Before the
Federal Communications Commission
Washington, D.C. 20554

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

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MEMORANDUM OPINION AND ORDER

Adopted: July 16, 2012 **Released: July 24, 2012**

By the Commission: Commissioners McDowell and Pai dissenting and issuing a joint statement.

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I. INTRODUCTION AND SUMMARY

1. This proceeding arises from a July 5, 2010 complaint by Tennis Channel Inc. ("Tennis Channel"), a video programming vendor, against Comcast Cable Communications, LLC, ("Comcast"), a multichannel video programming distributor ("MVPD"). Tennis Channel alleges that Comcast discriminates against Tennis Channel on the basis of affiliation in violation of the Communications Act and Commission rules. It alleges that Comcast carries Tennis Channel, with which Comcast is not affiliated, on a tier with narrow penetration that is only available to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks Golf Channel and Versus (now NBC Sports Network) on a tier with significantly higher penetration that is available to subscribers at no additional charge.

2. On December 16, 2011, following a full evidentiary hearing, an Administrative Law Judge (ALJ) issued an Initial Decision that found that "under any rubric of allocation of burdens of proof, the preponderance of the reliable evidence presented in this case, viewed in its entirety, establishes that [Comcast] discriminated against Tennis Channel . . . on the basis of affiliation, and that this discrimination had the effect of restraining Tennis Channel's ability to compete fairly in violation of section 616 of the Act and Section 76.1301(c) of the Commission's rules."[1] As relief, the ALJ ordered Comcast to pay a forfeiture of $375,000 and required Comcast to carry Tennis Channel at the same level of distribution as Golf Channel and Versus, although Comcast would retain "full discretion in determining the level of penetration it chooses to carry the three channels."[2] The ALJ also required Comcast to provide Tennis Channel with equitable treatment as to channel placement.[3] On January 19, 2012, Comcast filed Exceptions to the Initial Decision and appealed the Initial Decision to the Commission.[4] On the same day, Comcast filed an Application for Review of a determination by the Media Bureau that Tennis Channel's complaint was not barred by the statute of limitations.[5]

3. For the reasons explained below, we deny Comcast's Application for Review. We also deny Comcast's Exceptions other than its Exception to the ALJ's equitable channel placement remedy. We vacate the equitable channel placement remedy and affirm the ALJ's order in all other respects.

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[1] *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, 26 FCC Rcd 17160, 17204 ¶ 101 (ALJ Dec. 20, 2011) ("*Initial Decision*").

[2] *Id.* at 17213, 17211; ¶¶ 125-26, ¶ 119.

[3] *Id.* at 17211-12 ¶ 120.

[4] Comcast Cable Communications, LLC, Exceptions to Initial Decision, MB Docket No.10-204, File No. CSR 8258-P (filed Jan. 19, 2012).

[5] Comcast Cable Communications, LLC, Application for Review, MB Docket No.10-204, File No. CSR 8258-P (filed Jan. 19, 2012).

II. BACKGROUND

A. The Statute and Regulations

4. Section 616 of the Communications Act requires the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[6] These regulations shall "contain provisions designed to prevent a [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[7] "[T]he term 'affiliate', when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person."[8]

5. To satisfy the requirements of Section 616, the Commission adopted 47 C.F.R. § 76.1301(c).[9] This rule tracks Section 616 and restricts MVPDs from engaging in "conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[10] The Commission identifies discriminatory behavior on a case-by-case basis "because the practices at issue . . . necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation."[11]

6. Section 76.1301(c) also sets forth procedures for resolving program carriage complaints under Section 616. In filing a complaint, the burden of proof is placed on the programming vendor to "establish a prima facie showing that the defendant [MVPD] has engaged in behavior that is prohibited by Section 616."[12] The Commission anticipated that "most program carriage complaints [would] require an administrative hearing to evaluate contested facts related to the parties' specific negotiations."[13] After reviewing a complaint, answer, and reply, Commission staff determines whether a *prima facie* case of a violation has been made.[14] If a *prima facie* case has been made and the matter cannot be resolved on the

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[6] 47 U.S.C. § 536. Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[7] 47 U.S.C. § 536(a)(3).

[8] 47 U.S.C. § 522(2).

[9] *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,* MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642 (1993) ("*Second Report and Order*"); *see also Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage,* MM Docket No. 92-265, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994).

[10] 47 C.F.R. § 76.1301(c).

[11] *Second Report and Order*, 9 FCC Rcd at 2648 ¶ 14.

[12] *Id.* at 2654 ¶ 29.

[13] *Id.* at 2652 ¶ 24.

[14] *Id.* at 2655 ¶ 31.

sole basis of a limited written record, Commission staff is to "inform the parties of its determination that resolution of the complaint will require a hearing before an [ALJ]."[15] The parties are given the option to resolve the dispute through the Commission's alternative dispute resolution process or be heard by the ALJ.[16] Decisions rendered by the ALJ are directly appealable to the Commission.[17] Appropriate relief for program carriage violations is determined "on a case-by-case basis."[18] Complaints are expected to include a request for relief, accompanied by relevant evidence and arguments in support of that relief.[19] The Commission conceived the available remedies and sanctions to include "forfeitures, mandatory carriage, [and] carriage on terms revised or specified by the Commission."[20]

7. On August 1, 2011, the Commission released a *Second Report and Order and Notice of Proposed Rulemaking*,[21] codifying some procedures and rules for Section 616 program carriage disputes and seeking comment on others. The Program Carriage Order and NPRM was issued after the hearing in this case, and therefore did not apply to the proceeding before the ALJ.

B. Tennis Channel's Complaint

8. Tennis Channel is a national sports network vendor that launched on May 15, 2003 with a broad range of programming focusing on tennis and tennis-related programming.[22] It is the only cable network in the nation dedicated to covering tennis.[23] Tennis Channel carried exclusive telecast of portions of three of the four Grand Slam tournaments in 2008 and added portions of the fourth Grand Slam tournament, exclusive telecasts of every Davis Cup and Fed Cup match, and other prominent tennis events in 2009, resulting in year-round tennis event coverage.[24] Tennis Channel also offers non-event tennis-related content such as "hundreds of original lifestyle, instructional, and fitness series, specials, and short-form programs."[25] Approximately **[REDACTED]** subscribers receive Tennis Channel from about

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[15] *Id.* at 2652 ¶ 24.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 2653 ¶ 26.

[19] *Id.*

[20] *Id.*

[21] 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 (2011) ("Program Carriage Order and NPRM"), appeal docketed sub nom. Time Warner Cable Inc. v. FCC, No. 11-4138 (2nd Cir. Oct. 11, 2011).

[22] *Initial Decision*, 26 FCC Rcd at 17163 ¶ 5; Tennis Channel Exh. 14 at 2 ¶ 5 (Testimony of Ken Solomon).

[23] *Id.*

[24] *See Initial Decision*, 26 FCC Rcd at 17163 ¶ 5; Tennis Channel Exh. 14 at Exhibit B (Testimony of Ken Solomon).

[25] Tennis Channel Exh. 14 at 3 ¶ 6 (Testimony of Ken Solomon).

130 different distributors nationwide.[26]

9. Comcast is the largest MVPD in the United States[27] with approximately 23 million subscribers.[28] It owns an equity interest in sports networks, including a controlling interest in Golf Channel and Versus, two networks at issue in this dispute.[29]

10. Golf Channel is a cable sports network that launched in 1995 and focuses on golf-related programming.[30] It carries many golf tournaments, including Professional Golf Association Tour events, Champions Tour events, Nationwide Tour events, Ladies Professional Golf Association Tour events, and United States Golf Association tour events.[31] Golf Channel also offers non-event golf-related content such as news, interviews, comedy, and instructional programming.[32]

11. Versus is also a cable sports network that launched in 1995.[33] It carries a variety of sports programming including hockey, college football and basketball, bull riding, car races, lacrosse, hunting, fishing, professional basketball, martial arts, minor league baseball, skiing, snowboarding, volleyball, diving, World Extreme Cagefighting, triathlon, and bicycling.[34] Versus also offers non-event content.[35]

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[26] *Initial Decision*, 26 FCC Rcd at 17163 ¶ 5; Tennis Channel Exh. 14 at 3 ¶ 8 (Testimony of Ken Solomon). The ALJ issued three protective orders in this proceeding. The first is intended to protect trade secrets and other commercially sensitive confidential information contained in the documents exchanged by the parties, as well as the documents and testimony in this proceeding. *See Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Protective Order, MB Docket No. 10-204, File No. CSR-8258-P (ALJ Dec. 20, 2010) ("First Protective Order"). The second is intended to facilitate the use in this proceeding of commercially sensitive information that The Nielsen Company considers confidential. *See Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Second Protective Order, MB Docket No. 10-204, File No. CSR-8258-P (ALJ Apr. 27, 2011) ("Second Protective Order"). The third is intended to allow the parties to disclose documents in this proceeding that have continuing value to The Nielsen Company, subject to certain terms and conditions. *See Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Stipulation and Third Protective Order Concerning Use of Covered Information, MB Docket No. 10-204, File No. CSR-8258-P (ALJ Apr. 27, 2011) ("Third Protective Order"). In this Order, "**[REDACTED]**" indicates confidential or proprietary information, or analysis based on such information, submitted pursuant to the First Protective Order, the Second Protective Order, and the Third Protective Order. The unredacted version of this Order will be available upon request to qualified persons who execute and file with the Commission the signed acknowledgements required by the protective orders in this proceeding.

[27] *Initial Decision*, 26 FCC Rcd at 17163 ¶ 7; Tennis Channel Exh. 16 at 69 ¶ 101 (Testimony of Hal Singer).

[28] *Initial Decision*, 26 FCC Rcd at 17163 ¶ 7; Tr. 1989, 1991 (Madison Bond).

[29] *Initial Decision*, 26 FCC Rcd at 17163-64 ¶ 7; Tennis Channel Exh. 16 at 11 ¶ 21 & n.19 (Testimony of Hal Singer). At the time when Comcast rejected Tennis Channel's carriage proposal, Comcast owned Golf Channel and Versus in whole. Tennis Channel Exh. 16 at 11 ¶ 21 & n.19 (Testimony of Hal Singer).

[30] *Initial Decision*, 26 FCC Rcd at 17164 ¶ 8; Comcast Exh. 77 at 18-19 ¶ 30 (Testimony of Michael Egan).

[31] *Id.*

[32] *Initial Decision*, 26 FCC Rcd at 17164 ¶ 8; Comcast Exh. 77 at 19 ¶ 31 (Testimony of Michael Egan).

[33] *Initial Decision*, 26 FCC Rcd at 17164 ¶ 9; Tr. 1955-56 (Madison Bond).

[34] *Initial Decision*, 26 FCC Rcd at 17164 ¶ 9; Comcast Exh. 77 at 33-34 ¶ 57 (Testimony of Michael Egan); Tennis Channel Exh. 16 at 15 ¶ 27 (Testimony of Hal Singer).

[35] *Initial Decision*, 26 FCC Rcd at 17164 ¶ 9; Comcast Exh. 77 at 34 ¶ 58 (Testimony of Michael Egan).

12. On January 5, 2010, Tennis Channel filed a complaint with the Commission asserting that Comcast used its market power as the nation's largest cable operator to disadvantage Tennis Channel and protect the competing networks with which it was affiliated.[36] Since Comcast began carrying Tennis Channel in 2005, the network has been placed on the premium Sports and Entertainment Package tier ("Sports Tier") on the vast majority of Comcast systems.[37] To access this tier, subscribers must pay an additional $5 to $8 per month above what they pay for basic digital cable service.[38] The carriage agreement between Tennis Channel and Comcast gives the latter discretion in determining the tiers on which it will carry Tennis Channel **[REDACTED].**[39] Golf Channel and Versus, Comcast-affiliated networks that Tennis Channel views as competitors, generally are offered on Comcast's Digital Starter Tier or Expanded Basic Tier,[40] which are available to all digital subscribers at no additional cost and reach **[REDACTED]** of Comcast's customers.[41] By contrast, Comcast's Sports Tier reaches approximately **[REDACTED]** of Comcast's customers.[42] In 2009, Tennis Channel, pointing to recent viewership growth and programming improvements, asked Comcast to increase its distribution as the carriage agreement between them allowed by repositioning it to a tier that had broader penetration than the Sports Tier.[43] Comcast rejected Tennis Channel's proposal.[44]

13. In its complaint, Tennis Channel argues that it is similarly situated to Golf Channel and Versus,[45] that Comcast discriminated against Tennis Channel because the network is unaffiliated with Comcast,[46] and that Comcast's discrimination unreasonably restrains Tennis Channel's ability to compete fairly.[47] As relief, Tennis Channel requests that Comcast be required to carry Tennis Channel on non-discriminatory terms and conditions, specifically by carrying Tennis Chanel on each of Comcast's systems on a programming tier that is as broadly distributed as the most highly-penetrated tier on which it

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[36] The Tennis Channel, Inc., Program Carriage Complaint File No. CSR-8258-P, at 2 ¶ 3, filed by Tennis Channel (July 5, 2010) ("*Complaint*").

[37] *Initial Decision*, 26 FCC Rcd at 17167 ¶ 17; Tr. 1990 (Madison Bond).

[38] *Initial Decision*, 26 FCC Rcd at 17165-66 ¶ 14; Comcast Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

[39] *Initial Decision*, 26 FCC Rcd at 17166-67 ¶ 16; Tennis Channel Exh. 144 at 9 ¶ 6.2.1; Tr. 2159 (Madison Bond).

[40] *Initial Decision*, 26 FCC Rcd at 17165 ¶ 12; Tennis Channel Exh. 16 at 7 ¶ 18 (Testimony of Hal Singer).

[41] *Initial Decision*, 26 FCC Rcd at 17165 ¶ 12; *see* Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

[42] *Initial Decision*, 26 FCC Rcd at 17166 ¶14; *see* Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer). Comcast has other tiers with different levels of penetration, including a Digital Preferred Tier. The Digital Preferred Tier is the second most highly penetrated tier for digital Comcast customers, reaching **[REDACTED]** of Comcast's customers. *Initial Decision*, 26 FCC Rcd at 17165 ¶ 13; *see* Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer); Tr. 2190-91 (Madison Bond). This tier carries the NHL Network, the MLB Network, and NBA TV. *Initial Decision*, 26 FCC Rcd at 17165 ¶ 13; Tennis Channel Exh. 16 at 9 ¶ 20 (Testimony of Hal Singer).

[43] *Initial Decision*, 26 FCC Rcd at 17168 ¶ 19; Tennis Channel Exh. 14 at 9 (¶¶ 18-19) (Testimony of Ken Solomon).

[44] *Initial Decision*, 26 FCC Rcd at 17170 ¶ 23; Tr. 352-53 (Ken Solomon); Comcast Exh. 78 at 7 ¶ 17 (Testimony of Jennifer Gaiski).

[45] *Complaint* at 23-26 ¶¶ 56-63.

[46] *Id.* at 27-32 ¶¶ 64-74.

[47] *Id.* at 32-45 ¶¶ 75-100.

carries one or more of its affiliated sports networks.[48] Tennis Channel also requests that Comcast be required to carry Tennis Channel on all systems in Standard Definition and, where feasible, High Definition, pay an appropriate licensing fee for the new required carriage, and negotiate in good faith a new agreement that governs carriage of Tennis Channel following the expiration of the current agreement between the parties.[49]

14. On October 5, 2010, the Media Bureau released its Hearing Designation Order Notice of Opportunity for Hearing for Forfeiture.[50] As an initial matter, the Media Bureau rejected Comcast's arguments that Tennis Channel had filed its complaint after the one year statute of limitations had run, finding that the plain language of the statute of limitations provision allowed Tennis Channel to file within one year of notifying Comcast of its intent to file.[51] The Media Bureau further concluded that Tennis Channel had established a *prima facie* case of program carriage discrimination pursuant to Section 616(a)(3) of the Communications Act and Section 76.1301(c) of the Commission's rules.[52] The Media Bureau also found that there were "significant and material questions of fact warranting resolution at hearing."[53] The Media Bureau designated the dispute to an ALJ to resolve the following issues:

> (a) To determine whether Comcast has engaged in conduct the effect of which is to unreasonably restrain the ability of The Tennis Channel to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by The Tennis Channel, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and
>
> (b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Comcast should be required to carry The Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers and, if so, the price, terms, and conditions thereof; and/or whether Comcast should be required to implement such other carriage-related remedial measures as are deemed appropriate; and
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> (c) In light of the evidence adduced pursuant to the foregoing issues, to determine whether a forfeiture should be imposed on Comcast.[54]

The ALJ was directed by the Media Bureau to "develop a full and complete record in the instant hearing proceeding and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision on each of the outstanding factual and legal issues" and to do so on an expedited basis.[55]

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[48] *Id.* at 45 ¶ 101.

[49] *Id.* at 45-46 ¶¶ 102, 104.

[50] *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, MB Docket 10-204, 25 FCC Rcd 14149 (MB 2010) ("*Hearing Designation Order*").

[51] *Id.* at 14154-14156 ¶ 11.

[52] *Id.* at 14153 ¶ 9.

[53] *Id.* at 15154 ¶ 10.

[54] *Id.* at 14163 ¶ 24.

[55] *Id.* at 14162-63 ¶ 23.

15. Following the completion of discovery and the submission of direct testimony, proposed exhibits, and trial briefs, hearings before the ALJ were held at Commission headquarters from April 25, 2011 through May 2, 2011.[56] In these hearings, four witnesses appeared on behalf of Tennis Channel, seven witnesses appeared on behalf of Comcast, and thousands of documentary exhibits were received into evidence.[57] The ALJ issued his Initial Decision on December 16, 2011.

C. The Initial Decision

16. The ALJ concluded that Tennis Channel, Golf Channel, and Versus are similarly situated networks.[58] He found that the three networks provide year-round sports programming, attract similar types of viewers, "*i.e.*, predominantly male, affluent adults within the same overlapping age ranges," target the same advertisers, and have similar ratings.[59] Tennis Channel and Versus, he noted, have a history of sharing or seeking rights to the same sporting events.[60]

17. The ALJ determined that Comcast's evidence that the channels were not similarly situated was unpersuasive. He rejected the testimony of Michael Egan, Comcast's programming expert, that the networks were not similarly situated, finding that the testimony lacked credibility because Egan's methodology diverged from a methodology he had used in the past, and because the distinctions Egan drew between the networks were not significant or convincing.[61] The ALJ also rejected other efforts by Comcast to distinguish the channels as being unsupported by the evidence or overwhelmed by other factors.[62]

18. The ALJ found it undisputed that Comcast gave Golf Channel and Versus far more favorable channel placement and broader carriage than Tennis Channel.[63] The ALJ further found that these differences were based upon affiliation, citing the acknowledgment of Steven Burke, then President of Comcast Cable and Chief Operating Officer of Comcast Corporation, that affiliated networks "get treated like siblings as opposed to like strangers" and receive a "different level of scrutiny" than unaffiliated providers.[64] The ALJ further noted that "[e]very one of [Comcast's] affiliated networks is

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[56] *Initial Decision*, 26 FCC Rcd at 17162 ¶ 3.

[57] *Id.*

[58] *Id.* at 17170 ¶ 24.

[59] *Id.* at 17170-71 ¶ 24.

[60] *Id.* at 17171 ¶ 26.

[61] *Id.* at 17172-76 ¶¶ 28-36.

[62] *Id.* at 17177, 17179, 17180, 17181-82, 17183-85 ¶¶ 38-39, 42, 44, 46-47, 49-52.

[63] *Id.* at 17185-86 ¶¶ 53-54. Comcast's Washington D.C. system, for example, carries Versus on Channel 7 and Golf Channel on Channel 11, while carrying Tennis Channel on Channel 726. *Id.* at 17185 ¶ 53. Golf Channel and Versus are carried on the Expanded Basic or Digital Starter tiers that reach approximately **[REDACTED]** of Comcast subscribers while Tennis Channel is carried on the Sports Tier that reaches only about **[REDACTED]** of Comcast subscribers. *Id.* at 17185-86 ¶ 54.

[64] *Id.* at 17186 ¶ 55. The ALJ also notes that the Comcast executive responsible for distribution decisions, Madison Bond, testified that Comcast has a "sibling relationship" with its affiliated networks that "probably [affords those companies] greater access." *Id.*

carried on more widely distributed tiers than the Sports tiers," while it carries "only unaffiliated sports networks exclusively on the narrowly penetrated Sports Tier."[65]

19. The ALJ rejected Comcast's attempt to demonstrate that its carriage and distribution decisions were not based on affiliation by pointing to the practices of other MVPDs with regard to the three networks at issue.[66] The distribution decisions of other MVPDs, the ALJ found, do not establish that Comcast's carriage of Tennis Channel on the Sports Tier is "a result of a legitimate, non-discriminatory business decision because [Comcast's] distribution of Tennis Channel has an influence on the distribution decisions of other MVPDs."[67] The ALJ cited a "ripple effect" that increases the likelihood that other MVPDs will carry the network at the same level of distribution as Comcast, and noted that this "ripple effect" is enhanced by Comcast's status as the largest MVPD in the United States.[68] The ALJ also rejected Comcast's argument about the distribution decisions of other MVPDs on the grounds that Comcast's distribution of Golf Channel, Versus, and Tennis Channel are "not in line with the distribution of those networks in the market generally," with record evidence showing that Comcast carries Golf Channel and Versus at a higher penetration rate and carries Tennis Channel at a lower rate than those networks are carried by other MVPDs.[69]

20. The ALJ also rejected Comcast's arguments that its differential treatment of the three networks could be explained by factors other than discrimination. Comcast argued that Golf Channel and Versus achieved wide distribution at an earlier period in time and networks are rarely repositioned once they obtain broad penetration.[70] To the contrary, the ALJ noted evidence in the record that Comcast gave other, more recently positioned Comcast-affiliated sports networks much broader carriage than Tennis Channel.[71] The ALJ also rejected Comcast's argument that its carriage decision for Tennis Channel was based on a cost-benefit analysis.[72] The "cost-benefit analysis," the ALJ noted, examined only costs and made no attempt to quantify benefits that would arise from carrying Tennis Channel on more widely penetrated tiers.[73] In declining Tennis Channel's proposed carriage agreement, the ALJ pointed out, Comcast did not make a written analysis of whether the acceptance of the offer would result in an increase in subscribers or additional upgrades and "never gave any consideration" to whether acceptance would result in additional revenues through the sale of advertising availabilities.[74] The ALJ found the record to show that Comcast "pays substantially more for carrying Golf Channel and Versus than it would if it were to carry Tennis Channel at the same level of distribution."[75] While Comcast notes that it

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[65] *Id.* at 17187 ¶ 57

[66] *Id.* at 17189 ¶ 62.

[67] *Id.* at 17189 ¶ 63.

[68] *Id.*

[69] *Id.* at 17190-91 ¶¶ 66-67.

[70] *Id.* at 17193 ¶ 72.

[71] *Id.* at 17193 ¶ 73.

[72] *Id.* at 17195 ¶ 75.

[73] *Id.* at 17195 ¶ 76.

[74] *Id.* at 17195 ¶ 76 & n.252.

[75] *Id.* at 17196 ¶ 77.

convened a June 8 teleconference with the ostensible goal of seeking feedback from Comcast regional executives as to local system and customer interest in distributing Tennis Channel more broadly,[76] the ALJ found that the weight of record evidence led "to the inescapable conclusion" that the teleconference was merely "a ploy to shore up [Comcast's] defense strategy having sensed imminent future litigation and not to gauge the interest of its local systems in repositioning Tennis Channel."[77]

21. The ALJ concluded that Comcast benefits economically by favoring affiliated networks over unaffiliated networks. "There is an economic benefit realized by Comcast in retaining a dual distribution system that involves carrying Tennis Channel (and other unaffiliated sports networks) exclusively on the Sports Tier, while carrying affiliated sports networks on widely penetrated tiers."[78] He observed that networks on the Sports Tier receive less in license fees than those carried on broadly distributed tiers and face greater difficulty in attracting advertisers and competing for programming rights, creating an economic incentive for Comcast to "protect its affiliated sports networks from these disadvantages by carrying them on broadly penetrated tiers, while leaving only unaffiliated networks disadvantaged on the least penetrated Sport Tier."[79]

22. The ALJ concluded that Comcast's unequal treatment of Tennis Channel adversely affected Tennis Channel's ability to compete fairly in the video programming marketplace.[80] Relegating Tennis Channel to the Sports Tier "greatly diminishes the number of Tennis Channel subscribers which in turn reduces the amount of its earnings derived from license fees,"[81] "hinders the network's ability to compete for valuable programming rights,"[82] "makes it more difficult for the network to sell advertising,"[83] and causes a reduction in advertising revenues.[84]

23. The ALJ rejected Comcast's arguments that Tennis Channel was not unreasonably restrained from fairly competing. Comcast argued that all Comcast subscribers could access Tennis Channel by subscribing to the Sports Tier or switching to another MVPD that carries Tennis Channel more broadly.[85] The ALJ found this argument unpersuasive because Comcast subscribers must pay an additional fee for the Sports Tier, a practice in which only **[REDACTED]** of Comcast subscribers

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[76] *Id.* at 17169 ¶ 21.

[77] *Id.* at 17170 ¶ 22.

[78] *Id.* at 17197 ¶ 79.

[79] *Id.* at 17197 ¶ 80.

[80] *Id.* at 17198 ¶ 81.

[81] *Id.* at 17198 ¶ 82. The ALJ also cites unfavorable channel placement as a hindrance to Tennis Channel's ability to attract viewers. *Id.* at 17199 ¶ 85.

[82] *Id.* at 17199 ¶ 86. The ALJ concluded that Tennis Channel's ability to compete for programming rights was hindered by both a reduction in the amount in licensing fees available to networks to spend on programming and the tendency of holders of broadcast rights in high-profile events to favor networks with broader distribution over those with narrower distribution. *Id.* at 17199-17200 ¶ 86.

[83] *Id.* at 17200 ¶ 89. "Tennis Channel's Senior Vice President of Advertising Sales[] testified that the network's limited distribution is 'the single most prevalent reason' given by advertisers for not placing advertisements on Tennis Channel." *Id.* at 17201 ¶ 90.

[84] *Id.* at 17202 ¶ 91.

[85] *Id.* at 17199 ¶ 84.

engage, while Comcast subscribers do not have to pay a fee or switch MVPDs to view Golf Channel or Versus.[86] According to the ALJ, the added cost is "a significant impediment to Tennis Channel's ability to attract the one in four viewers in the United States that subscribe to Comcast."[87]

24. The ALJ concluded that "[a] party seeking to establish a violation of sections 616 and 76.1301(c) must show (1) that the MVPD discriminated against a programming vendor in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation and (2) that the effect of such discrimination unreasonably restrained the ability of the programming vendor to compete fairly."[88] He ruled that Tennis Channel must bear the burden of proof, but noted that the manner in which the burden of proof is allocated was immaterial to this case's disposition because "under any rubric of allocation of burdens of proof, the preponderance of the reliable evidence presented in this case, viewed in its entirety, establishes that [Comcast] discriminated against Tennis Channel . . . and that this discrimination had the effect of restraining Tennis Channel's ability to compete fairly in violation of section 616 of the Act and Section 76.1301(c) of the Commission's rules."[89]

25. After taking into account the relevant statutory and regulatory factors, the ALJ ordered Comcast to pay a forfeiture of $375,000.[90] He also ordered Comcast to afford Tennis Channel the same treatment in the terms and conditions of video program distribution that it provides to its similarly situated affiliates, Golf Channel and Versus.[91] Subject to an exception regarding analog services,[92] the ALJ required Comcast to carry Tennis Channel at the same level of distribution as Golf Channel and Versus, although it retained "full discretion in determining the level of penetration it chooses to carry the three channels."[93] The ALJ also required Comcast to provide Tennis Channel with equitable treatment as to channel placement.[94] In coming to these conclusions, the ALJ rejected Comcast's arguments that such a remedy would infringe upon its First Amendment right to exercise editorial discretion.[95]

26. On January 19, 2012, Comcast filed Exceptions to the Initial Decision and appealed the Initial Decision to the Commission.[96] On the same day, Comcast filed an Application for Review of the

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[86] *Id.*

[87] *Id.*

[88] *Id.* at 17203 ¶ 97.

[89] *Id.* at 17204 ¶ 100-101.

[90] *Id.* at 17210 ¶ 118.

[91] *Id.* at 17211 ¶ 119.

[92] *Id.* at 17211 ¶ 119 & n.353. The ALJ accepted Comcast's argument that analog tiers were subject to bandwidth limitations such that adding Tennis Channel to the analog expanded basic level of service would require deletion of an existing network from that tier. The ALJ therefore excluded "analog systems where the addition of Tennis Channel would require displacement of existing networks" from the ordered remedy. *Id.* at 17211 n.353.

[93] *Id.* at 17211 ¶ 119.

[94] *Id.* at 17211-12 ¶ 120.

[95] *Id.* at 17205-06 ¶¶ 102-04.

[96] Comcast Cable Communications, LLC, Exceptions to Initial Decision, MB Docket No.10-204, File No. CSR 8258-P (filed Jan. 19, 2012) ("*Comcast Exceptions*").

Media Bureau's finding that Tennis Channel's complaint was not barred by the statute of limitations.[97] On February 6, 2012, Tennis Channel filed a Reply to Comcast's Exceptions[98] and an opposition to Comcast's Application for Review.[99] On May 2, 2012, the Commission issued a stay of the Initial Decision pending the Commission's order in this case.[100]

III. DISCUSSION

27. We find that the record evidence, viewed in its entirety, supports the ALJ's conclusion that Comcast discriminated with regard to carriage against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation in violation of Section 616 of the Act and Section 76.1301(c) of the Commission's rules. We also find that the ALJ's ordered remedy with regard to carriage was appropriate and consistent with Section 616, the Commission's rules, and the Media Bureau's Hearing Designation Order. We reject the ALJ's ordered channel placement remedy as unsupported by the record. In coming to these conclusions, we deny the exceptions presented by Comcast to the ALJ's Initial Decision, except Comcast's exception regarding the channel placement remedy. We also conclude that the "similarly situated" discrimination analysis and the ALJ's ordered equal carriage remedy are consistent with the First Amendment.

A. Statute of Limitations

28. Before we turn to Comcast's Exceptions to the Initial Decision, we must address Comcast's argument that Tennis Channel's complaint should have been dismissed by the Media Bureau as time-barred. Comcast argues that Tennis Channel exceeded the applicable statute of limitations period because it filed its complaint more than one year after entering into the March 2005 carriage agreement with Comcast.[101] We reject Comcast's argument.

29. The allegedly discriminatory conduct at issue in Tennis Channel's complaint is Comcast's refusal in June 2009 to exercise its discretion under its existing contract with Tennis Channel to relocate Tennis Channel to a more widely distributed tier.[102] Tennis Channel notified Comcast of its intent to file a complaint in December 2009 and filed its complaint in January 2010.[103] Both the notification of its intent to file a complaint and the actual filing occurred well within one year of the conduct that allegedly violated Section 616.

30. 47 C.F.R. § 76.1302(f) sets forth the events that trigger the statute of limitations for Section 616 complaints: a complaint must be filed within one year of (1) the MVPD entering into a contract with a video programming distributor that is alleged to violate the rules; or (2) the MVPD

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[97] Comcast Cable Communications, LLC, Application for Review, MB Docket No.10-204, File No. CSR 8258-P (filed Jan. 19, 2012) ("*Comcast App. for Rev.*").

[98] The Tennis Channel, Inc., Reply to Exceptions to Initial Decision, MB Docket No.10-204, File No. CSR 8258-P (filed Feb. 6, 2012) ("*Tennis Channel Reply*").

[99] The Tennis Channel, Inc., Opposition to Application for Review, MB Docket No.10-204, File No. CSR 8258-P (filed Feb. 6, 2012) ("*Tennis Channel Opp. to App. for Rev.*").

[100] *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Order, MB Docket No. 10-204, File No. CSR-8258-P (rel. May 14, 2012).

[101] *Comcast App. for Rev.* at 2.

[102] *Complaint* at 21 ¶ 52.

[103] *Id.* at 3-4 ¶ 7.

offering to carry a video programming vendor's programming pursuant to impermissible terms that are unrelated to any existing contract between the MVPD and the complainant; or (3) a party notifying an MVPD that it intends to file a complaint with the Commission based on violations of the rules.[104] We find that the third trigger, Section 76.1302(f)(3), is the only one that applies to the circumstances here. The third trigger does not specify precisely what impermissible conduct starts the clock. Instead, it facially covers all allegedly impermissible conduct, and the one-year period starts to run when the complaining party (here Tennis Channel) notifies the MVPD (here Comcast) of an intent to file a complaint. There is no dispute that Tennis Channel filed its complaint within one year of notifying Comcast of its intent to do so.[105]

31. Comcast argues that the first trigger applies to this dispute and that the one year period started to run when Tennis Channel entered into its contract with Comcast in 2005.[106] This argument is inconsistent with the plain language of Section 76.1302(f)(1). The first trigger starts the one-year clock when the parties enter into a contract that "a party alleges to violate one or more of the rules contained in this section."[107] In other words, the first trigger only applies when a contract is alleged to violate the rules. Tennis Channel makes no such allegation about the March 2005 contract.[108]

32. The Media Bureau in its HDO similarly concluded that the third trigger, Section 76.1302(f)(3), applies.[109] Comcast raises three objections to this conclusion. First, Comcast argues that the statute of limitations rule "must be read to give each element meaning," and that properly read the third trigger "concerns a refusal to deal and other similar conduct that is not expressly covered by the first and second prongs."[110] Even if we were to accept Comcast's argument that each trigger in Section 76.1302(f) must be exclusive, we disagree with Comcast's assertion that the conduct at issue here falls

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[104] 47 C.F.R. § 76.1302(f)(2011).

[105] Comcast argues that reading the third trigger in this way results in an "oxymoronic, unlimited limitations period." *Comcast App. for Rev.* at 3. In the *Program Carriage Order and NPRM*, we acknowledged that the third trigger could be read to provide that a complaint is timely filed even if the allegedly discriminatory act occurred many years before the filing of the complaint and that, based on such a reading, the third trigger "undermines the fundamental purpose of a statute of limitations 'to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.'" *Program Carriage Order and NPRM*, 26 FCC Rcd at 11522-23 ¶ 38 (quoting *Bunker Ramo Corp.*, Memorandum Opinion and Order, 31 FCC 2d 449, 453 ¶ 12 (Review Board 1971)). To address this concern, we "propose[d] to revise our program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the program carriage rules." *Id.* at 11523 ¶ 39. Tennis Channel's complaint would be timely even under this proposed revision to the program carriage statute of limitations. Moreover, even without this proposed revision, we read subsection 76.1302(f)(3) consistent with the doctrine of laches to impliedly require notification of an intent to file a complaint within a reasonable time period of discovery of the allegedly unlawful conduct. Because the allegedly unlawful conduct at issue here occurred within one year of the filing of the complaint, we need not determine precisely what period of time would be "reasonable" here.

[106] *Comcast App. for Rev.* at 2.

[107] 47 C.F.R. § 76.1302(f)(1).

[108] As the Media Bureau noted, accepting Comcast's interpretation that the clock starts running when the contract is entered into, regardless of whether the allegations at issue concern the contract at the time of its formation, would "preclude programmers from bringing legitimate claims regarding allegedly discriminatory actions occurring more than one year after a contract was executed." *Hearing Designation Order*, 25 FCC Rcd at 14158 n.82.

[109] *Id.* at 14154 ¶ 11.

[110] *Comcast App. for Rev.* at 2-3.

under the first trigger. As noted above, Tennis Channel's complaint does not allege that the 2005 contract was improperly discriminatory, but instead focuses on Comcast's 2009 conduct. As for Comcast's assertion that the third trigger concerns refusals to deal or similar conduct, we find no support for that view in the text. Comcast relies upon the fact that the rule was originally promulgated with this limitation.[111] However, the Commission removed the limiting language in 1994, and there is no support for reading it back in notwithstanding its willful deletion.[112]

33. Second, Comcast argues that the Media Bureau's reading renders the first trigger "functionally meaningless by allowing [the] parties to 'reset' the limitations period at any time merely by unilaterally demanding a material change to the terms of an existing agreement and delivering a notice of its intent to file a complaint if its demand is not met."[113] This argument fails to take into account the fact that under the March 2005 contract, Comcast had discretion as to Tennis Channel's carriage.[114] Comcast had an obligation to exercise that discretion consistent with Section 616. As the Media Bureau explained, "The gravamen of The Tennis Channel's complaint is that Comcast has refused to exercise its discretion to [move Tennis Channel to a more widely distributed tier], and has thus failed to meet its obligation under Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules to avoid discrimination on the basis of affiliation. It is this refusal, not the terms of the contract, which forms the basis for The Tennis Channel's complaint."[115] In other words, Tennis Channel was not trying to demand a unilateral change in the existing terms of its contract with Comcast; it was asking that the existing contract be performed—that Comcast exercise its contractual discretion—consistent with its obligations under Section 616.[116]

34. Third, Comcast argues that Tennis Channel brought its complaint "as the culmination of a strategic effort, begun no later than January 2007, to undo the terms of its carriage agreement with Comcast."[117] We do not think it is relevant whether Tennis Channel was dissatisfied with Comcast's carriage prior to 2009. The complaint is focused on Comcast's behavior within the statute of limitations period, specifically its refusal in June 2009 to relocate the network to a more widely distributed tier, and the question before us is whether that conduct constituted a violation of Section 616. Even if Tennis Channel could have requested broader carriage from Comcast earlier, that does not mean Tennis Channel was obligated to do so. Comcast seems to suggest that Tennis Channel had an obligation to request broader carriage under the terms of the existing contract at the precise moment when it thought it was entitled to broader carriage, and not a moment later. As Tennis Channel explains, it "was aware of the remedies under Section 616 but concluded that it should first build its service and approach Comcast for relief from inadequate carriage."[118] Tennis Channel waited until it thought it had a sufficiently compelling case for broader carriage. It made that case to Comcast. Comcast, with discretion to provide broader carriage under its existing agreement with Tennis Channel, had an obligation to evaluate that case

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[111] *Id.* at 3.

[112] *Id.*

[113] *Id.*

[114] *Initial Decision*, 26 FCC Rcd at 17166-67 ¶ 16; Tennis Channel Exh. 144 at 9 ¶ 6.2.1; Tr. 2159 (Madison Bond).

[115] *Hearing Designation Order*, 25 FCC Rcd at 14155 ¶ 12.

[116] The 2005 contract between Comcast and Tennis Channel does not **[REDACTED]**, but rather **[REDACTED]**. Tennis Channel Exh. 144 at 9 ¶ 6.2.1.

[117] *Comcast App. for Rev.* at 4.

[118] *Tennis Channel Opp. to App. for Rev.* at 5.

in a nondiscriminatory manner. Comcast's alleged failure to do so, which occurred in June 2009, is the basis for Tennis Channel's Complaint.

B. Standard of Review

35. We review the ALJ's Initial Decision *de novo*.[119] However, we accord deference to the ALJ's credibility determinations.[120]

36. Comcast argues that where First Amendment rights are asserted, we must make an independent examination of the whole record and should not accord our usual deference to the ALJ's specific credibility findings.[121] However, the cases to which Comcast cites reaffirm that, while in certain First Amendment cases reviewing courts have a special obligation to review the record in full, credibility determinations are still reviewed with deference.[122] In any event, our independent review of the record, as set forth below, supports the ALJ's conclusions that Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation, and that Comcast's discrimination unreasonably restrained Tennis Channel's ability to compete in the marketplace. We need not rely on any credibility determinations to come to our conclusions here.

C. Burden of Proof

37. The Commission's orders have left open the question whether the burden of proof remains with the complainant in a Section 616 case even after successfully establishing a *prima facie* case of discrimination.[123] The ALJ, in his Initial Decision, determined that Tennis Channel retained the burden of proof notwithstanding the Media Bureau's finding that Tennis Channel had established a *prima facie* case.[124] Tennis Channel does not dispute this determination in its filings before the Commission.

38. We assume, *arguendo*, that Tennis Channel retains the burden of proof, but continue to leave this question open until the completion of the Commission's related rulemaking process.[125] We conclude, for the reasons set forth below, that the record evidence is sufficient to satisfy a burden of proof by Tennis Channel.

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[119] *See, e.g., Imposition of Forfeiture Against Capitol Radiotelephone Inc. d/b/a Capitol Paging*, 11 FCC Rcd 2335, 2342 (1996).

[120] *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 26 FCC Rcd 8971, 8983 ¶ 39 (2011) ("*WealthTV*"), *appeal docketed sub. nom. Herring Broad., Inc. d/b/a WealthTV v. FCC*, No. 11-73134 (9th Cir. Oct. 18, 2011).

[121] *Comcast Exceptions* at 4-5.

[122] *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688-89 (1989) (noting that "credibility determinations are reviewed under the clearly-erroneous standard"); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-500 (1984) (same).

[123] *Wealth TV*, 26 FCC Rcd at 8977-78 ¶ 18; *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, 18105 ¶ 11 (2010), *aff'd*, No. 11-1151, 2012 WL 1672264 (4th Cir. May 14, 2012) ("*MASN*").

[124] *Initial Decision*, 26 FCC Rcd at 17204 ¶ 100.

[125] *Program Carriage Order and NPRM*, 26 FCC Rcd at 11544-46 ¶¶ 79-81.

D. The Initial Decision's Conclusion that Comcast Violated Section 616 is Consistent with Section 616 and is Supported by the Record

39. For reasons set forth below, we find that the Initial Decision's conclusion that Comcast violated Section 616 and Section 76.1301(c) is consistent with the Act and Commission rules and is supported by the record. In making these determinations, we reject Comcast's constrained reading of Section 616 and its efforts to characterize Section 616 as tracking antitrust law, particularly the "essential facilities" doctrine.[126]

1. Section 616 was Enacted to Address Concerns about Vertical Integration

40. Insisting that Section 616 incorporates the antitrust "essential facilities" doctrine, Comcast urges us to read Section 616's "unreasonably restrain" language to mean "that the programmer [must] suffer[] a severe competitive handicap by dint of its inability to access a necessary service."[127] We find no support for this standard or for the notion that Congress's concern in passing Section 616 was, as Comcast argues, cable operators' "then-bottleneck power."[128] Congress applied Section 616 to all MVPDs, not just cable operators.[129] Furthermore, Congress provided only that, in order to be prohibited, discrimination must unreasonably restrain the ability of an unaffiliated programming vendor to fairly compete; Congress did not incorporate standards borrowed from the distinct antitrust doctrine of essential facilities, or speak in terms of "access to a necessary service."

41. Section 616 would serve no function if it existed simply as a redundant analogue to antitrust law. Nothing in the text of Section 616 indicates an intent to mimic existing antitrust law or the "essential facilities" doctrine. The legislative history, moreover, expressly repudiates such a design. The House Report explains, "This legislation provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws. All antitrust and other remedies that can be pursued under current law by video programming vendors are unaffected by this section."[130] In short, Section 616 was intended to operate alongside existing antitrust law, and to read Section 616 to simply echo antitrust law would frustrate Congress's clear purpose to grant the Commission new authority to address concerns specific to MVPDs and affiliated programming.[131]

42. Contrary to Comcast's arguments, our reading of the history of Section 616 reveals that it

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[126] *Comcast Exceptions* at 5-7.

[127] *Id.* at 6.

[128] *Id.*

[129] 47 U.S.C. § 536(a)(3) (applying the antidiscrimination requirement to "a multichannel video programming distributor").

[130] CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, H.R. REP. NO. 102-628, at 111 (1992) ("*House Report*").

[131] *See, e.g.*, *Satellite Bus. Sys. Apps. for Auth. Pursuant to Sections 308, 309 & 319 of the Commc'ns Act of 1934 to Construct Three Domestic Commc'ns Satellites; Apps. for Auth. Pursuant to Sections 308, 309 & 319 of the Commc'ns Act of 1934 to Construct Four Fixed Domestic Satellite Earth Stations at Poughkeepsie, N.Y.; Los Gatos, Cal.; Franklin Lakes, N.J.; & Agoura, Cal.*, 62 F.C.C.2d 997, 1067 ¶ 196 (1977) ("Under the regulatory scheme of the Communications Act, we consider antitrust issues as but one part of our larger public interest determination."). *See also United States v. FCC*, 652 F.2d 72, 87 (D.C. Cir. 1980) (*en banc*) ("[T]he agency is required to consider anticompetitive consequences as one part of its public interest calculus. [No] authority we have found makes the antitrust component of that calculus conclusive.").

was designed to address specific concerns about vertical integration in the video distribution market.[132] Congress was concerned that "vertical integration gives cable operators the incentive and ability to favor their affiliated programming services," thereby leading to reduced competition and diversity of programming.[133] Congress considered prohibiting vertical integration altogether, noting that such an approach "has appeal," but ultimately decided that "[t]o ensure that cable operators do not favor their affiliated programmers over others," it was appropriate to "bar[] cable operators from discriminating against unaffiliated programmers."[134] With this goal of protecting competition at its core, Section 616 is structured to prohibit discrimination on the basis of affiliation when such discrimination has the effect of "unreasonably restrain[ing] the ability of an unaffiliated . . . programming vendor to compete fairly."[135]

43. Our reading of the "unreasonably restrain" language of Section 616 follows from the text of that provision: the discrimination must be unreasonable and have a restraining effect on the programmer's ability to compete fairly in the MVPD distribution marketplace. As we explained recently, "[b]y favoring its affiliated programming vendor on the basis of affiliation, an MVPD can hinder the ability of an unaffiliated programming vendor to compete in the video programming market, thereby allowing the affiliated programming vendor to charge higher license fees and reducing competition in the markets for the acquisition of advertising and programming rights."[136]

2. The ALJ Correctly Concluded that Comcast Deliberately Discriminated Against Tennis Channel and in Favor of Golf Channel and Versus on the Basis of Affiliation

44. We find that the ALJ correctly concluded that Comcast both discriminated against Tennis Channel on the basis of nonaffiliation and discriminated in favor of Golf Channel and Versus on the basis of affiliation. We note that either of these forms of discrimination would be sufficient to entail a violation of Section 616 so long as the effect of the discrimination was to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly. Both Section 616 of the Act and Section 76.1301(c) of our Rules bar discrimination "on the basis of affiliation or nonaffiliation" when that discrimination unreasonably restrains the ability to compete fairly.[137]

a. The Record Contains Circumstantial Evidence Indicating a General Practice by Comcast of Favoring Affiliates over Non-affiliates

45. The record contains significant circumstantial evidence that Comcast engaged in a general practice of favoring affiliates over nonaffiliates. This circumstantial evidence, standing alone, might not be sufficient to support a finding that Comcast discriminated against a nonaffiliate in a particular instance. However, this circumstantial evidence, when read in conjunction with the determination that Tennis Channel, Golf Channel, and Versus were similarly situated but treated differently without a nondiscriminatory reason, supports our finding that the record, when taken as a

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[132] *See Program Carriage Order and NPRM*, 26 FCC Rcd at 11497-98 ¶ 4 (citing *House Report,* CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, S. REP. NO. 102-92 (1991) ("*Senate Report*")).

[133] *Senate Report* at 25.

[134] *Id.* at 27.

[135] 47 U.S.C. § 536(a)(3). *See also* 47 C.F.R. § 76.1301(c).

[136] *Program Carriage Order and NPRM*, 26 FCC Rcd at 11517 ¶ 31.

[137] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

whole, establishes that Comcast discriminated on the basis of affiliation.[138]

46. Two top Comcast executives, Stephen Burke and Madison Bond, likened Comcast's relationship with its affiliate networks to a "sibling" relationship.[139] Mr. Bond, the Executive Vice President of Content Acquisition, further testified in this proceeding that affiliates obtain "greater access to some degree" to Comcast decision-makers than non-affiliates.[140] Mr. Burke, Comcast Corporation's former Chief Operating Officer, indicated in a statement in another proceeding that affiliated networks are "treated like siblings as opposed to like strangers," and that affiliates "get a different level of scrutiny" than unaffiliated networks.[141] Though Mr. Burke argued in a declaration in this case that his previous statement did not pertain to carriage decisions and "was simply an observation that individuals from Comcast Cable and Comcast's affiliated network group ('Programming Group') are known to each other by virtue of physical proximity,"[142] this explanation is not consistent with his acknowledgment in his previous statement that affiliates "get a different level of scrutiny."[143]

47. Comcast's carriage of sports networks tracks the significance of its equity stake, providing further circumstantial evidence that it generally favors affiliated networks over nonaffiliated networks. As the ALJ pointed out, Comcast Cable's two majority-owned sports networks, Golf Channel and Versus, are carried broadly on the highly penetrated Expanded Basic or Digital Starter tiers.[144] Comcast carries sports networks in which it has a minority or indirect ownership—NHL Network, MLB Network, and NBA TV—on its Digital Preferred Tier,[145] which reaches **[REDACTED]** of its subscribers

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[138] Comcast argues that Section 616 requires a showing that an MVPD deliberately discriminated against a programmer based on affiliation. *Comcast Exceptions* at 12. Section 616 does require a showing of intentional or deliberate discrimination. We note, however, that this showing can be made via the use of either direct or circumstantial evidence of discrimination. *Initial Decision*, 26 FCC Rcd at 17206 ¶ 105; *Program Carriage Order and NPRM*, 26 FCC Rcd at 11503-05 ¶ 13-14; *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Recommended Decision, 24 FCC Rcd 12967, 12998 ¶ 63 (ALJ 2009) ("*WealthTV Recommended Decision*"), *adopted by the Commission in* WealthTV.

[139] *Initial Decision*, 26 FCC Rcd at 17186 ¶ 55; Tennis Channel Ex. 7; Tr. 2249 (Madison Bond).

[140] Tr. 2249 (Madison Bond).

[141] *Initial Decision*, 26 FCC Rcd at 17186 ¶ 55; Tennis Channel Ex. 7.

[142] Tennis Channel Ex. 19-2.

[143] Comcast also argues that Mr. Burke's previous testimony is not significant by pointing to our Order in *WealthTV*. *Comcast Exceptions* at 20. In *WealthTV*, the ALJ refused to admit the same testimony by Mr. Burke into evidence because WealthTV attempted to introduce it through an improper procedure. *WealthTV*, 26 FCC Rcd at 8982 ¶ 34. We rejected WealthTV's exception to the ALJ's evidentiary ruling. *Id.* at 8982. Comcast does not argue in its Exceptions here that the procedure by which Mr. Burke's previous testimony was introduced was improper. In our *WealthTV* Order, we further stated that there was "no evidence that [Mr. Burke's] testimony in a separate proceeding had any bearing on WealthTV's specific complaint against Comcast or the other defendants." *Id.* WealthTV failed to lay a proper foundation for inclusion of the testimony and failed to show how Mr. Burke's testimony fit into a pattern of circumstantial evidence supporting the proposition of discrimination against it. *See id.* at 8982 ¶¶ 34-35. The circumstances are different here. Mr. Burke restated his previous testimony for this proceeding through his declaration. Tennis Channel 19-2. That testimony provides important context to the circumstantial evidence of Comcast's favorable treatment of Golf Channel and Versus that appears in the record, as described below.

[144] *Initial Decision*, 26 FCC Rcd at 17187 ¶ 57; Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

[145] *Initial Decision*, 26 FCC Rcd at 17187 ¶ 57; Tennis Channel Exh. 16 at 9 ¶ 20 (Testimony of Hal Singer).

and is more broadly distributed than the Sports Tier to which Tennis Channel is relegated.[146] Every single nationally distributed network carried exclusively on the Sports Tier is unaffiliated with Comcast.[147]

48. This pattern holds even as Comcast launches new affiliated networks or changes its equity stake in existing networks. As the ALJ noted, in 2010, Comcast planned to launch the U.S. Olympic Network and include it as part of its digital basic offerings, which would "giv[e] it more exposure than competing premium sports cable channels."[148] This was notwithstanding the fact that the new network would have no rights to air any Olympic games.[149] Comcast gave Outdoor Life Network, the Comcast-affiliated predecessor to Versus,[150] broad distribution notwithstanding the fact that the head of Comcast's programming division referred to it at the time as "a crappy channel [that was] dead in the water."[151] When Comcast acquired an equity stake in the NHL Network, it moved it from the Sports Tier to the more highly penetrated Digital Preferred Tier.[152] Similarly, Comcast changed its plans to place the MLB network on the Sports Tier after obtaining an equity stake, and placed it instead on the much more widely distributed Digital Preferred Tier.[153]

49. In its exceptions, Comcast argues that this circumstantial evidence is irrelevant and not probative.[154] Comcast argues that there was no evidence in the record comparing Golf Channel, Versus, and Tennis Channel to the other sports channels carried on any Comcast tier, that there were specific nondiscriminatory reasons for the broader distribution of MLB Network and NHL Network, and that Comcast carries many unaffiliated networks broadly.[155] We agree that Comcast's general pattern of carrying sports networks is not necessarily conclusive in establishing actual discrimination in a given instance. However, we find the pattern significant and consistent with the notion that Comcast treats affiliates like "siblings" with respect to carriage decisions. Furthermore, this circumstantial evidence diminishes the credibility of Comcast's claims that it had legitimate nondiscriminatory reasons for carrying Tennis Channel less broadly than Golf Channel and Versus.

50. In order to conclusively establish discrimination by circumstantial evidence, the evidence must support the conclusion that, all else being equal, Comcast favors an affiliate or disfavors a non-

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[146] *Initial Decision*, 26 FCC Rcd at 17187 ¶ 57; *see* Tr. 2190-91 (Madison Bond); Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

[147] Tr. at 2198 (Madison Bond).

[148] *Initial Decision*, 26 FCC Rcd at 17187-88 ¶ 58; Tennis Channel Exh. 77; Tr. 2188-89 (Madison Bond).

[149] *Initial Decision*, 26 FCC Rcd at 17187-88 ¶ 58; Tennis Channel Exh. 76-77; Tr. At 2184, 2186-87 (Madison Bond).

[150] Outdoor Life Network was renamed Versus in the mid-2000s, following a decision to shift its programming to include more traditional competitive sports. Tennis Channel Exh. 17 at 19 ¶ 35 (Testimony of Timothy Brooks).

[151] *Initial Decision*, 26 FCC Rcd at 17188 ¶ 58; Tennis Channel Exh. 26; Tennis Channel Exh. 143 at 39 (Jeffrey Shell Deposition).

[152] *Initial Decision*, 26 FCC Rcd at 17188 ¶ 59; Comcast Exh. 75 at 9 ¶ 24 (Testimony of Madison Bond); Tr. 2179 (Madison Bond); *see* Tr. 853 (Hal Singer).

[153] *Initial Decision*, 26 FCC Rcd at 17188 ¶ 59; Tennis Channel Exh. 16 at 10 ¶ 20 & n.18 (Testimony of Hal Singer); Tr. 855 (Hal Singer).

[154] *Comcast Exceptions* at 28-29.

[155] *Id.*

affiliate without a valid nondiscriminatory reason. We now weigh that kind of evidence with specific regard to Golf Channel, Versus, and Tennis Channel.

b. The Record Establishes that Golf Channel, Versus, and Tennis Channel are Similarly Situated

51. The record evidence establishes that Golf Channel, Versus, and Tennis Channel are similarly situated for purposes of determining whether discrimination on the basis of affiliation occurred. This is clear when the networks are compared along a series of important axes.

52. **Similar Sports Programming.** All three networks provide sports programming. As the ALJ noted, all three networks broadcast sporting events and other types of similar non-event sports-related content, such as lifestyle and instructional sports programming. Tennis Channel and Golf Channel are each devoted to a single sport with high levels of audience participation.[156] Furthermore, Tennis Channel and Versus have a history of repeatedly sharing or seeking rights to the same sporting events.[157]

53. **Demographics.** Because the three networks carry similar programming, it is not surprising that the demographic evidence introduced before the ALJ indicates that the three networks target and reach similar audiences. All three channels target affluent viewers with very similar median household incomes.[158] All three channels skew male in their viewership.[159] And all three channels target adults in the overlapping 25-to-54 or 35-to-64 age brackets.[160]

54. **Advertisers.** The record further established remarkable overlap in advertisers. As the ALJ noted, in 2010 **[REDACTED]** of Golf Channel's revenue and **[REDACTED]** of Versus's revenue from each of their 30 largest non-endemic advertisers came from either recent advertisers on Tennis Channel or from companies that Tennis Channel was soliciting to advertise.[161] Of Tennis Channel's 30 largest non-endemic advertisers in 2010, **[REDACTED]** advertised on Golf Channel and **[REDACTED]** advertised on Versus.[162]

55. **Ratings.** The ratings for the three channels—Golf Channel, Versus, and Tennis Channel—are almost identical. Measuring markets in the first nine months in 2010 where the channels

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[156] *Initial Decision*, 26 FCC Rcd at 17171 ¶ 25; Tennis Channel Exh. 16 at 17 ¶ 28 (Testimony of Hal Singer). **[REDACTED]** of Tennis Channel viewers participate in tennis and **[REDACTED]** of Golf Channel viewers participate in golf. *Id.*

[157] *Initial Decision*, 26 FCC Rcd at 17171 ¶ 26; *see, e.g.,* Tennis Channel Exh. 16 at 22 ¶ 31 (Testimony of Hal Singer); Tennis Channel Exh. 35; Tennis Channel Exh. 40 at 10; Tennis Channel Exh. 41 at 11; Tennis Channel Exh. 43 at 2; Tennis Channel Exh. 49; Tr. 2592-93 (Joseph Donnelly); Tennis Channel Exh. 14 at 19 ¶ 42 (Testimony of Ken Solomon).

[158] *Initial Decision*, 26 FCC Rcd at 17176-77 ¶ 37; Tennis Channel Exh. 17 at 16-18, 23-25 ¶¶ 31-33, 42-45 (Testimony of Timothy Brooks); Tennis Channel Exh. 16 at 17 ¶ 28(Testimony of Hal Singer).

[159] *Initial Decision*, 26 FCC Rcd at 17178 ¶ 41; Tennis Channel Exh. 17 at 16-18, 23-25 ¶¶ 31-33, 42-45 (Testimony of Timothy Brooks); Tennis Channel Exh. 16 at 17 ¶ 28 (Testimony of Hal Singer).

[160] *Initial Decision*, 26 FCC Rcd at 17179-80 ¶ 43; Tr. 713-14 (Timothy Brooks). *See also* Tr. 626 (Gary Herman).

[161] *Initial Decision*, 26 FCC Rcd at 17180-81 ¶ 45; Tennis Channel Exh. 15 at 3-4 ¶¶ 8, 10, Exhibit B (Testimony of Gary Herman). Endemic advertisers are advertisers that exclusively promote products or services specific to a particular sport. Tennis Channel Exh. 15 at 3, 4 ¶¶ 7, 10 (Testimony of Gary Herman).

[162] *Initial Decision*, 26 FCC Rcd at 17181 ¶ 46; Tennis Channel Exh. 15 at 4 ¶ 10 (Testimony of Gary Herman).

are available, both Tennis Channel and Golf Channel averaged total-day household ratings of **[REDACTED]**,[163] while Versus was within hundredths of a rating point at **[REDACTED]**.[164]

56. Comcast asserts that the ALJ made "six serious errors" in its similarly situated analysis.[165] These purported "errors," taken together, are not sufficient to counterbalance the tremendous similarities between the networks established by the record.

57. First, Comcast argues that its broader carriage of Golf Channel and Versus is explained by the fact that when those channels were originally launched, MVPDs had spare capacity and were seeking new programming.[166] However, Comcast's carriage decisions regarding other networks around the time of its alleged discrimination against Tennis Channel make clear that time-to-market distinctions cannot explain Comcast's relegation of Tennis Channel to the Sports Tier. In 2009, Comcast granted carriage to two recently-affiliated sports networks—MLB Network and NHL Network—on the Digital Preferred Tier, which is much more broadly distributed than the Sports Tier.[167] Also in 2009, Comcast moved NBA TV, in which Comcast has an indirect ownership interest, from the Sports Tier to the Digital Preferred Tier.[168] Furthermore, the record evidence demonstrates that at the time of renewal, MVPDs generally consider whether to reposition networks they carry.[169] Comcast has moved unaffiliated networks to more narrowly penetrated tiers at these times.[170] Significantly, however, Comcast renewed agreements with Versus and Golf Channel in 2009 and 2010 without even considering such repositioning.[171]

58. Second, Comcast points to differences in programming between the networks, for example the fact that Tennis Channel shows some nonexclusive content and repeats of earlier matches while Golf Channel and Versus programs are exclusive and mostly current.[172] Comcast also points out that Tennis Channel pays significantly less for its programming and argues that Tennis Channel has less of an ability to attract subscribers than Golf Channel and Versus.[173] As discussed below, we do not find these purported distinctions to be as significant as Comcast presents them to be, nor do we find them to overcome the significant evidence of similarity.

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[163] *Initial Decision*, 26 FCC Rcd at 17183 ¶ 48; Tennis Channel Exh. 17 at 14-15 ¶ 28 (Testimony of Timothy Brooks).

[164] *Initial Decision*, 26 FCC Rcd at 17183 ¶ 48; Tennis Channel Exh. 17 at 20 ¶ 36 (Testimony of Timothy Brooks).

[165] *Comcast Exceptions* at 22-28.

[166] *Id. at* 22-23.

[167] *Initial Decision*, 26 FCC Rcd at 17193 ¶ 73; Tennis Channel Exh. 16 at 10 ¶ 20 & n.18 (Testimony of Hal Singer); Tr. 853, 855 (Hal Singer), Tr. 2179 (Madison Bond).

[168] *Initial Decision*, 26 FCC Rcd at 17193 ¶ 73; *Tr.* 2179-80, 2295 (Madison Bond).

[169] *Initial Decision*, 26 FCC Rcd at 17194 ¶ 74; Tr. 2240-41 (Madison Bond).

[170] *Initial Decision*, 26 FCC Rcd at 17194 ¶ 74; Tr. 2240-41, 2243 (Madison Bond).

[171] *Initial Decision*, 26 FCC Rcd at 17194 ¶ 74; *see* Tr. 2226-28, 2297 (Madison Bond); Tr. 2409-10 (Jennifer Gaiski).

[172] *Comcast Exceptions* at 23.

[173] *Id.* at 23-24.

59. With a careful examination of the three channels, Comcast's efforts to depict Tennis Channel's content as less attractive to subscribers rings hollow. For example, Comcast's point regarding Tennis Channel's non-exclusive tournament coverage is undermined by the fact that Tennis Channel covers all four Tennis Grand Slams,[174] while Golf Channel does not have the rights to air any of the four Golf Majors.[175] The relevance of Comcast's argument that Tennis Channel relies more on repeats is undermined by a comparison of the total number of hours of live event programming, a much more important metric for determining the freshness of sports programming. Tennis Channel airs almost exactly the same number of hours of live event programming as Golf Channel,[176] and airs more live event programming than Versus.[177] Furthermore, though Versus does not program non-live sporting events as often as Tennis Channel does, that does not mean that Versus is filling the balance of its schedule with fresh and appealing content; the second biggest category of programming on Versus is infomercials.[178]

60. Comcast's argument regarding the amount that Tennis Channel pays for its programming as compared to Versus and Golf Channel may be of some significance as an indicator of the value of the programming to networks and subscribers, but its persuasive force is overwhelmed by the much more powerful evidence in the record regarding the very similar ratings among the channels. Furthermore, it is not clear from the record how well the cost of programming serves as a proxy for appeal. As noted in the record, some of the highest rated and valuable content on television consists of reality programming that is inexpensive to produce.[179]

61. Also of some significance is evidence invoked by Comcast that supports the notion that subscribers value Golf Channel and Versus more than Tennis Channel. This evidence includes assertions by Comcast field representatives of a lack of consumer demand for Tennis Channel and testimony by an executive at Charter Communications to the same effect.[180] Comcast also argues that Golf Channel and Versus "have demonstrated a proven ability to attract and retain subscribers," by pointing to testimony that recounts how Charter Communications considered moving Golf Channel and Versus to a less penetrating tier but received a large number of Charter subscriber complaints after they viewed a crawl on the bottom of the screen on those networks that urged them to contact Charter.[181] The fact that Charter subscribers responded to a crawl in support of Golf Channel and Versus tells us nothing about how subscribers would have responded to a similar crawl in similar circumstances in support of Tennis Channel. As with the evidence that Tennis Channel pays less for its programming, we ultimately do not think this evidence overcomes the forceful evidence in the record that demonstrates Tennis Channel's similarity to Golf Channel and Versus.

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[174] *Initial Decision*, 26 FCC Rcd at 17163 ¶ 5; Tennis Channel Exh. 14 at 7 ¶ 13 (Testimony of Ken Solomon).

[175] *Initial Decision*, 26 FCC Rcd at 17164 n.25; Tr. 1513 (Michael Egan).

[176] Tennis Channel aired **[REDACTED]** of live event programming, while Golf Channel aired **[REDACTED]** of such programming in the same period. *Initial Decision*, 26 FCC Rcd at 17173 n.106; Comcast Exh. 77 at 31 ¶ 51 (Testimony of Michael Egan).

[177] Versus aired "somewhere in the neighborhood" of **[REDACTED]** of live event programming a year. Tr. 1651 (Michael Egan).

[178] Tr. 2634 (Joseph Donnelly).

[179] *Initial Decision*, 26 FCC Rcd at 17185 ¶ 51; Tennis Channel Exh. 16 at 55 ¶ 79 (Testimony of Hal Singer).

[180] *Comcast Exceptions* at 24.

[181] *Id.* at 24 n.105.

62. Third, Comcast attempts to undercut the importance of the similar ratings for the three networks by arguing that ratings "are of minimal importance to MVPDs, whose principal business is selling *subscriptions*, not *advertising*, for which ratings matter more."[182] As noted above, the evidence put forward by Comcast to suggest that Golf Channel and Versus drive more subscriptions than Tennis Channel is weak. Furthermore, the record indicates that Comcast itself relied upon ratings **[REDACTED]**.[183]

63. Fourth, Comcast argues that Golf Channel targets viewers older than those that Tennis Channel targets.[184] As the ALJ found, Golf Channel, Versus, and Tennis Channel all target adults in the overlapping 25-to-54 or 35-to-64 age brackets defined by Nielsen.[185] The record also demonstrates that the median age of Tennis Channel's viewers is not drastically different from that of Golf Channel and Versus—within **[REDACTED]** years of that of Golf Channel and within **[REDACTED]** years of that of Versus.[186] While one could argue that the **[REDACTED]** year spread in median age between Tennis Channel and Golf Channel is not small enough to provide strong independent evidence that the networks are similarly situated, we do not believe it is large enough to constitute evidence against such a determination. This evidence, introduced by Comcast, is consistent with and reinforces the conclusion that the three networks targeted adults in overlapping age brackets. Comcast argues **[REDACTED]** that half of Golf Channel viewers are older than 54 and therefore cannot be reconciled with the finding that Golf Channel and Tennis Channel target viewers in the 25-to-54 age bracket.[187] This argument is unpersuasive as it is little more than an attempt at statistical gaming.[188] Using Comcast's reasoning, half of Golf Channel viewers are younger than 54, which surely places a significant number of its viewers within that same 25-to-54 age bracket. This approach also ignores the 35-to-64 age bracket, which the record suggests is targeted by the three networks and into which a significant number of those Golf Channel viewers older than 54 certainly would fall.

64. Comcast also argues that the conclusion that Tennis Channel, like Golf Channel and Versus, targets male audiences is erroneous on the grounds that the record suggests that Tennis Channel appeals to both men and women.[189] In particular, Comcast cites the Recommended Decision in *WealthTV*, in which the ALJ rejected WealthTV's argument that its network's appeal skewed toward men by looking to marketing materials that demonstrated a broad appeal to both men and women.[190] Here, we find the most compelling evidence in the record of the networks' appeal to be the 2010 MRI data on actual audience demographics, which shows that **[REDACTED]**,[191] a ratio close to that which Comcast's

[182] *Comcast Exceptions* at 25.

[183] *See, eg.*, Tennis Channel Ex. 82 (**[REDACTED]**).

[184] *Comcast Exceptions* at 25-26.

[185] *Initial Decision*, 26 FCC Rcd at 17179-80 ¶ 43; Tr. 713-14 (Timothy Brooks). *See also* Tr. 626 (Gary Herman).

[186] *See Initial Decision*, 26 FCC Rcd at 17180 ¶ 44 & n.150; *see* Comcast Exh. 77 at 50 ¶ 87 (Testimony of Michael Egan). The median ages of Versus, Tennis Channel, and Golf Channel **[REDACTED]** respectively. *Id.*

[187] *Comcast Exceptions* at 25-26.

[188] This argument is inapplicable to Versus as its median age falls **[REDACTED]**. *See supra* note 184.

[189] *Comcast Exceptions* at 26.

[190] *Id.* (citing *WealthTV Recommended Decision*, 24 FCC Rcd at 12979-83 ¶¶ 27-34).

[191] *Initial Decision*, 26 FCC Rcd at 17178 at ¶ 41; Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 18 (¶ 33); *see* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

own expert conceded to be male-skewed.[192]

65. Fifth, Comcast attempts to rehabilitate the testimony of Comcast's programming expert, Michael Egan, which the ALJ determined was "not credible."[193] Though Mr. Egan had testified in *WealthTV* that a "genre" analysis was appropriate in evaluating similarity between networks,[194] in this case Egan testified about "sub-genres" within the sports genre and pointed to differences in the mix of sports programming on each channel—the amount of event vs. non-event programming; the popularity of each sport; the exclusive vs. nonexclusive programming; the amount of live vs. non-live programming; the amount of first run vs. repeat programming; and the amount spent on programming.[195] We do not find Mr. Egan's efforts to distinguish the networks by sub-genre persuasive. As the programming between any two networks could be distinguished if categorized finely enough, it was essential that Mr. Egan explain in his testimony why this particular "sub-genre" analysis was appropriate, especially when, by his admission, he was unaware of any prior use of this methodology in the cable industry.[196] Mr. Egan failed to provide such an explanation, leading us to agree with the ALJ's credibility determination. Even assuming Mr. Egan's analysis to be meaningful, we find that the similarities in programming among the three networks vastly outweigh the differences. The three networks carry similar amounts of live event programming.[197] Tennis Channel and Golf Channel are both single sports networks that, as noted above, reach audiences with similar demographics by income, age, and gender. And Tennis Channel and Versus competed directly against each other on numerous occasions to carry the same events.[198]

66. We also do not find convincing Mr. Egan's efforts to characterize the three networks as having very different "images." Comcast complains that the ALJ improperly faulted Mr. Egan for offering observations on direct examination that were not part of his written testimony when those observations were made in response to questions by the ALJ.[199] We find Mr. Egan's testimony about the different images of the three networks unconvincing on its own terms. Mr. Egan asserts that Tennis Channel projects a "very international" image that differs from Golf Channel's "country club" image and

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[192] *Initial Decision*, 26 FCC Rcd at 17179 ¶ 42; Tr. 2714 (Marc Goldstein). Comcast cites **[REDACTED]** in which Tennis Channel held itself out **[REDACTED]** between male and female viewers. Comcast Exh. 127 at TTCCOM_00019131; Comcast Exh. 181 at TTCCOM_00022484; Comcast Exh. 268, Comcast Exh. 589 at TTCCOM_00086182. We find data demonstrating a network's actual demographics more compelling than a network's representation of its own demographics.

[193] *Initial Decision*, 26 FCC Rcd at 17172-73 ¶ 28.

[194] *Id.* at 17172-73¶ 28 & n.99; Tr. at 1598-99 (Michael Egan). Mr. Egan also employed a "look and feel" analysis in the earlier case. *WealthTV Recommended Decision*, 24 FCC Rcd at 12978 ¶ 23.

[195] *Initial Decision*, 26 FCC Rcd at 17173 ¶ 29; Tr. 1601 (Michael Egan); *see* Comcast Exh. 77 at 18-40 ¶¶ 29-66 (Testimony of Michael Egan).

[196] *Initial Decision* , 26 FCC Rcd at 17173 ¶ 29; Tr. 1616 (Michael Egan). In response to a question asking Mr. Egan if he ever saw Comcast perform "the kind of slicing of the data" that he performed in this case, Mr. Egan responded that he "wouldn't suspect they did what [he] did because [they] would not typically [perform that kind of analysis.] That wouldn't be the [typical] behavior of an MVPD . . . ." Tr. 1615 (Michael Egan).

[197] *See supra* ¶ 59.

[198] *Initial Decision*, 26 FCC Rcd at 17171 ¶ 26 ;Tennis Channel Exh. 16 at 22 ¶ 31 (Testimony of Hal Singer); Tennis Channel Exh. 35; Tennis Channel Exh. 40 at 10; Tennis Channel Exh. 41 at 11; Tennis Channel Exh. 43 at 2; Tennis Channel Exh. 49; Tr. 2592-93 (Joseph Donnelly); Tennis Channel Exh. 14 at 19-20 ¶ 42 (Testimony of Ken Solomon).

[199] *Comcast Exceptions* at 26-27.

Versus's "aggressive" image.[200] We do not find the record to support any of the asserted network images. Egan's description of Tennis Channel as having an "international" image is based on "interstitial bits" about a minute or two in length that "might [talk] about what's going on in [a foreign city where a tournament is located]."[201] We do not find such brief segments of programming that are shown during tennis event coverage to convincingly establish Tennis Channel's image as "very international." Mr. Egan also attempts to demonstrate that Tennis Channel has a "very international" image by pointing to two network hosts, "a Latin-American woman" and an "Asian-American woman."[202] We find the suggestion that the on-air presence of two female professionals of color gives the Tennis Channel an image that is international rather than American to be completely unpersuasive. In arguing that Golf Channel has a "country club" image, Mr. Egan explains that he found the entire network to have that image because one program featured Donald Trump and another featured a conversation between "authoritative" hosts in front of a fireplace that "look[ed] like one of the rooms of a clubhouse of the Masters, Augusta."[203] Not only is this evidence unpersuasive on its own terms, it is notable that Mr. Egan failed to explain why Tennis Channel, a network that carries a sport that is commonly associated with country clubs,[204] did not project a similar "country club" image. Mr. Egan's proffered image of Versus as "aggressive" was limited to his analysis of the network's hunting and fishing programming, which comprises a fraction of its programming.[205] Egan's analysis did not explain how the network's competitive sports programming, which includes basketball, minor league baseball, skiing, snowboarding, volleyball, diving, triathlon, and bicycling,[206] contributes to an "aggressive" image. In fact, when Outdoor Life Network was rebranded as Versus, the network attempted to more closely associate itself with the sports that Mr. Egan's analysis does not consider and dissociate itself from the fishing and hunting that his analysis solely considers.[207]

67. Sixth, Comcast argues that the ALJ's rulings on discrimination and unreasonable restraint are inconsistent.[208] It cannot be, Comcast asserts, that Tennis Channel can have succeeded enough in the marketplace to be similarly situated and yet have suffered from an unreasonable restraint on competition.[209] What Comcast is attempting with this argument is to create a Catch-22 in which Tennis Channel is either similarly situated, in which case it is not harmed, or harmed, in which case it is not similarly situated. We reject this argument, and note that it amounts to an effort to effectively deprive Section 616 of its force. There is nothing inconsistent about a network attracting sufficient viewers, programming, and advertising to become similarly situated to other networks and yet being unreasonably restrained from finding greater success in competing against those networks due to discrimination by an

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[200] *Initial Decision*, 26 FCC Rcd at 17173-74 ¶ 30; Tr. 1518, 1519, 1534-35 (Michael Egan).

[201] *Initial Decision*, 26 FCC Rcd at 17174 ¶ 31; Tr. 1518-19 (Michael Egan).

[202] *Initial Decision*, 26 FCC Rcd at 17174-75 ¶ 32; Tr. 1519 (Michael Egan).

[203] *Initial Decision*, 26 FCC Rcd at 17175 ¶ 34; Tr. 1510, 1513-14 (Michael Egan).

[204] *Initial Decision*, 26 FCC Rcd at 17175 ¶ 34; *see* Tennis Channel Exh. 16 at 17 ¶ 28 (Testimony of Hal Singer).

[205] *Initial Decision*, 26 FCC Rcd at 17176 ¶ 35; Tr. 1534-35 (Michael Egan).

[206] *Initial Decision*, 26 FCC Rcd at 17176 ¶ 36; *see* Tr. 1539-41 (Michael Egan); Comcast Cable Exh. 77 at 33-34 ¶ 57 (Testimony of Michael Egan).

[207] *See* Tennis Channel Exh. 16 at 15 ¶ 27 (Testimony of Hal Singer).

[208] *Comcast Exceptions* at 27-28.

[209] *Id.*

MVPD with which those networks are affiliated.[210] For reasons discussed in detail below, we find that Tennis Channel did suffer an unreasonable restraint on its ability to compete fairly.

c. Comcast Differentially Treated Golf Channel, Versus, and Tennis Channel on the Basis of Affiliation

68. Comcast's differential treatment of Tennis Channel as compared to Golf Channel and Versus is not disputed. Comcast gives Golf Channel and Versus dramatically broader carriage than Tennis Channel. Comcast's decision to relegate Tennis Channel to the Sports Tier, which subscribers must pay an additional monthly fee to access, ensures that the network reaches far fewer of Comcast's subscribers. While the Golf Channel and Versus reach **[REDACTED]** of Comcast's subscribers, Tennis Channel reaches only **[REDACTED]**.[211]

69. This vastly differential treatment, when weighed together with the similarly situated nature of the three networks and the general evidence that Comcast treats its affiliates like "siblings" and its non-affiliates like "strangers," provide sufficient evidence to support the finding that Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation, absent any persuasive evidence or argument that the reasons for the differential treatment were nondiscriminatory. We find each of Comcast's arguments that the basis for its differential treatment was nondiscriminatory unpersuasive for the reasons set forth below.

70. **Comcast's claim that other providers treated Golf Channel and Versus more favorably than Tennis Channel.** Comcast argues that its differential treatment of Tennis Channel as compared to Golf Channel and Versus cannot be the result of discrimination on the basis of affiliation because other MVPDs that are not affiliated with Golf Channel or Versus also treat Tennis Channel less favorably.[212] Comcast relies on evidence that it carries Tennis Channel more broadly than other cable providers and that other MVPDs, including telephone and satellite companies, carry Golf Channel and Versus more broadly than Tennis Channel.[213]

71. We do not find this argument compelling. The record, examined in its entirety, shows that Comcast treats Golf Channel and Versus more favorably and Tennis Channel less favorably than they are treated by other MVPDs. The record demonstrates that Comcast carries Tennis Channel at **[REDACTED]** of the average penetration rate at which it is carried by other MVPDs, including telephone companies and satellite MVPDs.[214] Tennis Channel's average penetration rate with the largest MVPDs, those that have at least two million subscribers, in the third quarter of 2010 **[REDACTED]** than its penetration rate on Comcast's systems.[215] Comcast attempts to tilt the data by narrowing the

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[210] Furthermore, our methods of comparing the networks to see if they are similarly situated screen out some of the effect of the harm. For example, our comparison of the ratings of the networks only applies to ratings where the networks are carried. The three networks might have indistinguishable ratings, but they do not have an indistinguishable number of total viewers because Golf Channel and Versus are carried more broadly than Tennis Channel.

[211] *Initial Decision*, 26 FCC Rcd at 17185-86 ¶ 54; *see* Tennis Channel Exh. 16 at 7-8 ¶ 18 (Testimony of Hal Singer).

[212] *Comcast Exceptions* at 18-19.

[213] *Id.*

[214] *Initial Decision*, 26 FCC Rcd at 17191 ¶ 67; *see* Comcast Exh. 80 at 12, 26-29 ¶ 22 & Table 1A, 40 & Table 2B (Testimony of Jonathan Orszag); Tr. 1376-77 (Jonathan Orszag).

[215] *Initial Decision*, 26 FCC Rcd at 17191 ¶ 67; *see* Tennis Channel Exh. 16 at 40 ¶ 54 (Testimony of Hal Singer).

comparison to other cable operators.[216] However, elsewhere in its Exceptions, Comcast argues that its actions do not unreasonably restrain Tennis Channel's ability to compete because Comcast subscribers can always switch to other providers, like satellite, that carry Tennis Channel more broadly.[217] We think it is appropriate to view the market as a whole, and include in the comparison MVPDs that Comcast sees as its chief competitors.[218]

72. In addition to evidence that other MVPDs carry Tennis Channel more broadly than Comcast, there is also evidence that other MVPDs carry Golf Channel and Versus less broadly than Comcast. Golf Channel and Versus are carried on Comcast at **[REDACTED]** respectively, than they are by other MVPDs.[219]

73. Comcast is correct that other MVPDs generally carry Golf Channel and Versus more broadly than Tennis Channel. However, when viewed in light of Comcast's substantial market share and the fact that other MVPDs tend to treat Tennis Channel better, and Golf Channel and Versus worse, than Comcast, we find that this difference in carriage is best explained by the ripple effect that exists between MVPDs. The record establishes that one MVPD's decision to carry a network at a specific level of distribution increases the likelihood that another MVPD will carry that network at the same level of distribution.[220] A major MVPD's decision to widely distribute a network provides that network with greater access to subscribers, particularly in major cities, and additional publicity, which in turn makes broader carriage by other MVPDs more appealing and likely.[221] An MVPD's decision to narrowly distribute a network reduces the network's total subscribers, which lowers the licensing revenue it earns, reduces its ability to attract advertisers, and limits its ability to make the investments, such as raising revenue to purchase programming, that are necessary to compete with other sports networks.[222] A deprivation of access to subscribers by one MVPD thus can affect a network's overall standing and its ability to secure strong carriage deals with other MVPDs. The record illustrates this effect. MVPDs would often "inquire about Tennis Channel's level of carriage on Comcast" and would often follow

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[216] *Comcast Exceptions* at 18-19.

[217] *Id.* at 9.

[218] *Initial Decision*, 26 FCC Rcd at 17191-92 ¶ 68. Comcast suggests that Tennis Channel's average level of carriage in the marketplace is inflated by DirecTV's carriage of Tennis Channel at **[REDACTED]** the penetration of the rest of the market, implying that this is the result of an equity-for-carriage deal between a network and its "parent company." *See Comcast Exceptions* at 19 n.80. We find the record shows that a minority equity interests in Tennis Channel was granted to DirecTV in exchange for forgoing the "free period" of service at the beginning of the contract term, not for broader carriage. Tennis Channel Exh. 14 at 4-5 ¶ 8 & n.3 (Testimony of Ken Solomon); Tr. 506-08 (Ken Solomon); *see also Initial Decision*, 26 FCC Rcd at 17192 n.232 (same finding of fact). In any event, the record fails to establish that DirecTV's level of carriage of Tennis Channel is discriminatory or otherwise improper and we see no compelling reason to exclude it from consideration. *See also* ¶ 74, *infra*. Comcast makes no attempt to argue that DISH's carriage of Tennis Channel likewise should be excluded from consideration. *See* Tr. 506-08 (Ken Solomon) (testifying that level of carriage was determined for both DirecTV and DISH, without regard to consideration of equity interests).

[219] *Initial Decision*, 26 FCC Rcd at 17191 ¶ 66; Tr. 1299-1300 (Jonathan Orszag).

[220] *Initial Decision*, 26 FCC Rcd at 17189 ¶ 63; *see* Tr. 722-23 (Timothy Brooks); Tr. 1901-04 (Gregory Rigdon); Tennis Channel Exh. 16 at 41, 62-63, 70 ¶¶ 55, 89, 101 (Testimony of Hal Singer). When a network "gives a concession to a distributor that's visible, such as retiering rights, it's going to be used . . . [by] other distributors . . . as something they want." Tennis Channel Exh. 140 at 114 (Gregory Rigdon Deposition).

[221] Tr. 722 (Timothy Brooks); *see* Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon).

[222] Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon). *See infra* ¶ 83-84.

Comcast's lead, placing Tennis Channel in a more difficult negotiating position with those other MVPDs.[223] This ripple effect is also reflected in carriage agreements, which sometimes include clauses that increase the level of penetration of a network as its aggregate subscriber count increases. For example, under their carriage agreement, **[REDACTED].**[224] The record shows that Comcast itself recognized the existence of the ripple effect. Comcast executives were **[REDACTED]**[225] **[REDACTED].**[226] Comcast executives also noted that **[REDACTED].**[227] We note that the nature of the ripple effect is such that the larger the MVPD, the greater the effect. Comcast serves almost a quarter of the MVPD market.[228] Comcast's concerns about the ripple effect of the carriage decisions of **[REDACTED]**, an MVPD a fraction of its size, make it very difficult for Comcast to argue, as it does here, that the existence of the ripple effect "flies in the face of common sense."[229]

74. We reject the argument that our analysis of Comcast's discriminatory conduct should not have relied on, among other evidence, the average penetration rate of Tennis Channel, Golf Channel, and Versus among other MVPDs, but instead should have used a comparison metric that Comcast itself never articulates in its Exceptions (*i.e.*, a comparison between Comcast's carriage and that of other MVPDs without any equity interest in Tennis Channel).[230] We think it reasonable in assessing whether Comcast discriminated on the basis of affiliation to consider the treatment of the three networks at issue by the MVPD market in general, including Comcast's principal competitors, DirecTV and DISH—which are, after Comcast, the second and third largest MVPDs in the Nation. We disagree with the contention that we should have excluded those MVPDs from our comparison of penetration rates simply because they had an equity interest in Tennis Channel.[231] It is indisputable that the mere fact of vertical integration does not itself establish affiliation-based discrimination by the vertically integrated MVPD in favor of its affiliated network; were the opposite true, it would be sufficient to establish a violation of Section 616 that Comcast is affiliated with Golf Channel and Versus. Here, other than pointing to the satellite providers' equity interests in Tennis Channel, our dissenting colleagues identify no evidence that DirecTV and DISH must have given preferential treatment to Tennis Channel on the basis of its affiliated status.[232] Thus, we disagree with the assertion that it was improper to include carriage by those MVPDs in our comparative assessment of penetration rates; there has been no showing that the satellite providers'

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[223] Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon).

[224] *Initial Decision*, 26 FCC Rcd at 17190 ¶ 64; Tennis Channel Exh. 14 at 5 ¶ 8 & n.4 (Testimony of Ken Solomon).

[225] *See* Tennis Channel Exh. 16 at 40 & Table 6 (Testimony of Hal Singer).

[226] *Initial Decision*, 26 FCC Rcd at 17190¶ 65; Tennis Channel Exh. 38 at COMTTC_00052319; *see* Tr. 1901-02 (Gregory Rigdon).

[227] *Initial Decision*, 26 FCC Rcd at 17190 ¶ 65; Tennis Channel Exh. 38 at COMTTC_00052319.

[228] *Comcast Exceptions* at 9.

[229] *Id.* at 18. Comcast argues that "[i]f broad carriage of Tennis Channel truly were a valuable business opportunity, other sophisticated MVPDs would not blindly follow Comcast's lead if it were not in their own interests." *Id.* This argument entirely ignores the direct effect Comcast's carriage of Tennis Channel has on Tennis Channel's ability to compete for viewers, advertisers, and programming and thereby make itself more attractive to other MVPDs. As discussed in the following section, Comcast's narrow carriage of Tennis Channel has a dramatic effect on Tennis Channel's ability to compete in the MVPD carriage marketplace. *See infra* ¶ 83-84.

[230] *See* Joint Dissenting Statement of Commissioners McDowell and Pai ("Joint Dissent").

[231] *See id.*

[232] *See also* n. 218, *supra*.

carriage decisions were unduly tainted by considerations of affiliation (as opposed to based on legitimate business considerations concerning the satellite providers' evaluations of the value and audience appeal of Tennis Channel).

75. Even were we to assume that the alternative metric proposed is the proper one (and even were we to exclude our comparison of penetration rates from our analysis), we would reach the same conclusion that Comcast discriminated on the basis of Tennis Channel's unaffiliated status based on the independent – and substantial – evidence discussed above. Among other record evidence, this includes the evidence that Comcast treats affiliates like "siblings" and non-affiliates like "strangers," and Comcast's failure, discussed below, to engage in any actual cost-benefit analysis when confronted with Tennis Channel's carriage request. Further, the ripple effect, documented above, provides an explanation for similarities in carriage that is consistent with discrimination by Comcast. Our discussion of the ripple effect does not suggest that Comcast somehow has an obligation to improve Tennis Channel's standing through broader carriage.[233] Instead, our point is simply that where other evidence indicates that Comcast's carriage decision vis-à-vis Tennis Channel was the result of discrimination, the limited carriage of that network by some other MVPDs (particularly other cable operators) may be, at least in part, attributable to Comcast's carriage decision. That is particularly so in light of Comcast's significant market share and the influence it wields in the MVPD market.[234]

76. **Comcast's alleged cost-benefit analysis.** Comcast argues that its carriage decision regarding Tennis Channel was based not upon discrimination, but upon a cost-benefit analysis that found that the substantial cost of broadly carrying Tennis Channel outweighed the benefits.[235] Comcast asserts that Tennis Channel's proposal for wider distribution, if granted, would have substantially increased Comcast's costs through increased subscriber fees and reduced its Sports Tier revenue while providing no offsetting benefits.[236] Comcast also points to a poll of its regional executives who initially reported little interest among subscribers for broader carriage of Tennis Channel, and previous surveys of customers that reported no consumer demand for Tennis Channel.[237]

77. We find Comcast's cost-benefit analysis irredeemably flawed. A cost-benefit analysis, as its name makes clear, must include examinations of both costs and benefits. The record shows that Comcast failed to consider the benefits of carrying Tennis Channel on a more widely distributed tier. The Comcast executive in charge of acquisitions who performed the analysis admitted in her testimony that she gave no thought to preparing an analysis of "what Comcast might have gained by moving The Tennis Channel to a more widely-distributed tier."[238] She failed to consider the advertising availabilities from

[233] *See* Joint Dissent, *infra*.

[234] We also disagree with the proposition that the ripple effect is "counteracted" by the possibility that Comcast's competitors may be able to lure away customers by distributing Tennis Channel more broadly. *See* Joint Dissent, *infra*. As an initial matter, we doubt that this understanding of MVPD competition—that customers will opportunistically switch MVPDs based upon a lower price for one particular channel, even including customers who watch Tennis Channel only intermittently—realistically reflects the way in which the MVPD marketplace works in practice. Furthermore, it is significant that Comcast's most direct competitors, the satellite providers, do in fact distribute Tennis Channel more broadly. As shown above, substantial evidence in this case confirms that both parties (including Comcast) have expressed concern about the ripple effect. *See supra* ¶ 73.

[235] *Comcast Exceptions* at 13.

[236] *Id.*

[237] *Id.* at 14; Comcast Exh. 78 at 3-4 ¶¶ 9-10 (Testimony of Jennifer Gaiski); Tr. 1881-82 (Greg Rigdon); Comcast Exh. 130; Tr. 2365-66 (Jennifer Gaiski).

[238] *Initial Decision*, 26 FCC Rcd at 17195 ¶ 76 & n.251; Tr. 2439 (Jennifer Gaiski).

which Comcast might benefit and made no written analysis of the possibility of additional upgrades and subscribers if Tennis Channel were distributed more widely.[239]

78. Comcast's argument is also undermined by the evidence in the record that it did not consider repositioning, let alone perform a cost-benefit analysis of the impact of repositioning, Versus and Golf Channel at the time of their renewals in 2009 and 2010.[240] If Comcast had performed a cost-benefit analysis in 2010, it would have found that broadly distributing Golf Channel and Versus cost Comcast **[REDACTED]**, respectively.[241] The record shows that the cost of carrying Tennis Channel more broadly in 2009 was only **[REDACTED]**.[242] In other words, Comcast would have paid substantially less to carry Tennis Channel broadly than it did to carry Golf Channel and Versus broadly.[243]

79. Comcast argues that the ALJ erred in that he discounted the cost-benefit analysis on the grounds that Comcast did not make a written or quantified analysis of the benefits of carrying Tennis Channel broadly.[244] Comcast asserts that MVPDs are not required to document their carriage deliberations in writing, and argues that in any event there were no benefits to quantify.[245] Comcast misreads the ALJ's opinion. The Initial Decision does not find Comcast's argument regarding its cost-benefit analysis unpersuasive on the basis of the analysis not being written down or on the basis that Comcast did not attach numbers to its examination of benefits. The Initial Decision finds Comcast's argument unpersuasive because Comcast made no attempt to analyze benefits at all.[246] We find Comcast's cost-benefit analysis unpersuasive for the same reason.

80. We find Comcast's evidence that it made its decision based on data that indicated that its subscribers lacked interest in Tennis Channel to be unpersuasive. The record shows that when Comcast polled its regional executives regarding interest in Tennis Channel, it asked those executives to return in "a day or two" with updated findings following consultation with local system personnel.[247] However, Comcast made its decision on Tennis Channel's carriage request the next day, before those executives had a reasonable opportunity to present their findings.[248] Comcast's reliance on an incomplete poll in making its Tennis Channel carriage decision does not persuade us that the decision was nondiscriminatory. Even if Comcast had obtained the full results of the poll, Comcast's reliance on that information would be undermined by evidence in the record that Comcast had earlier overridden regional executives' decisions

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[239] *Initial Decision*, 26 FCC Rcd at 17195 ¶ 76 & n.252; Tr. 2414 (Jennifer Gaiski).

[240] *Initial Decision*, 26 FCC Rcd at 17194 ¶ 74; Tr. 2226-28, 2297 (Madison Bond); Tr. 2409-10 (Jennifer Gaiski).

[241] *Initial Decision*, 26 FCC Rcd at 17196 ¶ 77 & n.257; Tr. 2218-19, 2221 (Madison Bond); Tr. 2376 (Jennifer Gaiski).

[242] *Initial Decision*, 26 FCC Rcd at 17196 ¶ 77 & n.257; Comcast Exh. 588; Tr. 2376 (Jennifer Gaiski).

[243] Data from 2009 indicates that Tennis Channel's license-fee-per-rating point is **[REDACTED]**. Tennis Channel Exh. 16 at 32-33 ¶ 46 (Testimony of Hal Singer).

[244] *Comcast Exceptions* at 16-17.

[245] *Id.*

[246] *Initial Decision*, 26 FCC Rcd at 17195 ¶ 76.

[247] *Initial Decision*, 26 FCC Rcd at 17169-70 ¶ 21; Comcast Exh. 130; *see* Tr. 2367 (Jennifer Gaiski).

[248] *Initial Decision*, 26 FCC Rcd at 17170 ¶ 21; Comcast Exh. 78 at 7 ¶ 17 (Testimony of Jennifer Gaiski).

to carry Tennis Channel more broadly as not being good business.[249] In other words, Comcast had clearly indicated to its regional executives that it did not favor broad carriage of Tennis Channel, rendering the results of a "poll" of those executives unpersuasive.

81. We also reject Comcast's argument that it relied on previous customer surveys in making its carriage decision with regard to Tennis Channel.[250] Three of the four examples it cites are, in fact, not evidence related to customer surveys. Comcast cites testimony that in 2005, local systems answered an inquiry into whether there was an interest in carrying Tennis Channel more broadly by replying there was no interest in bearing the high license fees that accompanied broader carriage.[251] This occurred before Tennis Channel made improvements to its programming and increased its viewership.[252] Even so, Comcast's local systems at the time expressed "some enthusiasm" for Tennis Channel's programming.[253] Comcast also cites handwritten notes from the 2009 meeting with regional personnel discussed above that we have already rejected as unpersuasive.[254] Comcast further cites testimony indicating that one local system received no customer complaints when it moved Tennis Channel to the Sports Tier in 2007.[255] This testimony is unhelpful because the event it describes occurred before the period when Tennis Channel alleges carriage on the Sports Tier was a result of discrimination. The only actual customer survey evidence Comcast cites is testimony by Greg Rigdon, Comcast's current Executive Vice President of Acquisition and Content, that he reviewed consumer surveys in preparation to give testimony before the ALJ and found that there is "no consumer demand for [carrying Tennis Channel more broadly]."[256] However, there is no evidence that those surveys were reviewed in connection with Comcast's actual decisions about Tennis Channel's carriage, including the reevaluation by Mr. Rigdon of Tennis Channel's proposal in 2011.[257]

82. In light of these profound flaws in Comcast's purported "cost-benefit" analysis, we cannot conclude that this analysis was the true basis of Comcast's carriage decision as opposed to a strategy designed to insulate Comcast in litigation, especially when this evidence is weighed against the strong circumstantial evidence that Comcast's decision was animated by discrimination on the basis of affiliation.[258]

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[249] *Tennis Channel Reply* at 30-31; Tennis Channel Exh. 48. *See also* Tr. 1877, 1878-79 (Gregory Rigdon); Tr. 2196-98 (Madison Bond).

[250] *Comcast Exceptions* at 14; Comcast Exh. 78 at 3-4 ¶¶ 9-10 (Testimony of Jennifer Gaiski); Tr. 1881-82 (Greg Rigdon); Comcast Exh. 130; Tr. 2365-66 (Jennifer Gaiski).

[251] Comcast Exh. 78 at 3-4 ¶¶ 9-10 (Testimony of Jennifer Gaiski).

[252] *See supra* ¶ 12.

[253] Comcast Exh. 78 at 3 ¶ 9 (Testimony of Jennifer Gaiski).

[254] Comcast Exh. 130.

[255] Tr. 2365-66 (Jennifer Gaiski).

[256] Tr. 1881-82 (Greg Rigdon).

[257] *Id.* at 1883-85.

[258] *See Initial Decision*, 26 FCC Rcd at 17170 ¶ 22. Comcast also argues that the Initial Decision ignored evidence that demonstrates that changes in market conditions over time, not affiliation-based discrimination, guided its carriage decisions. *Comcast Exceptions* at 22. We have already examined this argument and rejected it as unpersuasive. *See supra* ¶ 57.

3. The ALJ Properly Found that Comcast's Treatment of Tennis Channel Unreasonably Restrains Tennis Channel's Ability to Compete

83. We find that Comcast's discriminatory treatment of Tennis Channel unreasonably restrained Tennis Channel's ability to compete in the marketplace. The record indicates that if Comcast had not relegated Tennis Channel to the Sports Tier and instead provided Tennis Channel with penetration equivalent to that of Golf Channel and Versus, the network would have approximately **[REDACTED]** additional subscribers.[259] The record also suggests that this gain would likely have been even greater once the "ripple effect" is taken into account.[260] Rather than provide Tennis Channel with broad distribution, Comcast placed the network onto a tier that reaches only **[REDACTED]** of its subscribers.

84. Comcast's placement of Tennis Channel affected its ability to compete in a variety of direct and indirect ways. Tennis Channel collects less in licensing fees than it would if it reached more MVPD subscribers,[261] cutting into the network's largest source of revenue.[262] The limitation on Tennis Channel's audience size and the reduction in Tennis Channel's income make it difficult for the network to acquire programming rights.[263] Comcast's limited distribution of Tennis Channel has also discouraged advertisers from placing advertisements on the network and consequently reduced advertising revenues.[264] We are persuaded by the evidence that Tennis Channel's limited distribution is "the single most prevalent reason" that advertisers give for not placing ads on the network, as it situates the network below the 40 million subscriber threshold that the advertising industry uses to determine the placement of national ads.[265] **[REDACTED]** have all declined to place ads on Tennis Channel on a regular basis in recent years because of the network's limited distribution.[266] **[REDACTED]** have only placed advertising on Tennis Channel during freeview periods when its subscriber count has risen to over the 40 million subscriber threshold.[267] The record provides evidence that Tennis Channel would have grown to

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[259] *Initial Decision*, 26 FCC Rcd at 17198 ¶ 82; Tr. 2096-97 (Madison Bond); Comcast Exh. 588.

[260] *Initial Decision*, 26 FCC Rcd at 17198 ¶ 82; *see supra* ¶ 73.

[261] *Initial Decision*, 26 FCC Rcd at 17198 ¶ 83; Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon).

[262] *Initial Decision*, 26 FCC Rcd at 17198 ¶ 83; Tr. 298 (Ken Solomon).

[263] *Initial Decision*, 26 FCC Rcd at 17199-17200 ¶ 86; Tennis Channel Exh. 14 at 17 ¶ 38 (Testimony of Ken Solomon); *see also* Tennis Channel Exh. 17 at 33 ¶ 65 (Testimony of Timothy Brooks). The record shows that Tennis Channel was unable to acquire the rights to telecast tennis event programming such as **[REDACTED]** as a consequence of its limited distribution. Tennis Channel Exh. 14 at 18 ¶ 40 (Testimony of Ken Solomon).

[264] *Initial Decision*, 26 FCC Rcd at 17201 ¶¶ 90, 91; Tr. 592-93 (Gary Herman); Tennis Channel Exh. 15 at 6, 9 ¶¶ 14, 24 (Testimony of Gary Herman).

[265] *Initial Decision*, 26 FCC Rcd at 17201 ¶ 90; *see* Tr. 592 (Gary Herman); Tennis Channel Exh. 15 at 5 ¶ 11 (Testimony of Gary Herman).

[266] *Initial Decision*, 26 FCC Rcd at 17201 ¶ 90; Tennis Channel Exh. 15 (Testimony of Gary Herman) at 6-7, 8 (¶¶ 16-17, 20).

[267] *Initial Decision*, 26 FCC Rcd at 17201 ¶ 90; *see* Tennis Channel Exh. 15 (Testimony of Gary Herman) at 7-8 (¶¶ 17-18). A freeview is "[a] period during which a network authorizes an MVPD to distribute its programming to incremental subscribers without charge to the incremental subscribers or to the distributor for these subscribers." *Initial Decision*, 26 FCC Rcd at 17217.

[REDACTED] subscribers,[268] exceeding the 40 million subscriber threshold and likely attracting more national advertisers, had Comcast not limited the network's distribution. These harms are of such a magnitude that they clearly restrain Tennis Channel's ability to compete fairly with similarly situated networks.

85. Tennis Channel was also unreasonably restrained in its ability to compete by Comcast's discrimination on the basis of affiliation in favor of Golf Channel and Versus.[269] Golf Channel and Versus are substantially similar to Tennis Channel, particularly in demographics and advertising.[270] As a result, those networks compete for viewers and advertisers. Because limiting the distribution of Tennis Channel shrinks the network's potential audience and discourages advertising placements, Golf Channel and Versus are effectively provided with a competitive advantage. Versus also competes directly with Tennis Channel for programming rights and therefore directly benefits from the difficulties in acquiring programming rights that Tennis Channel faces as a consequence of more limited carriage,[271] a detrimental effect that even Comcast executives have acknowledged.[272] The record shows that Golf Channel and Versus receive benefits because of affiliation with Comcast, such as Comcast ensuring favorable channel placement and sufficient distribution of Versus to protect its National Hockey League programming rights,[273] that provide further advantages to those networks' ability to compete against Tennis Channel. The advantages that Comcast provides to its affiliated networks, both directly and through its carriage decisions, support our finding that Comcast's discrimination against Tennis Channel was unreasonable and restrained Tennis Channel's ability to compete in the marketplace.

86. Comcast argues that Tennis Channel failed to provide any evidence that its ability to compete was unreasonably restrained.[274] It asserts that the harms to Tennis Channel described above are simply the negative consequences that follow from any network's inability to obtain broader carriage, which are insufficient to show unreasonable restraint under Comcast's interpretation of Section 616.[275] As we have stated above, we do not find Comcast's narrow interpretation of Section 616 to be persuasive as it is inconsistent with the section's legislative history, and we instead embrace a straightforward and textual reading of Section 616.[276] That standard, requiring that the discrimination be unreasonable and

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[268] *Initial Decision*, 26 FCC Rcd at 17198 ¶ 82; *see* Tr. 2096 (Madison Bond); Tennis Channel Exh. 14 at 3 ¶ 8 (Testimony of Ken Solomon); Comcast Exh. 588.

[269] Indeed, the differential between Comcast's distribution of Tennis Channel, on the one hand, and Golf Channel and Versus, on the other, is alone enough to establish that Comcast's discrimination on the basis of affiliation unreasonably restrained Tennis Channel's ability to compete.

[270] *See supra* ¶¶ 53-54.

[271] *See Initial Decision*, 26 FCC Rcd at 17199-17200 ¶ 86-88; Tennis Channel Exh. 16 at 22 ¶ 31 (Testimony of Hal Singer); Tennis Channel Exh. 35; Tennis Channel Exh. 40 at 10; Tennis Channel Exh. 41 at 11; Tennis Channel Exh. 43 at 2; Tennis Channel Exh. 49; Tr. 2592-93 (Joseph Donnelly); Tennis Channel Exh. 14 at 20 ¶ 42 (Testimony of Ken Solomon).

[272] *Initial Decision*, 26 FCC Rcd at 17200 ¶ 88; Tennis Channel Exh. 143 at 53-54 (Jeffrey Shell Deposition).

[273] *Initial Decision*, 26 FCC Rcd at 17188-89 ¶¶ 60, 61; Tennis Channel Exh. 55; Tr. 2270-75 (Madison Bond); Tennis Channel Exh. 84; Tr. 2393-98 (Jennifer Gaiski).

[274] *Comcast Exceptions* at 7.

[275] *Id.*

[276] *See supra* ¶ 43.

have a restraining effect on the programmer's ability to compete in the MVPD distribution marketplace, is satisfied here. We further reject Comcast's contention that the harms in this case are "highly generalized and speculative" and the sort that will "be present in *every* case in which a network seeks broader distribution by an MVPD."[277] The harms inflicted upon Tennis Channel were not simply the consequence of its inability to obtain broader carriage, but as the entirety of the evidence in the record demonstrates, were a consequence of Comcast's discrimination in favor of its own similarly situated affiliates with which Tennis Channel competes for advertisers, audience, and, in the case of Versus, programming. Because Comcast is the nation's largest MVPD, that harm amounted to a loss of access to **[REDACTED]** subscribers.[278]

87. Comcast makes two additional arguments to suggest that Tennis Channel was not unreasonably restrained by Comcast's decision to give Tennis Channel inferior carriage to Golf Channel and Versus. First, Comcast argues that its carriage of Tennis Channel on any tier belies the suggestion that Comcast unreasonably restrains Tennis Channel's ability to compete in the marketplace.[279] We reject this argument for the same reasons as it was rejected in the Initial Decision.[280] As the record shows, only **[REDACTED]** of Comcast subscribers pay the additional fee required to access the Sports Tier.[281] This low percentage suggests that Tennis Channel's placement on the Sports Tier serves as a barrier to access by Comcast subscribers. Furthermore, Comcast's unreasonably preferential treatment of Golf Channel and Versus gave those networks a competitive advantage over Tennis Channel. Second, Comcast argues that even if it did not carry Tennis Channel at all, Comcast customers amount to less than 24 percent of the MVPD market, leaving the rest of the market open to Tennis Channel.[282] We reject this argument as well. Comcast is the nation's largest MVPD. It directly represents nearly 24 percent of the market,[283] and has even greater influence on the market due to the ripple effect.[284] As we found in a previous proceeding, "Comcast's extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming."[285] In addition to serving almost a quarter of all homes in the United States, Comcast dominates seven of the top ten MVPD markets, and has a substantial presence in an eighth market.[286] For example, Comcast has a 62 percent share of the Chicago Designated Market Area and a 67 percent share of the Philadelphia Designated Market Area.[287] Comcast also holds more than 40 percent of

[277] *Comcast Exceptions* at 10.

[278] *Initial Decision*, 26 FCC Rcd at 17198 ¶ 82; Tr. 2096-97 (Madison Bond); Comcast Exh. 588.

[279] *Comcast Exceptions* at 9.

[280] *Initial Decision*, 26 FCC Rcd at 17199 ¶ 84.

[281] *Initial Decision*, 26 FCC Rcd at 17198-99 ¶ 83; Comcast Exh. 78 at 2 ¶ 4 (Testimony of Jennifer Gaiski).

[282] *Comcast Exceptions* at 9.

[283] Tennis Channel Exh. 13, *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Red 4238, 4284-85 ¶ 116 (2011) ("*Comcast-NBCU*").

[284] *See supra* ¶ 73.

[285] *Comcast-NBCU*, 26 FCC Rcd at 4238, 4284-85 ¶ 116

[286] Tennis Channel Ex. 16 at 69 ¶ 101 (Testimony of Hal Singer); Tennis Channel Ex. 15 at 5-6 (¶¶ 13-14) (Testimony of Gary Herman).

[287] *Comcast-NBCU*, 26 FCC Rcd at 4285 ¶ 116.

the market in 13 of the 20 largest markets.[288] We have found before that Comcast's extensive reach potentially allows it to reduce "the viewership of competing video programming networks, which in turn could render these networks less attractive to advertisers, thus reducing their revenues and profits."[289] An MVPD that discriminates against a video programming vendor by limiting the vendor's access to nearly a fourth of the entire market and to a significant percentage of subscribers in major regional markets, while by giving similarly situated affiliated competitor networks broad access is clearly restraining the vendor's ability to compete.[290]

4. An Equal Carriage Remedy is Appropriate and Authorized under Section 616

88. Comcast argues that the remedy ordered in the Initial Decision goes beyond the harms asserted by Tennis Channel.[291] Relieving the competitive injury allegedly inflicted upon Tennis Channel, Comcast asserts, does not require the network to be granted channel placement equal to that of Golf Channel and Versus.[292] Comcast believes that the Initial Decision fails to find injury based on channel placement, fails to analyze how the repositioning remedy would redress Tennis Channel's injury, and fails to consider the complexity and burden that Comcast faces in repositioning "even a single channel on each of the distinct channel lineups on Comcast's hundreds of cable systems."[293] Comcast also argues that the remedy ordered by the ALJ in the Initial Decision goes beyond rectifying harms by compelling Comcast to pay additional sums for broader carriage of Tennis Channel.[294] Comcast insists that such a result is not in the public interest.[295]

89. As discussed in detail above, we find that the record clearly supports the ALJ's conclusion that Tennis Channel was unreasonably restrained in its ability to compete by receiving significantly narrower carriage than Golf Channel and Versus.[296] Tennis Channel's competitive disadvantage against Golf Channel and Versus would be directly relieved if Comcast provided Tennis

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[288] *Id.* at 4285 n.275.

[289] *Id.* at 4285 ¶ 116.

[290] Our conclusion that Comcast's discrimination on the basis of affiliation unreasonably restrains Tennis Channel's ability to compete fairly is based upon Comcast's relegation of Tennis Channel to its Sports Tier. We offer no opinion as to whether this prong of Section 616 would be satisfied had Comcast instead placed Tennis Channel on a tier, such as the Digital Preferred Tier, with broader carriage than the Sports Tier but narrower carriage than the Digital Basic Tier. (We do not see how this observation constitutes any concession, let alone a "major concession." Joint Dissent, *infra*. All we say here is that if Comcast had carried Tennis Channel more broadly, the question whether Tennis Channel was unreasonably restrained in its ability to compete would be a different one and might yield a different answer. We think it appropriate and prudent to focus our conclusions on the facts at hand, rather than speculating on the proper analysis of facts not presented in this case. That particularly makes sense because Comcast does not attempt to address what the impact of its conduct would be if it instead had placed Tennis Channel on a tier with broader carriage than the Sports Tier but one with narrower carriage than the Digital Basic Tier.)

[291] *Comcast Exceptions* at 38.

[292] *Id.*

[293] *Id.*

[294] *Id.* at 39.

[295] *Id.*

[296] *See supra* ¶¶ 83-87.

Channel with equal carriage. With equal carriage, Tennis Channel would be able to compete against Golf Channel and Versus on equal footing for content, advertisers, and viewers. Furthermore, without the ripple effect of Comcast's narrow carriage of Tennis Channel on the basis of affiliation, Tennis Channel will be in a better position to compete for broader carriage on the systems of other MVPDs.

90. We are also not persuaded by Comcast's argument that it should not have to pay Tennis Channel for broader carriage. As an initial matter, the remedy only requires Comcast to provide Golf Channel and Tennis Channel with equal carriage. Comcast could comply with this remedy without providing Tennis Channel broader carriage. To the extent that Comcast makes the decision to comply by moving Tennis Channel to a more broadly distributed tier, then Comcast is effectively deciding that channels situated similarly to Golf Channel and Versus are most appropriately carried at a broader tier. Comcast and Tennis Channel already agreed in their contract how Tennis Channel should be compensated if it is carried on a broader tier.[297] Tennis Channel has not argued that those terms are discriminatory, and we see no reason to relieve Comcast of its contractual obligations.

91. We do, however, agree with Comcast that the record does not sufficiently establish that Tennis Channel's ability to compete fairly was unreasonably restrained by its channel placement. In June 2009, when Tennis Channel sought broader carriage from Comcast, it did not seek better channel placement. In the proceedings before the ALJ, Tennis Channel never sought better channel placement as a remedy. Because channel placement was not at the heart of the dispute between Comcast and Tennis Channel, and because Tennis Channel did not seek better channel placement as a remedy, the record on the effect of Tennis Channel's placement was underdeveloped. Comcast also makes a compelling argument that the ALJ failed to consider adequately the burden of repositioning Tennis Channel.[298] As a matter of common sense, it seems reasonable to assume that Comcast's placement of Tennis Channel in the upper reaches of its system hampers Tennis Channel's ability to attract viewers, while Comcast's placement of both Golf Channel and Versus within a few channels of ESPN helps their ability to attract viewers. That said, Tennis Channel did not significantly develop this issue and did not seek this remedy, and therefore we disagree with the ALJ that equitable channel placement is an appropriate remedy based on the record developed in this case.

92. Though we find the equal carriage portion of the ALJ remedy appropriate, we find it necessary to clarify it in some key respects. To satisfy the equal carriage requirement, Comcast must carry Tennis Channel on the same distribution tier, reaching the same number of subscribers, as it does Golf Channel and Versus.[299] The ALJ did not prescribe specific license fees, and we decline to do so here. However, this does not mean that Comcast has no obligations under this Order with regard to license fees. As indicated above, to the extent that Comcast moves Tennis Channel to a more broadly distributed tier, Comcast must pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated. To the extent the existing contract does not state how Tennis Channel should be compensated for broader carriage, we expect the parties to negotiate appropriate pricing terms.[300]

5. The Requirement to Carry Tennis Channel on Equal Terms with Golf

[297] *See* Tennis Channel Exh. 144 at 6 ¶ 5.1.

[298] *Comcast Exceptions* at 38.

[299] For the reasons stated in the Initial Decision, our remedy excludes parity on analog systems where the addition of Tennis Channel would require displacement of existing networks. *Initial Decision*, 26 FCC Rcd at 17211 ¶ 119 & n.353.

[300] Comcast does not offer any Exception to the ALJ's forfeiture order except for its general Exceptions to the conclusion that Comcast violated Section 616. We therefore do not independently review the forfeiture order here.

Channel and Versus is Consistent with the First Amendment

93. Comcast argues that the remedy ordered in the Initial Decision, and by extension the remedy ordered below, is a content-based speech restriction that violates its First Amendment rights.[301] Comcast contends that the "similarly situated" analysis depends upon an assessment of the content of Golf Channel, Versus, and Tennis Channel. Because the analysis compares Comcast's treatment of Tennis Channel with the treatment it accorded to its affiliated networks (Golf Channel and Versus), Comcast argues that the remedy imposed is the product of a content-based restriction on its speech and therefore is subject to strict scrutiny.[302] Comcast further contends that the remedy must be invalidated because it does not survive strict scrutiny.[303]

94. As explained below, while we agree with Comcast that the remedy imposed implicates its First Amendment rights, the carriage requirement is not content-based and therefore is subject to intermediate (rather than strict) scrutiny. Because the carriage requirement easily survives intermediate scrutiny review, we find that it is valid under the First Amendment.

95. Though Comcast styles its First Amendment arguments as taking issue with our analysis and remedy, its arguments effectively amount to a frontal assault on the constitutionality of Section 616. Comcast's First Amendment discussion takes issue with two aspects of the Initial Decision that we affirm here. First, Comcast argues that the "similarly situated" analysis violates the First Amendment. In making this argument, Comcast argues that the "similarly situated" analysis is "entirely untethered from the statutory text and Congress's intent."[304] But this is not accurate. Section 616 clearly speaks in terms of prohibiting discrimination. Admitting evidence of disparate treatment of similarly situated parties as circumstantial evidence supporting a showing of intentional discrimination is a hallmark of discrimination law.[305] Congress intended this kind of analysis to be applied under Section 616. As the House Report notes: "An extensive body of law exists addressing discrimination in normal business practices, and the Committee intends the Commission to be guided by these precedents."[306]

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[301] *Comcast Exceptions* at 30-38.

[302] *Id.* at 32-35. *See also id.* at 20-22.

[303] *Id.* at 35-38.

[304] *Id.* at 21.

[305] *See, e.g.*, *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 351 (6th Cir. 1998) ("[A] plaintiff . . . establishes a prima facie case of age discrimination when he or she produces evidence demonstrating that . . . 4) a similarly-situated employee who is not a member of the protected class was offered the opportunity to transfer to an available position, or other direct, indirect, or circumstantial evidence supporting an inference of discrimination."); *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006) ("Disparate treatment claims can be proven using direct evidence . . . or circumstantial evidence. . . . To establish a prima facie case for disparate treatment in a race discrimination case, the plaintiff must show that . . . (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated . . . .").

[306] *House Report* at 110. Comcast argues that the "similarly situated" analysis "is indistinguishable from the common-carrier discrimination standard that Congress rejected as inappropriate for Section 616 claims." *Comcast Exceptions* at 21. But employing a "similarly situated" analysis when analyzing discrimination is a far cry from imposing a common carriage requirement. The Initial Decision did not stop its analysis after concluding that Tennis Channel, Golf Channel, and Versus were similarly situated but treated differently. Instead, the Initial Decision reviewed additional evidence that Comcast discriminates on the basis of affiliation, reviewed and rejected Comcast's various non-discriminatory explanations for its differential treatment, and made an independent determination that Tennis Channel was unreasonably restrained from competing fairly. *Initial Decision*, 26 FCC Rcd at 17185-17202 ¶¶ 53-92.

96. Second, Comcast argues that its speech rights are implicated by the remedy's requirement to carry Tennis Channel so long as it chooses to carry Golf Channel and Versus.[307] Again, Comcast's issue is really with Section 616 more than with our remedy. Section 616 bars discrimination "*in the selection, terms, or conditions for carriage of video programming*."[308] On its face, Section 616 clearly prohibits certain "editorial decisions" not to carry particular channels. Comcast's complaint that the remedy infringes on its "editorial decisions" is really a complaint about Section 616's discrimination prohibition, not the particular remedy ordered here.

a. The Requirement to Provide Tennis Channel with Equal Carriage to Golf Channel and Versus is Subject to Intermediate Scrutiny

97. While we conclude that Comcast's First Amendment arguments generally lack merit, we agree with Comcast's threshold contention that the remedy—which requires Comcast to provide carriage to Tennis Channel on terms as favorable as those provided to Golf Channel and Versus—implicates Comcast's First Amendment rights. The ALJ concluded otherwise based on the rationale that Comcast remained free not to carry Tennis Channel if it chose to no longer carry Golf Channel and Versus.[309] We find that the ALJ erred in this limited respect. Comcast's First Amendment rights are implicated by our carriage remedy because Comcast is entitled, in the exercise of its editorial discretion, to choose to carry Golf Channel and Versus. Should it exercise that choice, our remedy requires Comcast to carry Tennis Channel. Thus, the remedy affects Comcast's authority to determine the composition of networks on its cable systems—a result that, under established law, has been recognized as implicating the First Amendment.[310]

98. That the remedy at issue implicates Comcast's First Amendment rights does not mean that it is subject to strict scrutiny, however. As the Supreme Court has explained in the context of required carriage by a cable system, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[311] In *Time Warner Entertainment v. FCC* (*Time Warner*), the D.C. Circuit found that intermediate scrutiny applied to section 19 of the Cable Television Consumer Protection and Competition Act (1992 Act), which prohibits cable operators from discriminating in the sale or delivery of affiliated cable networks.[312] As the D.C. Circuit explained, "[T]hese provisions are

[307] *Comcast Exceptions* at 31.

[308] 47 U.S.C. § 536(a)(3) (emphasis added).

[309] According to the ALJ, "the proposed remedy requires only elimination of discrimination in carriage between Tennis Channel and the two Comcast affiliates, without dictating how any of the three networks are to be carried, or not carried." *Initial Decision*, 26 FCC Rcd at 17205 ¶ 103.

[310] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*). For this reason, we reject Tennis Channel's argument that Comcast has not articulated any speech interest implicated by the Initial Decision because Comcast already carries Tennis Channel on its systems. *Tennis Channel Reply* at 33. As explained above, settled law establishes that the First Amendment is implicated where, as here, a carriage requirement limits the editorial discretion of a cable operator to select the composition of networks on its cable system. *See Turner I*, 512 U.S. at 636-37. Tennis Channel is therefore incorrect in asserting that the Initial Decision only effectively limits Comcast's authority to charge a fee to its subscribers who want to watch Tennis Channel. *Tennis Channel Reply* at 33. The remedy imposed requires carriage on terms equivalent to those provided to Comcast's affiliated networks and, in so providing, impacts Comcast's selection of networks on its cable systems. This conclusion is consistent with our 2011 rulemaking order, which concedes that the First Amendment is implicated but says that intermediate scrutiny applies. *Program Carriage Order and NPRM*, 26 FCC Rcd at 11517-18 ¶ 32.

[311] *Turner I*, 512 U.S. at 642.

[312] *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 977-78 (D.C. Cir. 1996).

content-neutral on their face, regulating cable programmers and operators on the basis of the 'economics of ownership,' a characteristic unrelated to the content of speech."[313] The government's interest was "the promotion of fair competition in the video marketplace," a goal that "both furthers an important government interest and is unrelated to the suppression of free expression."[314]

99. The application of intermediate scrutiny to a required-carriage remedy under Section 616 follows inexorably from *Time Warner*. Like the provision at issue in *Time Warner*, the program carriage provision (and the Commission's implementing rule) regulate anticompetitive conduct not on the basis of content, but rather on the basis of affiliation—the "economics of ownership." Our recent *Program Carriage Order and NPRM* precisely spelled out the connection between *Time Warner* and Section 616:

> The D.C. Circuit has already decided that the leased access provision of the 1992 Cable Act is not content-based. The court held that the leased access provision does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator. The same conclusion applies to the program carriage provision of the 1992 Cable Act, which prevents MVPDs from demanding exclusivity or financial interests from, or discriminating on the basis of affiliation with respect to, unaffiliated programming vendors and, accordingly, regulates speech based on affiliation with an MVPD, not based on its content. The court held in *Time Warner* that the provisions of the 1992 Cable Act that regulate speech based on affiliation are subject to intermediate scrutiny and are constitutional if the government's interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim. The *Time Warner* court found that there are substantial government interests in promoting diversity and competition in the video programming market. The program carriage rules, like the leased access requirements, promote diversity in video programming by promoting fair treatment of unaffiliated programming vendors and providing these vendors with an avenue to seek redress of anticompetitive carriage practices of MVPDs. Moreover, because MVPDs have an incentive to shield their affiliated programming vendors from competition with unaffiliated programming vendors for viewers, advertisers, and programming rights, the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programming vendors. Thus, like the leased access rules, the program carriage rules would be subject to, and would withstand, intermediate scrutiny.[315]

100. Comcast argues that the remedy at issue is a content-based restriction insofar as it is the product of "similarly situated" analysis, which involves a "detailed comparison of the three networks' content."[316] That argument, however, misunderstands the concept of a "content-based" regulation under First Amendment doctrine. As the Supreme Court explained in *Turner I*, the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[317] That is clearly not the case here. Here,

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[313] *Id.* at 977.

[314] *Id.* at 978.

[315] *Program Carriage Order and NPRM*, 26 FCC Rcd at 11517-18 ¶ 32 (internal citations omitted).

[316] *Comcast Exceptions* at 33.

[317] *Turner I*, 512 U.S. at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). *See also Ward*, 491 U.S. at 791(quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'").

we have considered the content of the three networks solely for purposes of conducting a comparative analysis to determine whether Comcast discriminated "on the basis of affiliation or nonaffiliation" by affording preferential treatment to affiliated networks that are similarly situated to Tennis Channel. The *particular* content of the programming at issue was irrelevant; the same comparative analysis would apply regardless of the specific type of programming involved. Moreover, we considered the relevant programming as merely one element of a series of factors (none of which was independently dispositive) to determine whether the three networks were similarly situated. Thus, nothing in our approach, or the statutory provision and Commission rule that undergirded it, favors or disfavors any particular speech "because of [agreement or] disagreement with the message it conveys."[318] Indeed, courts have upheld regulations that *do*, on their face, differentiate based on content when the regulations are justified by content-neutral reasons. Although such regulations "'might in a formal sense be described as content-based' given that they are triggered by whether the programming at issue involves sports, there is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas."[319] Here, our carriage remedy is justified by the goals of promoting diversity and competition in the video programming market, precisely the same content-neutral reasons upheld in *Time Warner*.[320]

101. The cases on which Comcast relies only confirm this conclusion. Comcast repeatedly cites cases in which the challenged regulation was specifically designed to favor or disfavor certain kinds of content. For example, in *Miami Herald Publishing Co. v. Tornillo*, the regulation at issue burdened a newspaper's ability to publish content criticizing a candidate for nomination or election by compelling the newspaper to publish a contrary message that effectively neutralized its own advocacy.[321] *Arkansas Writers' Project, Inc. v. Ragland* is similarly inapposite. There, the challenged regulation singled out the press for unfavorable treatment by taxing some magazines but not others expressly based on content.[322] Nothing in the our decision, or the underlying program carriage statute and the Commission's implementing rule, differentiates among networks on the basis of content, as opposed to on the basis of affiliation, which the courts have concluded to be content-neutral "economics of ownership."

102. Because we conclude that Section 616's application in this case was content-neutral, we review that application under intermediate scrutiny.

b. The Equal Carriage Requirement Satisfies Intermediate Scrutiny

103. Under intermediate scrutiny, the equal carriage requirement is permissible "if the government's interest is important or substantial and the means chosen to promote that interest do not

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[318] *Turner I*, 512 U.S. at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). *See also Ward*, 491 U.S. at 791 ("The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.")

[319] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011).

[320] Comcast argues that the ALJ "engage[d] in viewpoint-based analysis, signaling strong disapproval of Golf Channel's coverage of the Masters Tournament." *Comcast Exceptions* at 34. We agree that it would raise very significant First Amendment concerns if a carriage requirement were animated by approval or disapproval of a network's content. We do not read any of the ALJ's conclusions to turn on his views of any of the three networks' sports coverage or other content, and in any event we do not rely on such factors in reaching our conclusions here.

[321] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); Comcast Exceptions at 30, 32.

[322] *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); Comcast Exceptions at 21, 32, 33.

burden substantially more speech than necessary to achieve the aim."[323] The equal carriage requirement easily satisfies this standard.

104. As noted above, the purpose of Section 616 is to promote competition and diversity in the video programming market and address concerns about vertical integration of MVPDs and programmers.[324] Congress was concerned that vertical integration gives MVPDs the incentive and ability to favor their affiliated programming services.[325] Both the Supreme Court and the D.C. Circuit have held that promoting competition in the video programming distribution market is an important or substantial government interest.[326] As the D.C. Circuit explained, "the government's interest in regulating vertically integrated programmers and operators is the promotion of fair competition in the video marketplace. According to [the Supreme Court in] *Turner*, this goal both furthers an important government interest and is unrelated to the suppression of free expression."[327] We further note that the equal carriage requirement does not burden substantially more speech than necessary. To begin with, section 616 ties our authority to order a remedy to our determination that discrimination unreasonably restrained Tennis Channel's ability to compete fairly. It is built into the structure of the statute that we must find that Congress's substantial interest would actually be served by a remedy before a remedy is permissible. Furthermore, the equal carriage requirement only requires Comcast to carry Tennis Channel to the extent it carries networks we have found to be similarly situated. In other words, the remedy requires no more than that Tennis Channel not be carried in a discriminatory manner, and does not burden substantially more speech than necessary to achieve that end.

105. Comcast argues that "the basis for the government's interests has disappeared" due to changes in the marketplace.[328] But as we recently observed, "[i]n the program carriage discrimination provision, . . . Congress directed the Commission to assess on a case-by-case basis the impact of anticompetitive conduct on an unaffiliated programming vendor's ability to compete. These nationwide figures [showing increased competition in the video programming market] do not undermine Congress's finding that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain the ability of an unaffiliated programming vendor to compete fairly."[329] In this case, for reasons discussed above, the ALJ found that Comcast discriminated on the basis of affiliation, and that this discrimination unreasonably restrained the ability of Tennis Channel to compete. If those conclusions are correct, as we find they are, it does not follow that there is no longer any harm that the government has an important or substantial interest in addressing.[330] If an MVPD lacked the ability to limit competition through discrimination based

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[323] *Time Warner*, 93 F.3d at 969.

[324] *See supra* ¶¶ 42-43; *Program Carriage Order and NPRM*, 26 FCC Rcd at 11497-98 ¶ 4 (citing *House Report* and *Senate Report*).

[325] *Senate Report* at 25.

[326] *See Turner I*, 512 U.S. at 662-63; *Time Warner*, 93 F.3d at 978.

[327] *Time Warner*, 93 F.3d at 978.

[328] *Comcast Exceptions* at 35-36.

[329] *Program Carriage Order and NPRM*, 26 FCC Rcd at 11518-19 ¶ 33.

[330] Comcast's argument that the marketplace has changed largely turns upon its assertion that the government's interest in promoting competition and diversity in the video-programming market is limited to concerns about cable operators exercising "bottleneck, or gatekeeper, control." *Comcast Exceptions* at 36 (quoting *Turner I*, 512 U.S. at 656). That argument is at odds with the text of Section 616, which applies to all MVPDs and not just cable operators. Furthermore, we do not believe that the changes to the marketplace are as meaningful as Comcast (continued...)

on affiliation, then the elements of a Section 616 violation would not be satisfied.

106. Comcast also argues that the carriage requirement does not actually further the government's objective of promoting competition and diversity because the remedy leaves Comcast free to drop Tennis Channel, so long as it also drops Golf Channel and Versus.[331] We find no merit in it. The carriage requirement is designed to remedy discrimination by Comcast on the basis of affiliation. It is grounded in a determination that Comcast favored Golf Channel and Versus and disfavored Tennis Channel on the basis of affiliation, and that this differential treatment hindered Tennis Channel's ability to compete with Golf Channel and Versus for audience, advertisers, and events. By requiring Comcast to provide the three channels with equal carriage, the remedy enables Tennis Channel to compete fairly with Golf Channel and Versus, thereby furthering Section 616's goals of promoting competition and diversity in the marketplace.

IV. CONCLUSION

107. For the reasons stated above, we conclude that Tennis Channel has demonstrated that Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation, and that this discrimination unreasonably restrained Tennis Channel's ability to compete in violation of Section 616 of the Communications Act and Section 76.1301(c) of the Commission's rules. Further, we affirm the equal carriage remedy ordered in the Initial Decision, though we decline to order equitable channel placement.

V. ORDERS

108. Accordingly, **IT IS ORDERED,** for the reasons discussed above, that the Application for Review filed by Comcast Cable Communications, LLC **IS DENIED.**

109. **IT IS FURTHER ORDERED,** for the reasons discussed above, that the Exception to the Initial Decision filed by Comcast Cable Communications, LLC with regard to the equitable channel placement remedy ordered by Chief Administrative Law Judge Richard L. Sippel **IS GRANTED** to the extent described herein. All other Exceptions presented by Comcast Cable Communications, LLC **ARE DENIED.**

110. **IT IS FURTHER ORDERED** that the remedy ordered in the Initial Decision of Chief Administrative Law Judge Richard L. Sippel as to channel placement **IS VACATED** and the Initial Decision in all other respects **IS AFFIRMED** to the extent described herein.

(Continued from previous page)
suggests. The D.C. Circuit only recently rejected an almost identical argument, noting that concerns about competition remain in the video distribution market due to the hold that that cable operators continue to exert over some geographic areas, and stressing that a significant proportion of the top national networks are vertically integrated with the largest cable operators. *Cablevision Sys. Corp.*, 649 F.3d at 712. As Tennis Channel notes, Comcast is the nation's largest distributor, and is almost two and a half times larger than the cable operator (TCI), whose conduct was the focus of Congressional debate leading up to adoption of the 1992 Act. *See* Tennis Channel Reply at 11 & n.55. It strains credulity to argue that carriage decisions by Comcast that determine access to its 23 million subscribers can under no circumstances unreasonably restrain competition.

[331] *Comcast Exceptions* at 37-38. Comcast also argues that its decision to refuse Tennis Channel broader carriage has not hindered Tennis Channel's ability to compete fairly because Tennis Channel can still reach potential viewers through other distributors, through Comcast's Sports Tier, and through the Internet. *Id.* at 36-37. This argument is a simple rephrasing of Comcast's argument that its actions did not unreasonably restrain Tennis Channel's ability to compete, and we reject it for the reasons set forth above. *See supra* ¶ 87.

111. **IT IS FURTHER ORDERED** that pursuant to section 503 of the Communications Act of 1934, as amended, Comcast is **ORDERED TO PAY THE UNITED STATES TREASURY A MONETARY FORFEITURE** in the amount $375,000.

112. **IT IS FURTHER ORDERED** that Comcast Cable Communications, LLC must provide The Tennis Channel, Inc. with carriage equal to that of its similarly situated affiliates, Golf Channel and Versus (now NBC Sports Network), to the extent described herein.

113. **IT IS FINALLY ORDERED** that Comcast Cable Communications, LLC must complete remediation, as discussed in paragraphs 111 and 112 above, within forty-five (45) days of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

JOINT DISSENTING STATEMENT OF COMMISSIONERS ROBERT M. MCDOWELL AND AJIT PAI

Re: *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Memorandum Opinion and Order

Today, the Commission faults Comcast for not having been the first major multichannel video programming distributor (MVPD)[332] to carry Tennis Channel on the same programming tier as Golf Channel and Versus (now NBC Sports Network).[333] It then takes the extraordinary step of requiring Comcast to give Tennis Channel equal carriage and concomitantly to pay Tennis Channel more for programming rights. Because we do not find sufficient support for the conclusion that Comcast's refusal to carry Tennis Channel on the same tier as Golf Channel and Versus was discriminatorily motivated by different ownership interests, we respectfully dissent.[334]

In our view, the Commission's analysis founders on this simple fact: Comcast's treatment of Tennis Channel was within the industry mainstream. In 2010, the year in which Tennis Channel filed its complaint, *every* major MVPD in the United States distributed both Golf Channel and Versus to more subscribers than Tennis Channel. Or, to put it another way, not a single major MVPD found Tennis Channel to be "similarly situated" to Golf Channel and Versus when making carriage decisions. For example, Time Warner distributed Golf Channel to **[REDACTED]** of its subscribers, Versus to **[REDACTED]**, and Tennis Channel to only **[REDACTED]**; Cablevision distributed Golf Channel (**[REDACTED]**) and Versus (**[REDACTED]**) more widely than Tennis Channel (**[REDACTED]**). On average, major MVPDs unaffiliated with any of these three channels distributed Golf Channel (**[REDACTED]**) and Versus (**[REDACTED]**) to significantly more subscribers than Tennis Channel (**[REDACTED]**). Even DIRECTV, which is affiliated with Tennis Channel, distributed Golf Channel (**[REDACTED]**) and Versus (**[REDACTED]**) more widely than Tennis Channel (**[REDACTED]**).[335]

The Commission attempts to obscure this powerful evidence concerning other MVPDs' carriage practices by comparing apples to oranges. Specifically, it matches statistics on Comcast's carriage of Tennis Channel to those of *all* major MVPDs (other than Comcast), including those with ownership interests in Tennis Channel. This yields a significantly higher penetration rate for Tennis Channel due to the inclusion of DIRECTV and DISH Network—each of which is an affiliated distributor by virtue of an ownership interest. The Commission then concludes that the "record, examined in its entirety, shows that Comcast treats Golf Channel and Versus more favorably and Tennis Channel less favorably than they are treated by other MVPDs."[336] This statistical analysis, however, is fatally flawed. When one compares apples to apples—that is, by comparing Comcast's distribution of Tennis Channel to that of other major MVPDs *with no ownership interest in Tennis Channel*—there is no meaningful difference. About **[REDACTED]** of the other major MVPDs' subscribers received Tennis Channel in 2010, versus

[332] The term "major MVPDs" refers to providers with more than two million subscribers.

[333] The latter two networks are affiliated with Comcast, while the former is not.

[334] Because we conclude that Comcast did not discriminate against Tennis Channel, we need not reach the broader constitutional and policy arguments raised in this proceeding.

[335] *See* Comcast Exs. 1102, 1103. DIRECTV and DISH Network are both affiliated with Tennis Channel. *See* Comcast Exceptions at 15.

[336] Order at ¶ 71.

[REDACTED] of Comcast's subscribers. The Commission ought not implicate the First Amendment interests of a private actor based upon such a miniscule variance in carriage.[337]

To be sure, the Commission addresses this point by asserting that there is no evidence that affiliated MVPDs' carriage of Tennis Channel has been influenced by their equity interests in the network. This assertion cannot be squared with the facts. Take the carriage decisions made by major MVPDs in 2010: It was DIRECTV's distribution of Tennis Channel that was clearly an outlier, not Comcast's. Tennis Channel's penetration rate at DIRECTV was an eye-popping **[REDACTED]** in 2010, almost **[REDACTED]** the unaffiliated industry average. No other MVPD came close; DIRECTV led the pack by more than **[REDACTED]** points. Comcast, on the other hand, was in the middle of the pack. As this example suggests, it makes no sense to include major MVPDs with an equity interest in Tennis Channel within the control group if the goal of our analysis is to isolate the effects of ownership on carriage decisions. Rather, the Commission should compare the distribution decisions made by Comcast with the distribution decisions made by MVPDs that do not have an ownership interest in *any* of the networks at issue.[338]

Finally, even accepting the Commission's statistical method, it remains the case that MVPDs still distributed Golf Channel (**[REDACTED]**) and Versus (**[REDACTED]**) *much* more widely than Tennis Channel (**[REDACTED]**).[339] Therefore, the Commission's statistical analysis, taken on its own terms, does not demonstrate that Comcast's failure to place Golf Channel, Versus, and Tennis Channel on the same tier was primarily the result of discrimination on the basis of affiliation.

The Commission attempts to explain away the large disparity between major MVPDs' distribution of Golf Channel and Versus, on the one hand, and Tennis Channel, on the other, through what it calls the "ripple effect." It describes this phenomenon as follows:

> [O]ne MVPD's decision to carry a network at a specific level of distribution increases the likelihood that another MVPD will carry that network at the same level of distribution. A major MVPD's decision to widely distribute a network provides that network with greater access to subscribers, particularly in major cities, and additional publicity, which in turn makes broader carriage by other MVPDs more appealing and likely. An MVPD's decision to narrowly distribute

[337] Assuming, as the Commission asserts, that intermediate scrutiny applies, the Commission must demonstrate that its restriction of First Amendment freedom "is no greater than is essential to the furtherance of [a substantial governmental] interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1996). The Commission's remedy in this case plainly does not meet this test. The Commission identifies the promotion of "fair competition" as the substantial governmental interest at stake here, *see* Order at ¶ 104, but then orders Comcast to treat Tennis Channel more favorably than all other major MVPDs. We fail to see how such a mandate promotes fair competition; rather, it is a requirement for Comcast (and only Comcast; *see* note 10 *infra* and accompanying text) to favor one particular competitor in the marketplace.

[338] The Commission raises the red herring of discrimination with respect to disproportionate carriage of Tennis Channel by DIRECTV and DISH Network, asserting that "the mere fact of vertical integration does not itself establish affiliation-based discrimination by the vertically integrated MVPD in favor of its affiliated network." Order at ¶ 74. But the question is not whether—nor does our position here require us to show that—DIRECTV and DISH Network engaged in discrimination based upon affiliation. (Among other things, we nowhere claim that either provider carried Tennis Channel more broadly than an unaffiliated similarly situated channel or unreasonably restrained any other channel's ability to compete.) The question is merely whether those providers' carriage decisions were likely affected by equity interests, such that they should be excluded from the calculation of major MVPDs' carriage decisions. Common sense compels an affirmative answer to that question, especially given the statistics reviewed above.

[339] *See* Comcast Exs. 1102, 1103.

> a network reduces the network's total subscribers, which lowers the licensing revenue it earns, reduces its ability to attract advertisers, and limits its ability to make the investments, such as raising revenue to purchase programming, that are necessary to compete with other sports networks.[340]

Let us assume for the sake of argument that the ripple effect exists. On this view, had Comcast decided to carry Tennis Channel on the same tier as Golf Channel and Versus, Tennis Channel would have received more advertising revenue and additional subscription fees. These additional revenues, in turn, then could have been used to acquire and produce better programming, and that programming could have made Tennis Channel more attractive to other major MVPDs. Even granting all of this, the ripple effect still is not relevant, much less decisive, with respect to the question presented in this case. If a network such as Tennis Channel is insufficiently attractive for major MVPDs to distribute widely, why is Comcast obligated to be the first mover and provide the network with the revenue and publicity that it needs in order to become attractive to other MVPDs? Comcast's obligation under our rules is to provide unaffiliated networks with non-discriminatory—not preferential—treatment.[341]

Moreover, any waves the ripple effect creates surely are counteracted by the straightforward effect of competition. If consumers demand Tennis Channel as much as the Golf Channel and Versus but Comcast discriminates against it, Comcast's competitors have a golden opportunity to lure Comcast's customers away by distributing Tennis Channel as widely as (if not more widely than) the other two networks. That not a single major MVPD chose this course of action in 2010 is telling—not one company apparently thought that the marketplace demanded Tennis Channel as much as the Golf Channel and Versus.[342] Thus, Comcast's carriage of Tennis Channel simply reflected, rather than drove, the industry norm.

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[340] Order at ¶ 73 (footnotes omitted).

[341] The Commission's repeated references to Comcast's size or market share do not widen the scope of that obligation. *See* Order at ¶¶ 9 ("Comcast is the largest MVPD in the United States with approximately 23 million subscribers." (footnotes omitted)); 73 (explaining that the ripple effect is best understood "when viewed in light of Comcast's substantial market share"); 75 (referring to "Comcast's significant market share and the influence it wields in the MVPD market"); 86 (noting that "Comcast is the nation's largest MVPD"); 87 ("Comcast is the nation's largest MVPD. It directly represents nearly 24 percent of the market, and has even greater influence on the market due to the ripple effect." (footnotes omitted)); and n.330 ("Comcast is the nation's largest distributor."). To the extent that the Commission uses Comcast's size as a justification for ordering the company to assist non-affiliated programmers, it strains the legal underpinning of Section 616 of the Communications Act and Section 76.1301(c) of our rules. *See* 47 U.S.C. § 536; 47 C.F.R. § 76.1301(c). And if the Commission is using market share as a proxy for market power, we are not aware of any preferential-treatment obligation in other areas of competition law, even where (unlike here) market power is acknowledged. For example, traditional antitrust law does not impose an obligation to deal, let alone to offer preferential treatment. *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws proscribing monopolization "were enacted for 'the protection of competition, not competitors'" (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))). Nor does a refusal to deal with respect to exclusive, statutorily granted intellectual property rights imply liability. *See* 35 U.S.C. § 271(d)(4) ("No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his . . . refus[ing] to license or use any rights to the patent."). Even the "essential facilities" doctrine does not go so far as to require affirmative aid, but merely reasonable access. *See, e.g.*, *Aspen Highlands Skiing Corp. v. Aspen Skiing Corp.*, 738 F.2d 1509, 1519 (10th Cir. 1984) (noting that "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it"), *aff'd*, 472 U.S. 585 (1985).

[342] The Commission finds it significant that Comcast's most direct competitors, satellite providers, carry Tennis Channel more broadly than Comcast. *See* Order at n.234. But it is more noteworthy that, notwithstanding the fact that both satellite providers own equity interests in Tennis Channel, neither DIRECTV nor DISH Network did in (continued...)

Perhaps recognizing this problem, the Commission buries a major concession in footnote 290 of its decision. There, the Commission suggests that the reason for its decision isn't Comcast's differential treatment of Tennis Channel and Golf Channel and Versus. The real problem is Comcast's placement of Tennis Channel on the Sports Tier rather than the Digital Preferred Tier. The Digital Preferred Tier is an intermediate tier that would have given Tennis Channel additional subscribers, but not as many as Golf Channel and Versus (which are carried on the widely selected Digital Starter Tier or Expanded Basic Tier).

This concession devastates the Commission's case. Tennis Channel complained that it was being discriminated against vis-à-vis Golf Channel and Versus, two affiliated networks that are broadly carried in the Digital Starter Tier. Therefore, to prevail in this case, Tennis Channel is required to prove that it was unlawful for Comcast to refuse to carry Tennis Channel on the same tier as Golf Channel and Versus. Tennis Channel did *not* complain to the Commission that it was being discriminated against vis-à-vis the affiliated networks that appear on Comcast's Digital Preferred Tier, namely, MLB Network, NBA TV, and NHL Network. Tennis Channel is of course free to file such a complaint and ask for carriage on the Digital Preferred Tier, but that is not the complaint the Commission adjudicates here. The record and the decision below do not compare the programming, distribution, advertising revenue, or other relevant indicators of whether or not Tennis Channel is similarly situated to these Digital Preferred Tier networks. However, the Commission does have a full record regarding the carriage decisions of Comcast and other MVPDs regarding Golf Channel and Versus, and that record demonstrates that Comcast's refusal to place those channels on the same tier as Tennis Channel was in keeping with industry practice.

* * *

Consider, finally, the broader impact of today's decision on consumers. If the Commission merely ordered Comcast to carry Tennis Channel on the same tier as Golf Channel and Versus, that alone would make Comcast an industry outlier. But to add insult to injury, the Commission also effectively obligates Comcast to pay Tennis Channel for this privilege.[343] As a result, in order to shield themselves from discrimination complaints, Comcast and other MVPDs will be more likely to carry networks they do not want, on tiers with broader penetration, and at higher prices than ever before—at least if they are foolish enough to be willing to invest in content creation. And the Commission should not kid itself. These additional programming costs will come out of the pockets of consumers, not from MVPDs' bottom lines.

For all these reasons, we respectfully dissent.

(Continued from previous page)
2010 what the Commission believes that Comcast should have done: distribute Tennis Channel as broadly as Golf Channel and Versus.

[343] The Commission's claim that Comcast could comply with its decision without giving Tennis Channel broader carriage elevates form over substance. *See* Order at ¶ 90 ("We are also not persuaded by Comcast's argument that it should not have to pay Tennis Channel for broader carriage. As an initial matter, the remedy only requires Comcast to provide Golf Channel and Tennis Channel with equal carriage. Comcast could comply with this remedy without providing Tennis Channel broader carriage."). Comcast theoretically could move Golf Channel and Versus (now NBC Sports) alongside Tennis Channel in the Sports Tier. By doing so, however, Comcast would be distributing Golf Channel and NBC Sports far more narrowly than other MVPDs, to the detriment of Comcast subscribers who presumably value that programming. We very much doubt the Commission believes that this will happen.