May 14, the Commission stayed the Initial Decision pending the completion of administrative review.³ The Commission observed that a stay was warranted because “[t]his is the first program carriage adjudication in which an initial decision requires the defendant to carry the complainant's programming, and it presents important issues that are likely to recur in future program carriage adjudications.”⁴ The Commission also found that a stay was “equitable and [would] serve the public interest” because it would “preserve the status quo” while the Commission considered the merits, would “avoid potential disruption to consumers and any affected third-party programmers,” and would “not unduly delay the grant of any relief to which The Tennis Channel may be entitled.”⁵

On July 24, 2012, the Commission issued an Order that largely affirms the Initial Decision.⁶ The Order imposes an extraordinary remedy, requiring Comcast to carry Tennis Channel at least as broadly as Golf Channel and Versus, thus mandating terms of carriage that

² *Tennis Channel, Inc. v. Comcast Cable Commc 'ns, LLC*, 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*”).

³ *Tennis Channel, Inc. v. Comcast Cable Commc 'ns, LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-50 (rel. May 14, 2012) (“*Stay Order*”).

⁴ *Id.* at 3 (footnote omitted).

⁵ *Id.* at 4.

⁶ *Tennis Channel, Inc. v. Comcast Cable Commc 'ns, LLC*, Memorandum Opinion and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78 (rel. July 24, 2012) (“*Order*”).

Tennis Channel did not bargain for and that the record demonstrates it could not obtain from *any* major MVPD. Notwithstanding the burdens that novel remedy imposes on Comcast, and despite the Commission’s prior recognition that requiring compliance even while that remedy is under review could create disruption to third parties and consumers,⁷ the Order requires Comcast to “complete remediation” within 45 days.⁸

ARGUMENT

Comcast’s Conditional Petition for Stay and its Reply, incorporated herein by reference, fully explained the reasons that a stay of the Initial Decision pending judicial review was warranted.⁹ The Commission itself agreed that the Initial Decision should not take effect until the Commission’s own review was complete. A stay of the Commission’s Order pending judicial review should be granted for the same reasons. While the Commission stated that its decision to grant an administrative stay would not “necessarily determine” the outcome of a motion for a stay pending judicial review,¹⁰ nothing in the Commission’s Order justifies a different conclusion regarding the need for a stay now. The Order adopts the same basic reasoning as the Initial Decision, and therefore commits the same fundamental errors on the merits.¹¹ It also subjects Comcast to the same irreparable constitutional injury and both Comcast and its customers to nearly all of the same severe, concrete harms.

⁷ *Stay Order* at 4.

⁸ *Order* ¶ 113.

⁹ Comcast’s Conditional Pet. for Stay (filed Jan. 25, 2012) (attached as Exhibit A); Comcast’s Reply to Tennis Channel’s Opp. to Comcast’s Conditional Pet. for Stay (filed Feb. 10, 2012) (attached as Exhibit B).

¹⁰ *Stay Order* at 4 n.25.

¹¹ Although the Order rejects the Initial Decision’s conclusion that the carriage remedy it imposed does not even implicate Comcast’s First Amendment rights, *Order* ¶ 97, the Order still

Although the Order properly rejects the Initial Decision's channel-placement remedy,¹² that modification does not come close to eliminating the irreparable harms that Comcast and its customers will suffer, and thus does not remove the need for a stay. The carriage remedy that the Order leaves intact will still irreversibly infringe Comcast's constitutional rights, and it will still impose significant burdens on Comcast and its customers. Compliance with the Order while judicial review is pending will require substantial outlays of time and money so that Comcast can, among other things, satisfy customer notice requirements; communicate relevant information to thousands of customer-service representatives; update websites, electronic programming guides, and databases; print new digital channel lineup cards and produce new local rate cards; and have engineers reprogram thousands of digital channel lineup maps across the country. Comcast's customers will also likely experience disruptions, degradation of service, and confusion during the process of changing Tennis Channel's carriage, which will in turn damage Comcast's goodwill. None of these costs and burdens can be undone if Comcast ultimately prevails on judicial review—to the contrary, they will be compounded when Tennis Channel is transferred back to the sports tier. Comcast has explained all of this in its prior filings, incorporates those filings by reference, and respectfully requests that the Commission consider the arguments in those filings and grant a stay pending judicial review.¹³

errs in ruling that the remedy survives First Amendment scrutiny for the reasons that Comcast explained in its exceptions and its stay filings.

¹² *Id.* ¶ 110.

¹³ Comcast argued in its conditional stay petition that section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, prohibited the Commission from making the Initial Decision effective while administrative review was pending. Because the Commission mooted that issue by granting a stay on its own motion pending administrative review, and because administrative review of the Initial Decision is now complete, Comcast's argument regarding section 10(c) of the APA is no longer pertinent at this stage of the proceedings.

Out of an abundance of caution, in addition to incorporating by reference its previous filings, Comcast reiterates below the reasons that a stay of the Order pending judicial review should be granted under the traditional four-factor test applied by the Commission and the courts. That 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.¹⁴ Each of these factors strongly favors a stay of the Commission's Order while a court considers the merits.

Comcast respectfully requests that the Commission issue a ruling on this stay petition no later than August 7, 2012. The Order requires Comcast to "complete remediation" within 45 days,¹⁵ and an expedited ruling is therefore necessary to allow Comcast sufficient time, if the Commission denies this stay petition, to seek a judicial stay as soon as reasonably practicable. If the Commission does not issue a ruling on this petition on or before August 7, Comcast expects to seek a judicial stay promptly thereafter.

I. Comcast Is Likely To Succeed On The Merits.

A. 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)(1).¹⁶ That complaint assails decisions made over seven years ago: The parties' 2005 agreement permits Comcast to distribute Tennis Channel on its sports tier, even though Golf Channel and Versus were already more broadly distributed at that time, and Comcast has exercised its right to carry Tennis Channel on its sports

¹⁴ See *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (1958); *In the Matter of Brunson Commc'ns, Inc. v. RCN Telecom Servs., Inc.*, 15 FCC Rcd 12883, 12883-84 ¶ 2 (CSB 2000) (citing *Virginia Petroleum* factors).

¹⁵ *Order* ¶ 113.

¹⁶ 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."

tier ever since. The Order nevertheless deems Tennis Channel’s 2010 complaint timely under Section 76.1302(f)(3) because it was filed within one year after Tennis Channel notified Comcast of its intent to institute a program-carriage case.¹⁷ That implausible reading, however, renders subsections (f)(1) and (f)(2) superfluous because it permits those subsections to be overridden by subsection (f)(3) even when they are directly on point and would bar the complaint at issue.¹⁸ And, as a practical matter, the Order’s interpretation would allow *any* long-dead claim to be resuscitated simply by asking to reopen settled negotiations—a result the Commission itself has elsewhere recognized would “undermin[e] the fundamental purpose of a statute of limitations.”¹⁹ Indeed, that is *precisely* what Tennis Channel sought to do here, using its 2009 proposal as a pretext to revive a claim it could have brought, and indeed *contemplated* bringing, years earlier.

The Order itself recognizes that its hyper-literal reading of subsection (f)(3) would allow complainants to restart the limitations period at will, which would sabotage the entire purpose of the statute of limitations. That is why the Order purports to graft a new, unwritten, and undefined “laches” doctrine onto the regulation.²⁰ The Order states that, under this newly minted rule, complainants must provide notice of their intent to file a complaint within a “reasonable

¹⁷ Order ¶¶ 30-31.

¹⁸ See, e.g., *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071-72 (2012) (applying the canon that “the specific governs the general,” and observing that the canon avoids a result in which “a specific provision . . . is swallowed by the general one, violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute” (internal quotation marks and alteration omitted)).

¹⁹ *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).

²⁰ Order ¶ 30 n.105.

time” after discovering a violation.²¹ But the Order provides no explanation of how this new “reasonable time” rule will be applied. The Order also does not even attempt to explain how Tennis Channel satisfied that rule here—nor could it, given that Tennis Channel knew from the time it signed its carriage agreement in 2005, and when it sought broader carriage in 2006 and 2007, that Comcast carried Golf Channel and Versus on broadly-penetrated tiers, yet did not file its complaint until 2010. Ultimately, the Order’s new, undefined “reasonable time” standard empowers the Commission to decide on an ad hoc basis when program-carriage contracts can be reopened in the future. All of this fundamentally undermines the point of the statute of limitations—upholding parties’ “settled expectations”²²—and turns it into a dead letter.

The Order’s revisionist interpretation of the statute of limitations is unlikely to withstand judicial review. Courts refuse to allow an agency, “under the guise of interpreting a regulation, to create *de facto* a new regulation,”²³ and will not defer to an agency’s unpersuasive interpretation of a regulation that would result in “unfair surprise” to regulated parties.²⁴ Here, the Order rewrites the statute of limitations contained in its regulations, rather than interpreting it. It also subjects Comcast to “unfair surprise” by applying subsection (f)(3) in a manner that is wholly divorced from the historical understanding of that provision, which was that it applied only where an MVPD had denied or refused to acknowledge a request to negotiate for carriage. The Order asserts that there was a “willful deletion” of that limitation when subsection (f)(3) was amended in 1994.²⁵ At the time, however, the Commission stated that those amendments were

²¹ *Id.*

²² *Bd. of Regents of Univ. of the State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980).

²³ *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

²⁴ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-70 (2012).

²⁵ *Order* ¶ 32.

intended only to afford standing to MVPDs to file program carriage complaints, and did not suggest that the revisions were substantive in any other respect.²⁶ Further, the Commission reiterated in 1999 that subsection (f)(3) addresses the situation in which a “defendant unreasonably refuses to negotiate with [the] complainant.”²⁷ Comcast had no notice that the Commission would abruptly change its view here and adopt a radical new approach that inexplicably allows Tennis Channel, in contravention of subsection (f)(1), to revive its Section 616 claim years after the parties entered their carriage agreement.

B. The Order 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 caused by intentional discrimination “on the basis of affiliation.”²⁸ 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 want it, and, to the extent it deems sports-tier carriage inadequate, it is free to seek broad carriage from MVPDs other than Comcast, including satellite companies that serve every community in America. In the face of this evidence, the Order finds a violation of Section 616 only by effectively reading the unreasonable-restraint requirement out of the statute altogether. It finds an unreasonable restraint because Tennis Channel could secure more viewers and advertising revenue in absolute terms through broader carriage, and could secure more

²⁶ *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).

²⁷ *In the Matter of 1998 Biennial Regulatory Review – Part 76 – Cable Television Pleading & Complaint Rules*, CS Docket No. 98-54, 17 Communications Reg. (P&F) 951, 1999 WL 766253, ¶ 5 (1999).

²⁸ 47 U.S.C. § 536(a)(3).

viewers and advertising revenue relative to Golf Channel and Versus if the networks were carried on the same tier.²⁹ But Congress assuredly was not concerned with—much less willing to compel speech to prevent—conduct that allegedly “unreasonably restrain[s] [a network] from *finding greater success* in competing against [other] networks.”³⁰ The ability to secure more viewers, whether in absolute or relative terms, will be present in *every* case in which a network seeks broader carriage through a claim of affiliation-based discrimination, rendering the unreasonable-restraint requirement of Section 616 a nullity.

The Order dismisses Comcast’s interpretation of the unreasonable-restraint element of Section 616 as “simply echo[ing] antitrust law” and “frustrat[ing] Congress’s clear purpose to grant the Commission new authority to address concerns specific to MPVDs and affiliated programming.”³¹ But even if Congress intended to give “the Commission new authority to address concerns specific to MPVDs and affiliated programming,” it does not follow that Congress intended that the Commission should ignore antitrust principles that make clear a duty to deal exists only in extraordinary circumstances. In fact, Section 616 not only invokes antitrust principles, but also *further limits* the circumstances in which MVPDs have a duty to deal, by providing that a plaintiff must show *both* an “unreasonabl[e] restrain[t]” on competition *and* intentional discrimination “on the basis of affiliation.” Thus, Section 616 does not “simply echo antitrust law”³²—it *narrows* the application of antitrust principles by the Commission in the video-programming market. This makes perfect sense because, as Congress presumably understood, requiring MVPDs to deal with unaffiliated networks implicates special First

²⁹ Order ¶¶ 83-86.

³⁰ Order ¶ 67 (emphasis added).

³¹ Order ¶ 41.

³² *Id.*

Amendment concerns that are not present in other industries.³³ Section 616 is, therefore, properly interpreted to grant the Commission authority only to remedy particularly severe forms of competitive harm—and not, as the Order would have it, as a vast expansion of antitrust principles that would authorize imposing a duty to deal even in the absence of a serious harm to the ability to compete.

Additionally, although only handicaps resulting from intentional discrimination on the basis of affiliation trigger the statute, the Order errs by disregarding un rebutted evidence that Comcast’s carriage of Tennis Channel was based on legitimate business considerations, including its impartial determination that accepting Tennis Channel’s proposal for broader carriage would cost Comcast [REDACTED] with no offsetting benefits.³⁴ The Order faults Comcast for not weighing the proposal’s benefits,³⁵ but neither it nor Tennis Channel shows that any benefits exist, let alone that they came close to outweighing the costs. Comcast cannot be faulted for failing to weigh benefits that, so far as the record shows, do not exist against costs that indisputably do. And the Order’s insistence that it does not fault Comcast for failing to quantify or reduce to writing its analysis of costs and benefits fails to explain how else it could validly determine that Comcast failed to prove a negative.³⁶

³³ See, e.g., *Traynor v. Turnage*, 485 U.S. 535, 546 (1988) (“It is always appropriate to assume that our elected representatives, like other citizens, know the law.” (internal quotation marks omitted)); *Morse v. Republican Party of Va.*, 517 U.S. 186, 245 (1996) (Breyer, J., concurring in the judgment) (“our practice [is to] presume that Congress, which also has sworn to protect the Constitution, would intend to err on the side of fundamental constitutional liberties when its legislation implicates those liberties” (internal quotation marks omitted)).

³⁴ 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.

³⁵ Order ¶ 77.

³⁶ Order ¶ 79.

Moreover, as the Joint Dissenting Statement of Commissioners McDowell and Pai correctly recognizes, the Order’s conclusion that Comcast discriminated on the basis of affiliation “finds on this simple fact: Comcast’s treatment of Tennis Channel was within the industry mainstream.”³⁷ Like Comcast, “every major MVPD in the United States [in 2010] distributed both Golf Channel and Versus to more subscribers than Tennis Channel.”³⁸ The Order erroneously “attempts to obscure this powerful evidence concerning other MVPDs’ carriage practices by comparing apples to oranges” and artificially inflating the average penetration rate for Tennis Channel by including the carriage of the network by its affiliated MVPDs, DirecTV and Dish Network.³⁹ Ironically, as the dissent explains,⁴⁰ the Order requires Comcast to carry Tennis Channel on a more widely distributed tier than even the network’s affiliated owners (DirecTV and Dish Network) carry it.

The Order also writes off the highly probative decisions of other market participants based on an entirely speculative “ripple effect,” which illogically presumes that Comcast’s carriage decisions, even if economically unsound, drove the decisions of other MVPDs.⁴¹ None of the evidence cited by the Order remotely supports this theory, which ignores experience and human nature. As the dissent explains, “any waves the ripple effect creates surely are

³⁷ *Order* at 44 (Joint Dissenting Statement of Commissioners McDowell and Pai) (“*Joint Dissenting Statement*”).

³⁸ *Id.* Further, [REDACTED].
Comcast’s Proposed Findings of Fact & Conclusions of Law, dated June 7, 2011, ¶¶ 47-51. The Commission disregarded that evidence.

³⁹ *Joint Dissenting Statement* at 44.

⁴⁰ *Joint Dissenting Statement* at 47 (“order[ing] Comcast to carry Tennis Channel on the same tier as Golf Channel and Versus [will] make Comcast an industry outlier”).

⁴¹ *Order* ¶ 73.

counteracted by the straightforward effect of competition.”⁴² Market players, after all, do not leave valuable opportunities on the table simply because *others* have not seized them. In any event, the Order’s application of its “ripple effect” theory in this case cannot be squared with the record, which establishes that several MVPDs, including Time Warner and Cox, entered carriage agreements with Tennis Channel in 2002 and 2003, respectively—years *before* Comcast did—and that those MVPDs carried Tennis Channel less broadly than Golf Channel and Versus.⁴³ Comcast’s subsequent carriage decision could not conceivably have affected those determinations, which demonstrate that Comcast was adhering to the judgment of the market, not driving it.⁴⁴

C. Even if the Order could be squared with Section 616, it violates the First Amendment. Although the Order correctly rejects the Initial Decision’s conclusion that Comcast’s First Amendment rights are not even *implicated* in this case, the Order arrives at the same erroneous result 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

⁴² *Joint Dissenting Statement* at 46.

⁴³ Comcast Exhs. 165, 235, 1103; Comcast’s Proposed Findings of Fact & Conclusions of Law, dated June 7, 2011, ¶¶ 16 & n.28, 53, 55, 74; Comcast’s Reply Findings of Fact & Conclusions of Law, dated June 21, 2011, ¶ 240.

⁴⁴ Moreover, the Order’s “ripple effect” theory in fact undermines its conclusion that Comcast discriminated on the basis of affiliation. This theory posits that, unless Tennis Channel is broadly carried by one major MVPD, it is not sufficiently attractive to warrant broader carriage by other MVPDs. But that reaffirms that Comcast had a legitimate business reason for declining broader carriage of Tennis Channel—it was not carried broadly by any other major MVPD, and its broad appeal was therefore, at a minimum, unproven. Ultimately, therefore, the Order simply places a special burden on Comcast to be the *first* major MVPD to provide broad carriage of Tennis Channel. But Section 616 imposes no such special burden on particular market participants. Comcast has the same right to assess the costs and benefits of broader carriage that a smaller MVPD would, and it has no duty to *make* networks attractive to other MVPDs. *See Joint Dissenting Statement* at 46 (observing that Comcast has no duty to be the “first mover” because its “obligation under [the Commission’s] rules is to provide unaffiliated networks with non-discriminatory—not preferential—treatment”).

discretion and constitutes an impermissible penalty for its speech. This penalty is nakedly content-based, and is therefore subject to strict scrutiny, because the Order infers discrimination from its determination that Tennis Channel is “similarly situated” to Golf Channel and Versus—a determination that turns on comparing the three networks’ content, including their “genre” (*i.e.*, sports) and “image.”⁴⁵

The Order asserts that its “similarly situated” analysis is not content-based, even though it involves the explicit analysis of content, because the government’s goal in applying that analysis is not to suppress particular speech.⁴⁶ But that assertion contradicts Supreme Court precedent holding that “[t]he First Amendment’s hostility to content-based regulation extends *not only* to restrictions on particular viewpoints, *but also* to prohibition of public discussion of an entire topic” and other restrictions based on subject matter.⁴⁷ If applying a law depends on speech’s content, as applying the Order’s “similarly situated” analysis does, the law is content-based.⁴⁸ The Order’s contrary conclusion erroneously ignores the well-established distinction between *content*-based and *viewpoint*-based rules.⁴⁹

⁴⁵ Order ¶¶ 51-52, 65-66.

⁴⁶ Order ¶ 100.

⁴⁷ *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (emphases added; internal quotation marks omitted).

⁴⁸ *Id.* at 229; *see also United States v. Stevens*, 130 S. Ct. 1577, 1584, 1587-92 (2010) (holding content-based—and facially invalidating—a federal statute banning depictions of the intentional wounding or killing of animals, irrespective of the messages those depictions conveyed); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2543-44, 2548 (2012) (plurality opinion) (deeming content-based a federal statute prohibiting false statements about the receipt of military medals); *id.* at 2552 (Breyer, J., concurring in the judgment) (recognizing that, when content-based regulations are subjected to strict scrutiny, the result is “near-automatic condemnation”).

⁴⁹ *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

The Order also asserts that, to give effect to Section 616, the Commission *must* apply a “similarly situated” analysis that ultimately turns on a comparison of networks’ content.⁵⁰ But Section 616 does not prohibit discrimination against “similarly situated” networks; it prohibits discrimination “on the basis of affiliation.”⁵¹ A faithful application of that statutory text turns not on content, but instead on the content-neutral elements of intent and affiliation. An interpretation of the statute that eschews content-based analysis is thus not only more consistent with the language that Congress used in Section 616, but is also necessary to avoid potential violations—and, in this case, an actual violation—of the First Amendment.

The Order also errs when it claims that *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (per curiam), compels application of intermediate scrutiny in this case. The Order fails to account for the fact that the court in *Time Warner* addressed provisions whose application did *not* depend on programming content.⁵² The case thus provides no support for the Order’s view that its analysis here is content-neutral or that the carriage remedy it imposes can escape strict scrutiny.

Even if intermediate scrutiny did apply, the Order would still violate Comcast’s First Amendment rights because the interests that Section 616 was designed to serve—promoting competition and diversity in the programming market—were premised on the “bottleneck, or gatekeeper, control” of cable operators,⁵³ which “[c]able operators . . . *no longer have.*”⁵⁴ Unable to establish that such power exists today, the Order retreats from that theory and claims

⁵⁰ See Order ¶ 100.

⁵¹ 47 U.S.C. § 536(a)(3).

⁵² See *Time Warner*, 93 F.3d at 969, 977-78.

⁵³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994) (“*Turner P*”).

⁵⁴ *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (emphasis added).

that Congress was not concerned about “bottleneck” power in the video-programming market when it enacted Section 616, but instead targeted “vertical integration” by itself.⁵⁵ But that theory ignores the language of the statute—which limits its reach to “unreasonabl[e] restrain[ts]” on programmers’ ability to compete—and judicial authority identifying the amelioration of the effects of bottleneck power as *the* interest that the provisions of the Cable Television Consumer Protection and Competition Act of 1992 were intended to serve.⁵⁶ Those decisions do not hold, or even suggest, that vertical integration *absent* bottleneck power (which “unreasonably restrains” a network’s ability to compete) constitutes an important government interest. And even if it were true that Congress were concerned with vertical integration *simpliciter*, the Order fails to explain why that interest is sufficiently important. The Order relies on *Turner I* and *Time Warner*,⁵⁷ but each was premised on bottleneck power.

In any event, the Order also fails intermediate scrutiny because it is not narrowly tailored to the government’s interests in promoting competition and diversity in the content market. In “order[ing] Comcast to treat Tennis Channel more favorably than all other major MVPDs,” the Order fails to “promote[] fair competition,” and instead requires Comcast, and *only* Comcast, “to favor one particular competitor in the marketplace.”⁵⁸ Moreover, the Order itself concedes that a less burdensome remedy than the one it imposes—requiring Comcast to move Tennis Channel only to the Digital Preferred Tier, rather than the Digital Basic Tier on which Golf Channel and

⁵⁵ *Order* ¶¶ 40-42.

⁵⁶ *See, e.g., Turner I*, 512 U.S. at 656, 661; *Time Warner*, 93 F.3d at 969, 978.

⁵⁷ *Order* ¶ 104.

⁵⁸ *Joint Dissenting Statement* at 45 n.337. In this sense, the Order also inhibits Comcast’s ability to provide a competitive product—the programming of its affiliated networks.

Versus are carried—might alleviate Tennis Channel’s alleged competitive harm.⁵⁹ Despite that concession, the Order blithely adopts the more burdensome remedy, in violation of the narrow tailoring requirement that the government must “not burden substantially more speech than necessary to achieve [its] aim.”⁶⁰

The Order also is not narrowly tailored because it may obligate Comcast to pay an increased aggregate fee to Tennis Channel, even though that increased fee will not serve any cognizable interest identified by the Commission. The Order states that “Comcast and Tennis Channel already agreed in their contract how Tennis Channel should be compensated if it is carried on a broader tier,”⁶¹ and that “Comcast must pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated.”⁶² But insofar as the supposed competitive injury that Tennis Channel has suffered is the failure to gain broader exposure to subscribers, any additional payment beyond the current aggregate fee will do nothing to remedy that injury. The Order’s attempt to mandate such additional payment therefore renders it overbroad. Although the Order suggests that a higher aggregate fee would simply flow from the rates established in the parties’ contract,⁶³ the obvious premise of Comcast’s agreement to those rates was that Comcast would provide broader carriage only if it determined that such carriage was warranted by marketplace realities and was in its economic interest—not that it

⁵⁹ *Order* ¶ 87 n.290.

⁶⁰ *Time Warner*, 93 F.3d at 969. Furthermore, as the Joint Dissenting Statement explains, the Order’s concession that carrying Tennis Channel on the Digital Preferred Tier might be lawful also calls into question the Order’s conclusion that Comcast engaged in impermissible discrimination by carrying Tennis Channel on a different tier than Golf Channel and Versus. *See Joint Dissenting Statement* at 47.

⁶¹ *Order* ¶ 90.

⁶² *Order* ¶ 92.

⁶³ *Order* ¶¶ 90, 92.

would be compelled to provide broader carriage by dint of a government order. Thus, the Order's invocation of the rates in the contract, in circumstances entirely divorced from those in which Comcast contemplated those rates might be triggered, is not a "contract" remedy at all. It is a naked, arbitrary expropriation of Comcast's property that operates as a fine for Comcast's exercise of its First Amendment rights. Because that penalty on Comcast's speech is wholly unconnected to any government interest, the Order violates the narrow tailoring requirement.⁶⁴

The Order's ruling on the statute of limitations and Tennis Channel's own conduct further demonstrate that the Order is overbroad to the extent that it requires Comcast to pay the rates tied to broader distribution in the parties' 2005 agreement. The Order rules that Tennis Channel's complaint is timely because it supposedly challenges, not the terms of the 2005 contract, but Comcast's decision to decline Tennis Channel's proposal for broader carriage in 2009.⁶⁵ As a part of that 2009 proposal, however, Tennis Channel offered Comcast [REDACTED] [REDACTED] if it were moved to a broader tier.⁶⁶ That proposal was consistent with industry practice, under which price terms are typically renegotiated when a network seeks broader carriage. If Tennis Channel is to receive broader carriage, it must take the bitter with the sweet. Because Tennis Channel recognized in its 2009 proposal that Comcast should not be required to pay the 2005 contract rates for broader carriage of the network, the Order imposes

⁶⁴ This overbreadth problem is not cured by the Order's assertion that, "[t]o the extent the existing contract does not state how Tennis Channel should be compensated for broader carriage, [the Commission] expect[s] the parties to negotiate appropriate pricing terms." *Order* ¶ 92. Any agreement reached pursuant to such "negotiat[ion]" still would be the result of government compulsion, not a product of the marketplace, because no truly voluntary agreement can be reached when the Commission has thrown its weight behind one of the negotiating parties. Thus, any increased fees that Comcast is forced to pay under such an agreement would flow from the Order itself, and the Order would still, therefore, impose greater burdens than needed to further the government's purported interests.

⁶⁵ *Order* ¶¶ 29, 32.

⁶⁶ *See Initial Decision* ¶ 19.

substantially greater burdens than are necessary or appropriate by attempting to force Comcast to pay those rates for broader carriage now—particularly when Comcast’s decision not to accept the 2009 proposal is the only basis on which the Order deems Tennis Channel’s complaint to be timely. The Order therefore fails to satisfy the narrow tailoring requirement on this ground as well.

II. Comcast Will Be Irreparably Injured Absent A Stay.

The Order’s requirement that Comcast must carry Tennis Channel at the same level of distribution as Golf Channel and Versus will violate Comcast’s First Amendment rights, and “[i]t has long been established that the loss of constitutional freedoms, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’”⁶⁷ That alone justifies a stay.

The Order, moreover, will also cause irreparable harm to Comcast’s business. As the dissent recognizes, it is unrealistic to assert that Comcast “could comply with [the Order] without giving Tennis Channel broader carriage” because, if Comcast were to move Golf Channel and Versus to the sports tier, it would be carrying those networks “far more narrowly than other MVPDs, to the detriment”—and irritation—“of Comcast subscribers who presumably value that programming.”⁶⁸ And, in any event, Comcast is contractually obligated to carry Golf Channel and Versus broadly, and thus will, as a practical matter, have no choice but to provide Tennis Channel with similarly broad distribution.

This change will impose immediate, substantial burdens on Comcast that cannot be undone if the Order is overturned on judicial review. The process of providing Tennis Channel with broader distribution in systems in which it is currently carried (known as “melting”), and of

⁶⁷ *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)).

⁶⁸ *Joint Dissenting Statement* at 47 n.343.

launching Tennis Channel in systems that do not already carry it, involves significantly more than “flipping a switch.”⁶⁹ Comcast would have to, at a minimum, take the time-consuming and burdensome steps of updating websites, electronic programming guides, and multiple internal and external databases, printing new digital channel lineup cards, and producing new local rate cards.⁷⁰ Comcast’s engineers also would be required to reprogram (or “remap”) thousands of channel lineup maps associated with more than [REDACTED] digital channel lineup across the country.⁷¹ Moreover, Comcast would have to comply with customer notice requirements imposed by thousands of local regulators that mandate waiting periods and widely varying types of communications to those affected.⁷² Together, these tasks would require Comcast to allocate substantial resources, including the time and efforts of over one hundred national and regional employees.⁷³ And because these processes require significant time to complete, Comcast is required to begin suffering these burdens *immediately* to satisfy the Order’s direction to provide broader carriage to Tennis Channel within 45 days, and an immediate stay of the order pending judicial review is, therefore, necessary to avoid causing irreparable injury to Comcast.⁷⁴

Furthermore, to mitigate the inevitable viewer confusion that changing Tennis Channel’s level of distribution would cause, Comcast must launch extensive, costly outreach initiatives

⁶⁹ Declaration of Jay Kreiling ¶ 5 (July 30, 2012) (attached as Exhibit D).

⁷⁰ Declaration of Jennifer Gaiski ¶¶ 6, 13-14 (July 30, 2012) (attached as Exhibit C); Kreiling Decl. ¶¶ 9, 18-19.

⁷¹ Gaiski Decl. ¶¶ 6, 15; Kreiling Decl. ¶ 18.

⁷² Gaiski Decl. ¶¶ 14-15; Kreiling Decl. ¶¶ 6, 8, 10-13.

⁷³ Kreiling Decl. ¶¶ 7, 18.

⁷⁴ Order ¶ 113.

required by company practice to prepare viewers for the changes in advance.⁷⁵ It must also prepare for the likely increase in customer-service inquiries, which impose additional costs and degrade service quality.⁷⁶ In particular, Comcast will be required to communicate relevant information to approximately 30,000 customer-service representatives so that they can respond to calls regarding the changes.⁷⁷ Even these measures cannot completely eliminate consumer confusion and loss of goodwill.⁷⁸

The Order will also impose irreparable burdens in its application to Comcast’s systems that do not currently carry Tennis Channel at all and that have little to no spare bandwidth available to launch new networks.⁷⁹ To carry Tennis Channel on these systems, Comcast likely will be required to choose among several highly burdensome alternatives, including making large economic investments to increase channel capacity on many of these systems—investments that are not economically feasible and that Comcast would not otherwise make—delaying the launch of new networks, degrading the quality of existing services, or even ceasing to carry some well-established networks altogether.⁸⁰ And, again, Comcast will be required to suffer these burdens immediately to comply with the Order’s 45-day deadline.

All of these changes will be exceedingly difficult to unwind when the Order is overturned. Indeed, the entire process would need to be repeated in reverse, meaning these costs would not

⁷⁵ Gaiski Decl. ¶ 14; Kreiling Decl. ¶¶ 14-16.

⁷⁶ Kreiling Decl. ¶ 17.

⁷⁷ Kreiling Decl. ¶ 17; Gaiski Decl. ¶ 15.

⁷⁸ Kreiling Decl. ¶ 17; *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.”).

⁷⁹ Gaiski Decl. ¶¶ 5, 16-17; Kreiling Decl. ¶¶ 6, 9, 20-23. Approximately ██████████ of Comcast’s systems, representing ██████████ subscribers, do not carry Tennis Channel and have little to no bandwidth available to launch new networks. Gaiski Decl. ¶ 17.

⁸⁰ Gaiski Decl. ¶¶ 5, 16-17; Kreiling Decl. ¶¶ 6, 9, 20-23.

be recouped, but *doubled*.⁸¹ Comcast would again be required to update websites and electronic programming guides, print new channel lineup cards and produce new rate cards, reprogram digital channel lineup maps, satisfy notice requirements imposed by regulation and company practice, and take even more extensive steps to prevent a heightened strain on customer relations.⁸² Absent additional extensive and costly customer-outreach efforts, those who begin receiving Tennis Channel under the Order could be displeased—and, at a minimum, confused—if access to Tennis Channel were suddenly rescinded.⁸³ A stay pending judicial review is necessary to prevent these whipsaw effects on Comcast and its subscribers.

Absent a stay, these harms also will be magnified by the significant risk that, under the Order’s requirement that Comcast “pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated,”⁸⁴ Comcast may be compelled to pay a higher aggregate fee to Tennis Channel while judicial review is pending. Comcast knows of no clear path—and the Order does not prescribe one—for recovering those fees, once paid, if it ultimately prevails.⁸⁵ And even to the extent that the Order might permit Comcast to negotiate with Tennis Channel regarding the fees for broader carriage,⁸⁶ engaging in those negotiations will itself impose costs on Comcast that cannot be recovered after judicial review is complete.

⁸¹ Gaiski Decl. ¶¶ 6, 18-20; Kreiling Decl. ¶¶ 7, 24.

⁸² Gaiski Decl. ¶¶ 6, 18-20; Kreiling Decl. ¶¶ 7, 24.

⁸³ Gaiski Decl. ¶ 19.

⁸⁴ *Order* ¶ 92.

⁸⁵ *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)).

⁸⁶ *See Order* ¶ 92.

III. A Stay Would Impose No Harm On Tennis Channel.

As the Commission recognized in granting a stay pending administrative review, a stay would merely maintain the status quo and would not “unduly delay the grant of any relief to which The Tennis Channel may be entitled.”⁸⁷ Indeed, Tennis Channel 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.

IV. The Public Interest Favors A Stay.

“[I]t is always in the public interest to prevent violation of a party’s constitutional rights,”⁸⁸ especially speech and press rights. The First Amendment’s premise is that the public interest is best served by allowing content to rise or fall based on individual preference, not governmental fiat. Thus, the Order’s unwarranted intrusion on Comcast’s First Amendment rights, standing alone, fully supports a stay pending judicial review.

The public also will be forced to bear unjustified burdens absent a stay. As the dissent explains, Comcast’s subscribers are likely to bear the increased costs if Comcast is required to pay increased aggregate fees to Tennis Channel.⁸⁹ Moreover, the Order will cause Comcast’s

⁸⁷ *Stay Order* at 4.

⁸⁸ *Déjà Vu of Nashville, Inc. v. Metro. Gov’t of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) (internal quotation marks omitted).

⁸⁹ *Joint Dissenting Statement* at 47.

systems that have limited spare bandwidth to degrade their existing services or drop other networks so that they can carry Tennis Channel, and viewers will therefore suffer disruptions and inconvenience and be forced, at a minimum, to expend time and energy to understand the change.⁹⁰ Displaced networks will also suffer decreased viewership and advertising revenue.⁹¹ Indeed, in granting a stay pending administrative review, the Commission expressly found that a stay would “serve the public interest” because it would “avoid potential disruption to consumers and any affected third-party programmers in the event that” the remedy imposed against Comcast is reversed or modified.⁹² That finding applies equally here. Thus, the public will not gain, and may in fact be injured, if the Order is allowed to overturn Comcast’s exercise of its editorial discretion and business judgment—a judgment fully consistent with industry practice—pending judicial review.

CONCLUSION

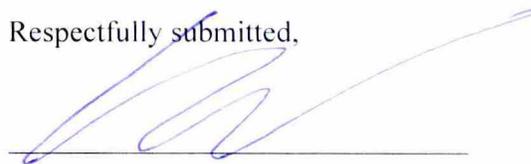
For the foregoing reasons and the reasons stated in Comcast’s Conditional Petition for Stay and its Reply, which are incorporated by reference, Comcast requests that the Commission stay the effectiveness of its Order pending the conclusion of judicial review. Comcast also requests that the Commission issue a ruling on this stay petition no later than August 7, 2012.

⁹⁰ Gaiski Decl. ¶¶ 5, 16-17; Kreiling Decl. ¶¶ 6, 9, 20-23.

⁹¹ Gaiski Decl. ¶ 5.

⁹² *Stay Order* at 4.

Respectfully submitted,



Dated: July 30, 2012

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Exhibit A

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

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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.

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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.¹ Early in their development, both networks paid substantial sums in order to induce MVPDs, including Comcast, to expand their carriage.² Today, both networks broadcast significant amounts of exclusive programming, and both are broadly distributed by most major MVPDs including Comcast.³

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

¹ 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.

² 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.

³ 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.

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

⁵ Comcast Exh. 52.

⁶ 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.⁷

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,⁸ but [REDACTED] and Comcast—in decisions that Tennis Channel concedes were not discriminatory—declined.⁹ Comcast conducted a cost-benefit analysis and concluded that it would lose money if it accepted.¹⁰

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

[REDACTED]

[REDACTED]

[REDACTED].¹¹ In early 2009, it hired a consultant to prepare for litigation.¹² 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.¹³ Comcast conducted a cost-benefit analysis and concluded that it would lose money under either proposal.¹⁴ On the one hand, accepting

⁷ Comcast Exhs. 165, 235, 120, 659.

⁸ 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.

⁹ 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.

¹⁰ Comcast Exh. 75 (Bond Written Direct) ¶¶ 25–27.

¹¹ Comcast Exh. 24.

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

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

¹⁴ 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.¹⁵ 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.¹⁶ And, in 2011, Cablevision dropped the network altogether.¹⁷ Its parent companies DirecTV and Dish Network provide [REDACTED] of its subscribers.¹⁸ All major MVPDs—even DirecTV and Dish Network—distribute Tennis Channel to fewer subscribers than Golf Channel and Versus.¹⁹

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

¹⁵ Comcast Exh. 588; *see also* Comcast Exh. 467.

¹⁶ Comcast Exhs. 31, 121, 201, 529, 534, 545, 632, 650.

¹⁷ 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>.

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

¹⁹ 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”).²⁰ On December 20, 2011, the ALJ issued an Initial Decision finding that Comcast violated Section 616.²¹ 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.”²²

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.”²³ 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

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

²¹ *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*”).

²² *Initial Decision* ¶¶ 119–20.

²³ *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.”²⁴ 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.²⁵

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

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.²⁷ For the Commission both to alter the Initial Decision to make it immediately effective and deny a stay would be inconsistent with the APA.

²⁴ 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.”).

²⁵ *Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

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

²⁷ *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.²⁸ 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? . . .²⁹

While “no single factor is necessarily dispositive,”³⁰ 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

²⁸ 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”).

²⁹ *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)).

³⁰ *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,”³¹ and that the issues raised by the petition “bear further analysis.”³² 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*.³³ 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.”³⁴ To the contrary, they serve important “policies of repose,” including upholding parties’ “settled

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

³² *Brunson Commc’ns*, 15 FCC Rcd at 12885 ¶ 5.

³³ *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).

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

expectations.”³⁵ 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.”³⁶

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.”³⁷

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

³⁵ *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.”).

³⁶ *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”).

³⁷ 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.”³⁸ 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.”³⁹ But under this theory *every* long-dead claim can be resuscitated simply by asking to reopen settled negotiations.⁴⁰ 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].⁴¹ Correspondence between Tennis Channel’s Chairman and CEO Ken Solomon and one of its directors shows that it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁸ *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).

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

⁴⁰ *See 2011 Report & Order* ¶ 38.

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

██████.⁴² 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.⁴³ 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.⁴⁴ 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

⁴² Comcast Exhs. 125, 126.

⁴³ *2011 Report & Order* ¶ 38.

⁴⁴ 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.⁴⁵ 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.”⁴⁶ 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.⁴⁷ 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

⁴⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994) (“*Turner P*”); 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”).

⁴⁶ 47 U.S.C. § 536(a)(3).

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

effectively.⁴⁸ 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.⁴⁹

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,⁵⁰ 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.⁵¹ 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.

⁴⁸ 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).

⁴⁹ *Hecht*, 570 F.2d at 992.

⁵⁰ See Tennis Channel Exh. 308, at 13.

⁵¹ *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”⁵² 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.⁵³ 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,⁵⁴ the Initial Decision nonetheless finds “discrimination” because Comcast failed to weigh the benefits of broader carriage.⁵⁵ 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

⁵² Bond Direct, Apr. 29, 2011 Tr. 2127:3–11.

⁵³ 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.

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

⁵⁵ *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.”⁵⁶ Here, *every* major MVPD—including Tennis Channel’s parent companies Dish Network and DirecTV—carries Golf Channel and Versus more broadly than Tennis Channel.⁵⁷ Four MVPDs, like Comcast, rejected broader-carriage proposals from Tennis Channel during the same time frame.⁵⁸ And, in 2011, Cablevision dropped the network entirely.⁵⁹ 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.”⁶⁰ 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.⁶¹

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

⁵⁶ *MASN*, 25 FCC Rcd at 18111–12 ¶ 18.

⁵⁷ Comcast Exhs. 1102, 1103.

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

⁵⁹ 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.

⁶⁰ *Initial Decision* ¶ 63.

⁶¹ 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.⁶² 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,

⁶² 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.⁶³ 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.⁶⁴ To the extent the Initial Decision gives Comcast any choice at all,⁶⁵ 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.⁶⁶ *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

⁶³ *Initial Decision* ¶¶ 102–03.

⁶⁴ *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.”).

⁶⁵ Comcast is contractually obligated to carry Golf Channel and Versus broadly. *See Tennis Channl 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.

⁶⁶ *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.”⁶⁷ 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.⁶⁸ The Supreme Court has never upheld a content-based restriction of this sort in a comparable context.⁶⁹ In fact, the entire train of First Amendment doctrine stands for the proposition that such content-based restrictions are subject to strict scrutiny.⁷⁰ 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.⁷¹

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

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

⁶⁸ 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.

⁶⁹ *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).

⁷⁰ *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)).

⁷¹ 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.”).

market⁷²—were once regarded as “important,”⁷³ both have since become less substantial. The importance of those interests was premised on the “bottleneck, or gatekeeper, control” of cable operators,⁷⁴ but today “[c]able operators . . . *no longer have*” such “bottleneck power.”⁷⁵ 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.⁷⁶

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

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

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

⁷⁴ *Turner I*, 512 U.S. at 656.

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

⁷⁶ *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.⁷⁷ 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

⁷⁷ 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.⁷⁸ 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.’”⁷⁹ 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.⁸⁰ 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

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

⁷⁹ *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)).

⁸⁰ 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.⁸¹ Because Comcast, unlike some other MVPDs, grew through acquisition of multiple cable systems, its cable systems are remarkably diverse.⁸² Comcast’s cable systems have more than [REDACTED] different channel configurations.⁸³ And, they differ considerably in their mix of analog and digital signals.⁸⁴ Comcast’s cable systems are also regulated by over 6,450 local franchise authorities,⁸⁵ 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.⁸⁶

The process of moving a network to a broad level of distribution, referred to as “melting,” involves significantly more than “flipping a switch.”⁸⁷ 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

⁸¹ Gasiki Decl. ¶ 7.

⁸² Gaiski Decl. ¶ 13.

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

⁸⁴ Gaiski Decl. ¶ 12.

⁸⁵ Kreiling Decl. ¶ 12.

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

⁸⁷ Kreiling Decl. ¶ 5.

regulations that require waiting periods and particular types of notice to those affected.⁸⁸

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.⁸⁹

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.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴ 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

⁸⁸ Gaiski Decl. ¶ 28; Kreiling Decl. ¶ 6.

⁸⁹ 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.

⁹⁰ Gaiski Decl. ¶¶ 22, 25.

⁹¹ Gaiski Decl. ¶¶ 16–17.

⁹² Gaiski Decl. ¶¶ 18–19, 22–24.

⁹³ Gaiski Decl. ¶ 19.

⁹⁴ Gaiski Decl. ¶¶ 20–21, 24.

must be relocated to another channel position.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸ And, even with those steps, consumer confusion, and a concomitant loss of goodwill, may inevitably result.⁹⁹ Further adding to these burdens, more than 100 Comcast employees must update multiple databases, directories, and channel guides, and provide

⁹⁵ Gaiski Decl. ¶¶ 16, 19.

⁹⁶ Gaiski Decl. ¶¶ 6, 17, 19.

⁹⁷ Kreiling Decl. ¶¶ 9, 11–17; Gaiski Decl. ¶ 26.

⁹⁸ Kreiling Decl. ¶¶ 18–19; Gaiski Decl. ¶ 28.

⁹⁹ 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.¹⁰⁰ Each affected network also must be remapped in every system, and physical engineering work may be required.¹⁰¹

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*.¹⁰² 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.¹⁰³ 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.

¹⁰⁰ Kreiling Decl. ¶ 20.

¹⁰¹ Gaiski Decl. ¶ 26; Kreiling Decl. ¶¶ 20–21.

¹⁰² Gaiski Decl. ¶¶ 31–34.

¹⁰³ 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.¹⁰⁴ 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.”¹⁰⁵ 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.”¹⁰⁶ 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.

¹⁰⁴ *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”).

¹⁰⁵ *Initial Decision* ¶ 92.

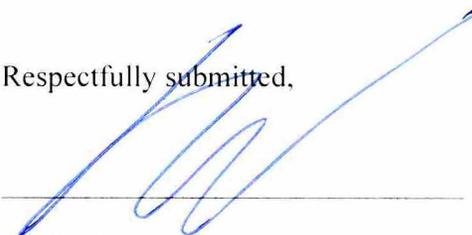
¹⁰⁶ *See Déjà Vu of Nashville, Inc. v. Metro. Gov’t of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001).

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

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CERTIFICATE OF SERVICE

I, David B. Toscano, do hereby certify that on this 25th 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.

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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.¹

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.

¹ 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”).²

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

² 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")³ – 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

³ 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.⁴ 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.)

⁴ 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.,	)	MB Docket No. 10-204
Complainant	)	File No. CSR-8258-P
v.)	
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 tier¹ 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.

¹ 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)²; FCC Upholds Order Forcing Time Warner to Air NFL Network, *First Amendment Center* (Aug. 8, 2006).³

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

² Available at www.newjerseynewsroom.com/movies/new-jersey-and-new-york-government-authorities-being-pulled-into-cablevision-scripps-dispute.

³ Available at 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.⁴ 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.

⁴ 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.

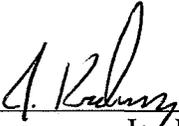
24. Moreover, when there is little to no bandwidth available on a system, Comcast has three choices if it is forced to launch a new network on that system: Comcast can (1) further compress the content already provided by the system to free up spectrum for the new content, thereby degrading the quality 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

Exhibit B

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

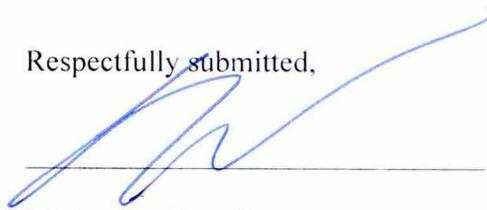
In the Matter of)	
)	
The Tennis Channel, Inc.,)	
Complainant	)	MB Docket No. 10-204
v.	)	File No. CSR-8258-P
Comcast Cable Communications, LLC,)	
Defendant)	

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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Attorneys for Defendant Comcast Cable Communications, LLC

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

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)	

**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

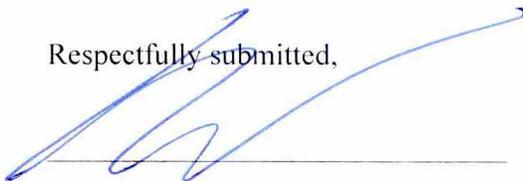
For the foregoing reasons, Comcast requests that the Commission grant Comcast's Conditional Petition for Stay.

³⁶ *Id.* at 33.

³⁷ *Id.*

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

Respectfully submitted,



Dated: February 10, 2012

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CERTIFICATE OF SERVICE

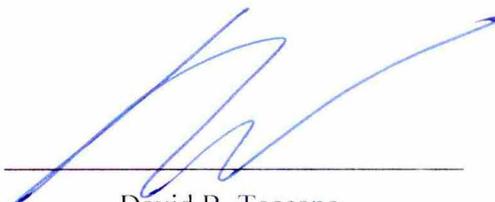
I, David B. Toscano, do hereby certify that on this 10th day of February, 2012, I caused the foregoing Motion for Acceptance of Comcast's Reply to Tennis Channel's Opposition to Comcast's Petition for Stay to be served upon the following individuals by hand-delivery and electronic mail.

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David B. Toscano

Your submission has been accepted

ECFS Filing Receipt - Confirmation number: 2012210800567		
Proceeding		
Name	Subject	
10-204	In the Matter of The Tennis Channel, Inc. v. Comcast Cable Communications, LLC complaint alleging program carriage discrimination.	
Contact Info		
Name of Filer: Comcast Cable Communications, LLC		
Attorney/Author Name: Andrew DeLaney		
Lawfirm Name (required if represented by counsel): Davis Polk & Wardwell LLP		
Address		
Address For: Law Firm		
Address Line 1: Davis Polk & Wardwell LLP		
Address Line 2: 450 Lexington Avenue		
City: New York		
State: NEW YORK		
Zip: 10017		
Details		
Type of Filing: MOTION		
Document(s)		
File Name	Custom Description	Size
2012.02.10.Comcast.Motion.Reply.Stay.Petition.PUBLIC.VERSION.pdf		1 MB
Disclaimer		
<p>This confirmation verifies that ECFS has received and accepted your filing. However, your filing will be rejected by ECFS if it contains macros, passwords, redlining, read-only formatting, a virus, or automated links to other documents.</p> <p>Filings are generally processed and made available for online viewing within one business day of receipt. You may use the link below to check on the status of your filing:</p> <p>http://fjallfoss.fcc.gov/ecfs/comment/confirm?confirmation=2012210800567</p> <p>For any problems please contact the Help Desk at 202-418-0193.</p>		

Exhibit C

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 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 Federal Communications Commission’s Order dated July 24, 2012 would require. Instead, I address what I understand to be actions possibly required by that order.

I. Summary

5. As I discuss below, changing Tennis Channel's level of carriage and/or launching Tennis Channel would impose a heavy burden on Comcast and create customer confusion. On certain digital systems, Comcast would be forced to reallocate bandwidth in already overtaxed systems to support launches of Tennis Channel, and launching Tennis Channel therefore would cause Comcast to drop or delay the launch of other networks, thereby harming those other networks and ultimately Comcast's customers.¹

6. More specifically, making these changes would require Comcast to comply with customer notice requirements as required by law and by company practice, communicate relevant information to approximately 30,000 customer service representatives so that they can respond to customer calls and inquiries, update websites and electronic programming guides, print new channel lineup cards, re-program thousands of channel lineup maps,² and update local rate cards. Should a court eventually determine that Comcast should not have been required to re-position Tennis Channel and therefore Comcast did not need to ultimately make these costly and burdensome changes, Comcast most likely would seek to unwind them, which would make all the initial costs, time-consuming operational exercises, and potential customer confusion pointless, and which would impose the same costs a second time.

¹ 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.

² "Re-mapping" is the technical term for the manual re-programming of channel lineups to implement, for example, the re-tiering of an existing network or the launch of a new network.

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 22.1 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 specific channels or multiple 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 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 22.1 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 remaining subscribers, however, receive channel signals in a combination of analog and digital forms.

III. Moving Tennis Channel to Digital Starter or Launching Tennis Channel on Certain Systems Would Be Costly and Could Require Comcast to Drop or Postpone the Launch of New Programming Networks

13. In most systems where Tennis Channel is already available, it is carried on the Sports Tier and would have to be relocated to the Digital Starter Tier.³ On other systems where Tennis Channel is not already available, it would need to be launched for the first time on the Digital Starter Tier. Both melting and launching are time-consuming and burdensome processes. (See Declaration of Jay Kreiling dated July 30, 2012 (“Kreiling Decl.”)).

14. Comcast is required by local franchise authority (“LFA”)⁴ 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 is launched. 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. Both forms of notice are described in detail in Jay Kreiling’s Declaration. (See Kreiling Decl. ¶¶ 10-16). Further, Comcast would have to produce new rate cards, print new channel lineup cards, and update websites and electronic guides. (See Kreiling Decl. at ¶ 18.)

15. I would give notice of tier changes and launches 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 communicate relevant information to the approximately 30,000 customer

³ 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.

⁴ LFAs are local or state units of government that regulate cable television, including Comcast’s cable systems.

service representatives it employs to prepare them to respond to calls about the tier changes and launches, and also would need to update websites and electronic guides. To implement the melts and launches, Comcast engineers would have to re-map thousands of channel lineup maps associated with more than [REDACTED] digital channel lineups across the country. (See Kreiling Decl. ¶¶ 18-19).

16. Moreover, approximately [REDACTED] digital systems, representing approximately [REDACTED] subscribers, do not carry Tennis Channel at all. If Comcast were required to launch the network on those systems, the cost to Comcast would be even higher and the burden even more onerous. While some of these Comcast systems have bandwidth available to launch new networks, others have very little. Even those systems that do have extra capacity would need to go through the complicated and burdensome launch and notice processes described above.

17. Additionally, approximately [REDACTED] of the systems that do not yet carry Tennis Channel, representing approximately [REDACTED] subscribers, have little to no bandwidth left to launch new channels. 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 would need to be dropped to launch a new one. These systems often 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. ¶ 22.)

IV. It Would Be Difficult, Costly, and Disruptive to Consumers to Drop Tennis Channel and Undo Changes to Its Tier

18. If the Commission's Order were overturned 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, as it generally is today, and to drop it from systems on which it was launched in response to the Order. It would be extremely difficult and costly, however, to unwind the changes described above.

19. 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.

20. Finally, Comcast would be required to once again analyze and effectuate any notice requirements, produce new channel lineup cards, update web sites and electronic channel guides, and communicate with its approximately 30,000 employee customer service representatives so that they could properly handle customer calls. In addition, Comcast engineers would have to implement re-tiering and drops through the time-consuming and

burdensome process of re-programming digital channel maps as previously described. (*See* Kreiling Decl. ¶¶ 18-19).

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
July 30, 2012


Jennifer T. Gaiski

Exhibit D

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 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 Federal Communications Commission’s Order dated July 24, 2012 (the “Order”) would require, but instead to discuss certain steps that I understand potentially may be required.

I. Summary

5. Re-tiering Tennis Channel from the Sports Tier to the Digital Starter tier¹ on some systems and launching it for the first time on others could not be achieved by simply “flipping a switch.”

6. Instead, those changes would require Comcast to undertake numerous burdensome and costly measures, including potential displacement of other networks, that would be disruptive to customers and/or other networks. As detailed below, if Comcast were required to launch Tennis Channel on 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 July 30, 2012 (“Gaiski Decl.”) ¶¶ 16-17), then those launches would require Comcast to reallocate bandwidth in already bandwidth-constrained systems (including by displacing networks or services currently available to customers and/or degrading the quality of existing services), and to draft and provide notice to its customers in accordance with the differing requirements of numerous local franchise authorities and other governing bodies.

7. Together, these tasks would require Comcast to allocate substantial resources, including hundreds of hours of manpower from more than one hundred national and regional employees. The burdens on Comcast would not be undone by a reversal of the Order on appeal, but instead would be compounded by returning Tennis Channel to the Sports Tier on systems on which it had been melted and dropping it from systems on which it had been launched, which would result in additional customer notifications, engineering effort to (again) change the tier assignment of the network or drop it, and additional customer confusion.

¹ 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. Melting and Launching Tennis Channel Would Result in Substantial Burden and Cost to Comcast, and Potential Disruption to Customers and Other Networks

8. As discussed below, Comcast is required by law to give to its customers advance notice of a change in the tiering of a currently carried network or the launch of a new network. 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 the changes. These customer-facing notifications would be paralleled by numerous internal changes to Comcast technical systems and databases to implement the melts and launches.

9. Further, the process of implementing the melt or launch is time-consuming and burdensome. In addition, when Comcast launches a network on systems, Comcast must engage in the time-consuming and burdensome task of updating its internal databases and channel lineups listings to reflect the launches. In order to free up bandwidth for a launch, Comcast could also have to displace existing networks, which would cause disruption to customers and those other networks.

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

10. Comcast's notice requirements in connection with melting and launching networks can be divided into two categories: (1) notice required by law, and (2) supplemental and repeated notice to educate customers about the changes.

11. First, Comcast is required by the Federal Communications Commission ("FCC") and local franchise authorities ("LFAs") to notify its customers of the launch or melt of a network. 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. 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 tier of any network or launches a 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)²; FCC Upholds Order Forcing Time Warner to Air NFL Network, First Amendment Center (Aug. 8, 2006).³

12. 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.

13. 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 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

² Available at www.newjerseynewsroom.com/movies/new-jersey-and-new-york-government-authorities-being-pulled-into-cablevision-scripps-dispute.

³ Available at www.firstamendmentcenter.org/fcc-upholds-order-forcing-time-warner-to-air-nfl-network.

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.

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

15. When there are changes being made to its channel offerings, including melts and launches of networks, Comcast has at times found it is preferable to communicate with customers multiple times using different tactics over a period of months prior to the changes being implemented. This level of notice often happens where a network is removed from a level of service, which could happen if Comcast were forced to melt or launch Tennis Channel pursuant to the Order, but subsequently undid the change in response to a reversal of the Order. This helps educate customers on the reasons for the changes being made, and it also helps minimize call volume from customers seeking information after the changes are made. Outreach in advance of the 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 can begin months before the changes take place, with the frequency of communications increasing as the dates approach. Comcast would also need to update its programming guides and system rate cards in order to communicate this change to subscribers

16. In total, this form of “notice” would be more costly and more burdensome to execute than the notice required by law.

17. In addition, Comcast must prepare for an increase in customer-service calls, which would impose additional costs and degrade service quality. Specifically, Comcast has to provide its approximately 30,000 customer service representatives with information to answer inquiries coming into Comcast’s customer care call centers in connection with the re-tiering or launch of a network, including from cost-conscious subscribers. Even these measures cannot completely eliminate customer confusion and loss of goodwill.

B. Melt and Launching a Network Are Time-Consuming and Present Technical and Administrative Burdens

18. In order to implement the melt or launch of a network, more than 100 Comcast employees have to input the new tier or channel placement data into a number of different databases and computer systems, a process referred to as “re-mapping.” Changing Tennis Channel’s tier or launching Tennis Channel 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 (rate cards, channel lineup cards, print guides, newspaper TV listings, online TV listings, etc.). This process takes a number of weeks.

19. Other internal databases would have to be updated as well to reflect the changed carriage of Tennis Channel. The substantial administrative task would involve additional time and effort from numerous Comcast employees both nationally and regionally.

C. Launching a Network Is Particularly Burdensome

20. As explained in the accompanying declaration of Jennifer Gaiski (*see* Gaiski Decl. ¶¶ 16-17) there are a number of systems that do not carry Tennis Channel.

21. Identifying the required bandwidth to support carrying the network 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.

22. 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).

23. In addition, launching a new channel requires Comcast to perform physical engineering work at affected system headends.⁴

24. Each of these burdens would be compounded by any future ruling that reverses the Order. The notice, technical and administrative burdens of undoing the changes would be as substantial as for implementing the changes, and the removal of Tennis Channel from a tier of service or from a system would generate further customer confusion.

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

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
July 30, 2012

 7/30/12

Jay Kreiling

CERTIFICATE OF SERVICE

I, David B. Toscano, do hereby certify that on this 30th day of July, 2012, I caused the foregoing Petition for Stay Pending Judicial Review to be served upon the following individuals by hand-delivery and electronic mail.

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