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

In the Matter of	)	
	)	
THE TENNIS CHANNEL, INC.	)	MB Docket No. 10-204
	)	File No. CSR-8258-P
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC	)	

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

To: The Commission

OPPOSITION TO COMCAST'S PETITION FOR STAY PENDING JUDICIAL REVIEW

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

Counsel to The Tennis Channel, Inc.

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Summary

For more than three years, The Tennis Channel, Inc. ("Tennis Channel") has been denied fair carriage by the nation's largest multichannel video programming distributor (MVPD), Comcast Cable Communications, LLC ("Comcast"). In a carefully reasoned decision, following full discovery and trial, the Commission has definitively held that Comcast is discriminating against Tennis Channel, and in favor of its affiliated networks Golf Channel and Versus (now NBC Sports Network), and that Comcast's discrimination is causing serious harm to Tennis Channel. To remedy that harm, the Commission has ordered Comcast to provide Tennis Channel with carriage equal to what it provides to its similarly situated affiliates.

Comcast asks for leave to continue its discrimination — for the Commission to stay the relief it has granted Tennis Channel. But Comcast fails to satisfy its heavy burden of showing that (1) it is likely to succeed on the merits of this case, (2) it will be irreparably harmed absent a stay, (3) a stay will not substantially harm other parties, and (4) a stay would serve the public interest. To the contrary, each of these elements cuts decisively against staying enforcement.

First, Tennis Channel, not Comcast, is likely to succeed on the merits. Each of Comcast's merits arguments has been consistently rejected by the Commission and the courts, including most recently in the Commission's carefully considered July 24, 2012 Order in this case. Properly understood, Comcast's arguments simply express its core disagreement with the statute, and such arguments cannot serve as a basis for granting a stay in this proceeding.

Second, Comcast has not shown that it would suffer irreparable injury absent a stay. The harms it claims are actions that are routinely part of its day-to-day business and that it completes expeditiously when doing so benefits its own networks. These alleged harms fall far short of irreparable injury, and, at most, amount to no more than the routine costs of legal compliance.

Third, Tennis Channel, by contrast, is harmed every day that Comcast continues its illegal discrimination. As the Commission has already found, this harm impacts every aspect of Tennis Channel's business — its ability to compete for viewers, to obtain carriage from other MVPDs, to secure programming, and to obtain advertising revenue — in ways that impair its basic ability to compete effectively as a network.

Fourth, allowing Comcast to continue discriminating while it exhausts appellate options would be contrary to the public interest. Section 616 reflects a legislative determination that the public interest is served by increasing programming diversity and competition. Enforcing the Commission's order now is directly consistent with that goal. Indeed, Comcast's suggestion that consumers will be hurt by increasing diversity cannot be squared with any meaningful reading of Section 616.

Comcast's efforts at delay are contrary to express congressional statements about the need for prompt relief under Section 616. When Congress adopted Section 616, it expressly stated that discrimination complaints should be subject to "expedited review." This mandate and

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the Commission's policy requiring carriage orders to become immediately effective recognize that a complainant who prevails in a program carriage case should receive prompt relief to alleviate the harm it experiences from unlawful discrimination. Given Comcast's adjudicated wrongdoing, which has stretched over several years, the public's interest should be satisfied now without further delay.

Tennis Channel has succeeded at every stage in this proceeding. The FCC's Media Bureau found a *prima facie* violation of the statute. The agency's Enforcement Bureau, the Chief Administrative Law Judge, and now the full Commission have all agreed that Comcast has engaged in illegal discrimination under Section 616. Each has also concluded that Comcast should pay the maximum fine allowed by law, an expression of a shared judgment that Comcast's behavior with respect to Tennis Channel has been egregious and inexcusable. On these facts, where Tennis Channel continues to suffer daily harm from Comcast's discrimination, and where Comcast continues to benefit from its unlawful conduct, further delay in requiring compliance with the law would be inappropriate.

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Procedural Background

Tennis Channel entered into a carriage agreement with Comcast in 2005. That agreement gives Comcast the discretion to carry Tennis Channel on a tier commensurate with its performance.[1] Since 2005, Comcast has carried Tennis Channel on its pay-extra sports tier, while carrying its wholly-owned program services, Golf Channel and Versus, on a widely distributed tier that reaches nearly all of its subscribers.[2] 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" — a proposal that Comcast flatly rejected.[3]

Based on these facts, Tennis Channel filed a program carriage complaint against Comcast in January 2010.[4] The Media Bureau determined that Tennis Channel had established Comcast's *prima facie* violation of the program carriage rules, and it designated the matter for hearing.[5] After extensive discovery and a six-day evidentiary hearing, the FCC's Chief Administrative Law Judge issued an Initial Decision, concluding that Comcast had violated Section 616 of the Communications Act[6] and requiring that Comcast carry Tennis Channel in a

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1 *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78, Memorandum Opinion & Order, ¶ 12 (July 24, 2012) [hereinafter "Order"].

2 *Id.*

3 *Id.*

4 *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Program Carriage Complaint (Jan. 5, 2010) [hereinafter "Complaint"].

5 *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, DA 10-1918, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, ¶¶9-10, 17, 19-20, 24 (MB 2010) [hereinafter "HDO"].

6 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c).

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nondiscriminatory manner.[7] Comcast filed Exceptions to the Initial Decision and an Application for Review of the Hearing Designation Order and petitioned for a stay of the Presiding Judge's prescribed carriage remedy pending review of the decision by the full Commission.[8]

On May 14, 2012, the Commission stayed the Initial Decision on its own motion and dismissed Comcast's conditional petition for stay as moot.[9] It noted that this case "present[ed] important issues that [would be] likely to recur in future program carriage adjudications."[10] And it concluded that it could not at that point, without a thorough review of the record, determine whether the Initial Decision should be modified.[11] The Commission took pains to state that it did "not consider Comcast's arguments in favor of a stay" or conduct any review of the merits.[12] Rather, the stay was predicated on the Commission's view that the Initial Decision might not have provided adequate guidance on certain subjects and on its desire to ensure that its own instructions going forward provided sufficient guidance for future litigants.[13]

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7 *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, 11D-01, 26 FCC Red 17160, Initial Decision of Chief Administrative Law Judge Richard L. Sippel (ALJ 2011) [hereinafter "Initial Decision"].

8 *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Exceptions to Initial Decision (Jan. 19, 2012); *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Application for Review (Jan. 19, 2012); *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Comcast's Conditional Petition for Stay (Jan. 25, 2012).

9 In granting a stay on its own motion, the Commission stated it "need not consider Comcast's arguments in favor of a stay." *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-50, Order, ¶ 6 n.25 (May 14, 2012) [hereinafter "Conditional Stay Order"].

10 *Id.* ¶ 5.

11 *Id.*

12 *Id.* ¶ 6 n.25.

13 *See id.* ¶ 5. The Commission noted the Initial Decision's lack of guidance on questions of compensation — guidance which the Commission has since provided in its July 24 Order, which requires that Comcast pay Tennis Channel the compensation for broader carriage that the (continued...)

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In declining to require compliance months ago, the Commission warned Comcast that it might order prompt compliance in the future, directing Comcast to "continue its efforts [to engage in good-faith planning for compliance with and implementation of the Initial Decision]."[14] This admonition was consistent with Comcast's earlier promise that it would be "prepared to implement [the Initial Decision's] remedies as soon as practicable if and when the Initial Decision becomes effective."[15]

The ALJ's decision has now been affirmed virtually in its entirety by the full Commission, which has given Comcast 45 days to provide Tennis Channel with carriage equivalent to that which it gives its own networks.[16] And yet, despite its prior assurances, Comcast now seeks a stay pending appellate review.[17]

Argument

Existing law and policy, and the facts of this case, mandate that the Commission deny Comcast's request for a stay. A stay of an administrative action is "extraordinary relief"[18] that will be granted only where the movant can demonstrate that: (1) it is likely to succeed on the merits on review; (2) it would suffer irreparable injury absent a stay; (3) a stay would not

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parties have already negotiated in their existing contract. Order ¶ 92. The Commission also expressed concern in its stay ruling about the Initial Decision's channel placement remedy, *see* Conditional Stay Order ¶ 5, which the Commission subsequently vacated in its July 24 Order. Order ¶¶ 91, 110.

14 Conditional Stay Order ¶ 5 n.22.

15 *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 5 n.11 (Jan. 25, 2012) [hereinafter "Opposition to Petition to Compel"].

16 Order ¶ 113.

17 *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Comcast's Petition for Stay Pending Judicial Review (Jul. 30, 2012) [hereinafter "Stay Petition"].

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substantially harm other interested parties; and (4) a stay would serve the public interest.[19] Only when these factors "are 'heavily tilted in the movant's favor' is the extraordinary relief of a stay appropriate."[20] Comcast has not made — and cannot make— a sufficient showing on any of these factors to justify a stay.[21]

Nor can Comcast rely on the Commission's earlier brief stay of the ALJ's Initial Decision, as it seeks to do in its Stay Petition. As we have shown, the Commission explicitly avoided any consideration of the foregoing stay factors; thus Comcast must satisfy the four-factor test in its instant petition — a task which it has plainly failed to do.

A. Comcast Is Not Likely To Succeed On The Merits.

The bulk of Comcast's merits arguments have been rejected by three agency bodies, each of which independently reviewed the record and arrived at the conclusion that Comcast discriminated against Tennis Channel in violation of the program carriage rules.[22] In

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

19 The Commission uses the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Wash. Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). *See Time Warner Cable, A Division of Time Warner Entm't Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016, 9018 ¶ 9 (2006).

20 *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, FCC 02-90, 17 FCC Rcd 6175, 6177 ¶ 6 (2002).

21 Tennis Channel notes that Comcast incorporated by reference and attached its voluminous prior briefing on its Conditional Petition for Stay, despite the Commission's policy disfavoring such a practice. *See, e.g. In re DFW Radio License*, LLC, 23 FCC Rcd 2646, 2648 & n.19 (MB 2008) ("Our rules do not allow for a 'kitchen sink' approach . . . , rather the burden is on the [party] to set forth fully its argument and all underlying relevant facts") (internal citation omitted). To the extent that the Commission reviews Comcast's prior papers and finds them relevant, Tennis Channel respectfully requests that the Commission take into account its prior responses, attached for the convenience of the Commission at Exhibits 1 and 2.

22 The Commission typically declines to find a probability of success on the merits where the merits arguments have already been fully addressed and decided. *See APCC Services, Inc. v.* (continued...)

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its Stay Petition, Comcast recycles arguments that the Commission and the courts already have rejected, without offering any reason why a reviewing court, looking at the same record, would arrive at a different conclusion. And Comcast ignores well-established legal principles that require substantial judicial deference to an agency's interpretation of its own rules and to its factual findings, making it even less likely that Comcast will prevail on review.

1. Tennis Channel's Complaint Was Timely Filed.

Comcast rehashes an interpretation of the applicable statute of limitations regulation that defies any sensible reading of the rule. More important, Comcast's interpretation repeatedly has been rejected by the Commission, both in this case and in decisions that will receive heavy deference from the Court of Appeals.[23]

Here, the Commission correctly held that Tennis Channel's complaint was timely. Under the plain language of the applicable regulation, a carriage complaint is timely if it is filed within one year of the date on which "[a] party has notified a . . . distributor that it intends to file

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Netwirkip, LLC, Order, File No. EB-03-MD-011, DA 07-2079, 22 FCC Rcd 9080, 9083 ¶ 6 (2007) ("Most, if not all, of [the merits] arguments have already been fully addressed and decided in the Commission's *Orders*, and, after further careful consideration, we conclude that the Motion does not raise any basis — new or repeated — for believing that Network has a substantial likelihood of obtaining reversal or vacatur of any of the Commission's decisions in those *Orders*.").

[23] The Court of Appeals will defer to the view of an agency interpreting its own regulation: where there is a question of the "interpretation of an administrative regulation," a court "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *id.* at 414 ("the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Commission has all the more authority to interpret its own rules here, given that the rule governing the timing of carriage complaints is a creation of the Commission, not Congress. *See generally Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2652-53 ¶ 25 (1993) ["1993 Second Report and Order"].

a complaint with the Commission based on violations of one or more of the [program carriage] rules."[24] Tennis Channel timely filed its complaint a month after it provided such notice to Comcast.[25] That is all that was necessary for the Commission to find as it did.[26]

Comcast repeatedly asserts that this interpretation allows Tennis Channel to avoid the terms of the agreement it signed with Comcast in 2005. But, as the Commission found, Tennis Channel is not seeking relief from its contract — which accords Comcast discretion as to where to carry Tennis Channel — but from Comcast's 2009 decision to exercise that discretion in a way that violates the antidiscrimination provisions of Section 616.[27] As the Commission explained, "Comcast had an obligation to exercise [the contractual] discretion consistent with Section 616," and Tennis Channel's request that Comcast do so does not amount to a demand for a "change in the existing terms of [the] contract."[28] This reading, far from rendering any

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24 47 C.F.R. § 76.1302(f)(3) (now codified at 47 C.F.R. § 76.1302(h)).

25 Order ¶ 29.

26 *Id.* ¶ 30.

27 *See, e.g.*, *id.* ¶ 30 ("Tennis Channel makes no . . . allegation about the March 2005 contract" that it "violate[s] the rules"); *id.* ¶ 32 ("Tennis Channel's complaint does not allege that the 2005 contract was improperly discriminatory, but instead focuses on Comcast's 2009 conduct."). The Commission also noted that Tennis Channel's complaint was filed within one year of the discriminatory conduct at issue — "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." *Id.* ¶ 31 n.108.

28 *Id.* ¶ 33; *id.* ¶ 34; *see also Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Mem. Op. & Hearing Designation Order, 23 FCC Rcd 14787 ¶ 105 (a contract may "commit[] . . . carriage decisions . . . to Comcast's 'discretion,'" but that does not mean the network has "waived its statutory program carriage rights with respect to Comcast's exercise of such discretion" or that the limitations period begins running as of the date of the contract); *see also id.* ¶¶ 70, 72 (MB 2008) [hereinafter "Omnibus HDO"].

provision superfluous, prevents legitimate claims from being time-barred, as they would be under Comcast's view.[29]

Comcast argues that the Commission's plain language application of the rule and its "laches" limitation on program carriage complaints subject Comcast to "unfair surprise."[30] But the Commission's decision does not depend on its "laches" limitation; in any event, the limitation poses an additional hurdle on *complainants*, not MVPDs. And Comcast's claim that it is "surprised" by how the Commission interpreted its own regulation, according to its express language, is itself surprising, given that the Commission has done so in a consistent manner in prior cases, including in cases to which Comcast was a party, giving effect to the Commission's "willful deletion" in 1994 of language that Comcast says supports its view.[31]

2. The Commission Correctly Interpreted Section 616 To Conclude That Comcast Violated The Statute.

Reviewing courts are required to give substantial deference to the Commission's interpretation and application of Section 616, the statute the agency is charged with administering, as well as its findings of fact. The court may set aside the Commission's decision only if it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right," and it must uphold the factual

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29 Order ¶ 31 n.108. In particular, the Commission observed that "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 formation, would 'preclude programmers from bringing legitimate claims regarding allegedly discriminatory actions occurring more than one year after a contract was executed." *Id.* (citing HDO ¶ 15 n.82).

30 Stay Petition at 7.

31 Order ¶ 32 (discussing 1994 deletion of language that Comcast suggests would putatively restrict Section 76.1302(f)(3) to unreasonable refusals to deal); Omnibus HDO ¶ 105.

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findings unless they are "unsupported by substantial evidence."[32] As a court of appeals has held recently in evaluating a different Commission ruling on a carriage complaint, "[r]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid."[33]

The Commission's well-reasoned and thorough opinion plainly survives review under this "highly deferential" standard. There is extensive evidence in the record to support the finding of the core elements of Section 616 discrimination:

- Similarly situated: Golf Channel, Versus, and Tennis Channel carry similar sports programming (in fact, Tennis Channel and Versus have competed for the same event rights),[34] target the same viewers, compete for the same advertisers,[35] and have "almost identical" ratings.[36]

- Differential treatment: Comcast carries Golf Channel and Versus at above-market rates to [redacted] of its subscribers, while carrying Tennis Channel at below-market rates to only [redacted] of its subscribers."[37] This discriminatory treatment reflects Comcast's general practice of treating its affiliated networks "like siblings as opposed to like strangers."[38]

- Pretextual justifications: Comcast's justifications for its discrimination were after-the-fact pretexts that did not enter into its decision to deny Tennis Channel fair carriage.[39] And the carriage decisions of other MVPDs cannot justify

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32 5 U.S.C. § 706.

33 *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. FCC*, 679 F.3d 269, 274 (4th Cir. 2012) (internal quotation marks omitted) (quoting *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009)); *see also id.* at 276-77 (regarding substantial evidence standard).

34 Order ¶ 52.

35 *Id.* ¶¶ 53-54.

36 *Id.* ¶ 55.

37 *Id.* ¶ 68.

38 *Id.* ¶¶ 46-48.

39 *Id.* ¶¶ 77-79 (concluding Comcast's flawed "cost-benefit" analysis was fundamentally one-sided and inherently flawed).

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Comcast's treatment of Tennis Channel because, *inter alia*, those MVPDs were impacted by the "ripple effect" of Comcast's discrimination.[40]

- Harm: Comcast's discrimination severely diminishes Tennis Channel's subscriber base;[41] impairs Tennis Channel's ability to acquire programming rights, sell advertising, and collect licensing revenue;[42] and provides Golf Channel and Versus with a significant "competitive advantage."[43]

Comcast's legal arguments should fare no better on review, particularly in light of the deference afforded to the Commission. For instance, Comcast's novel interpretations of Section 616 expressly rejected here, such as its theory that Section 616 is nothing but a "limited" version of the antitrust laws,[44] are likely to be unavailing. As the Commission noted, Section 616 was not intended to "mimic existing antitrust law," but rather was intended to augment it and provide new remedies for networks harmed by vertical integration — which Congress considered prohibiting altogether.[45] Notably absent from Comcast's petition is any reference to this central purpose of the statute or any effective effort to address the embedded statutory finding that as a vertically integrated MVPD, it has both a unique incentive and ability to favor its affiliated networks and hinder the ability of unaffiliated programming vendors to compete in the marketplace.[46]

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40 *Id.* ¶ 73 (citing Comcast's own documents on ripple effect).

41 *Id.* ¶ 83.

42 *Id.* ¶ 84.

43 *Id.* ¶ 85. Indeed, Versus "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, a detrimental effect that even Comcast executives have acknowledged." *Id.*

44 Stay Petition at 9.

45 *See* Order ¶¶ 41-42.

46 *See* Tennis Channel Ex. 1, Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 25 (1991) [hereinafter "Senate Report"]; *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of* (continued...)

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The Commission also applied the correct legal standard to conclude that Comcast's discrimination unreasonably restrains Tennis Channel's ability to compete fairly. On this issue, Comcast accuses the Commission of lowering the bar for showing harm, "effectively reading the unreasonable-restraint requirement out of the statute altogether."[47] But Comcast would have the bar set so high that it would be virtually unreachable for any network. Again, the Commission's interpretation of the statute, which allows a finding of harm when a network is meaningfully impaired by plain discrimination,[48] is both correct and entitled to deference.

3. The Commission's Order Is Consistent With The First Amendment.

Finally, as the Commission recognized, Comcast's First Amendment arguments would eviscerate Section 616 and are unlikely to succeed. In erroneously arguing for a strict scrutiny judicial standard and suggesting the statute no longer serves an important purpose, Comcast overstates the role that comparing network content plays under the Commission's Section 616 analysis, mischaracterizes Congress's intent in enacting the statute, and ignores the competitive realities of the marketplace.

The Commission's Order, like the statute itself, is appropriately reviewed under an intermediate scrutiny standard. The Commission's consideration of the content of the three networks was "solely for purposes of conducting a comparative analysis to determine whether Comcast discriminated 'on the basis of affiliation or nonaffiliation'" in its treatment of similarly

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Competition and Diversity in Video Programming Distribution and Carriage, MB Docket Nos. 11-131 & 07-42, FCC 11-119, 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 ¶ 33 (2011) [hereinafter "2011 Program Carriage Order"].

47 Stay Petition at 8.

48 *See* Order ¶¶ 43, 86.

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situated networks.[49] The Commission in no way expressed or enforced a preference for one kind of content over any other. Nothing in its approach "favors or disfavors any particular speech 'because of [agreement or] disagreement with the message it conveys.'"[50] Moreover, the Commission's content evaluation was merely one element — indeed, the most obvious element — of its overall analysis to determine whether the networks in fact are similarly situated. The Commission also looked to non-content factors such as ratings, audience demographics, and advertisers.[51]

Significantly, the "similarly situated" requirement actually protects Comcast by heightening the complainant's burden for establishing discrimination.[52] Comcast invoked this protection when it introduced detailed expert testimony from Michael Egan in an unsuccessful attempt to argue that Tennis Channel, Golf Channel, and Versus are not similar in content terms. Now that Comcast has failed on this point, and the Commission has categorically rejected the expert's analysis and conclusions as incorrect and irrelevant,[53] Comcast cannot complain that the Commission's consideration of its own expert's testimony violates the First Amendment.

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49 *Id.* ¶ 100.

50 *Id.* ¶ 100 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) [hereinafter "Turner I"]); *see also Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996) (comparable cable carriage provisions "do not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed").

51 *See* Order ¶¶ 51-67.

52 *See, e.g.*, *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc.*, 26 FCC 8971, 8978-80 ¶¶ 19-26 (2011). Indeed, the requirement prevents networks from pursuing litigation under the rules based on complaints of disparate treatment alone.

53 Order ¶¶ 65-66.

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Applying the appropriate standard, the Order plainly satisfies intermediate scrutiny.[54] Its nondiscrimination requirement advances what has been recognized time and again as important government interests for purposes of a First Amendment analysis: promoting diversity and competition in the video programming market.[55]

Comcast argues that program carriage regulation no longer serves important governmental interests because cable no longer has a "bottleneck" in the video distribution market.[56] But Section 616 was enacted to curb the anticompetitive effects of vertical integration,[57] which Congress considered prohibiting altogether.[58] Those harmful effects remain, as both the Commission and U.S. Court of Appeals have recently affirmed.[59]

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[54] Under that standard, government action must be sustained 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." *Time Warner*, 93 F.3d at 969; *see also Turner I*, 512 U.S. at 662; *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[55] *See Turner I*, 512 U.S. at 642 (1994); *Time Warner*, 93 F.3d at 969, 978.

[56] Stay Petition at ii, 14-15.

[57] *See* Senate Report at 24-26. Congress determined that restrictions on vertically-integrated entities were justified by the "special characteristics" of such companies — their "unique power" to disadvantage programmers in competition with services they own. *Time Warner*, 93 F.3d at 978; *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010).

[58] Senate Report at 27.

[59] The D.C. Circuit noted that cable operators continue to exert control in certain geographic areas. *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 712 (2011); *Cablevision*, 597 F.3d at 1309. And in July 2011, as part of its program carriage rulemaking, the Commission explicitly found that "substantial government interests in promoting diversity and competition remain." 2011 Program Carriage Order ¶ 33. After considering evidence offered by the cable industry, it concluded the so-called marketplace changes cited did "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." *Id.*

In reaching this conclusion, the Commission pointed to the recent Comcast-NBCU merger — the size of which is unprecedented — as likely to "result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks." *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For* (continued...)

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Moreover, the Order does not burden substantially more speech than necessary to advance the government's interest in competition and diversity. "[T]he remedy requires no more than that Tennis Channel not be carried in a discriminatory manner."[60]

In short, the Commission's Order is clearly consistent with, and indeed advances the interests underlying, the First Amendment. Because Comcast's First Amendment rights have not been violated, any alleged "constitutional injury" Comcast asserts cannot form the basis of its arguments on the irreparable injury and public interest prongs of the stay standard.[61] To show otherwise, Comcast must necessarily prove that a long string of Supreme Court and D.C. Circuit decisions are invalid. For the reasons discussed above, it has plainly failed in that undertaking.

B. Comcast Will Not Be Irreparably Injured Absent A Stay.

The Commission ordered Comcast to carry Tennis Channel on the same tier and to the same number of subscribers as it carries Golf Channel and Versus.[62] Implementation of this relief requires nothing more than the type of business decision Comcast makes routinely with many channels, and the effort it will take to achieve that result cannot justify a stay. The

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Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, FCC 11-4, Memorandum Opinion and Order ¶ 116.

Comcast's argument that the marketplace is dramatically changed cannot be sustained given that at its current size, it 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." Order ¶ 105 n.330.

60 *Id.* ¶ 104.

61 Constitutional injury could be grounds for a stay only if the unconstitutionality of the action is patent. The Commission acted consistently with the First Amendment, and the effect is to expand viewer access to programming that has been denied to them for anticompetitive reasons only.

62 *Id.* ¶ 92 It declined, however, to order Comcast to grant Tennis Channel equal channel placement. *Id.* ¶ 91. In doing so, the Commission eliminated the more challenging aspect of the ALJ's prescribed relief and left Comcast to complain only about the burden involved in doing something that is a part of its daily business model — changing a channel's penetration level.

Commission has held that "even substantial injuries in terms of money, time and energy expended in the absence of a stay are not adequate grounds to justify a stay."[63] Because Comcast proves no harm beyond the cost and effort involved in effecting a change in the carriage level of a single channel, it has failed to show the type of harm necessary to justify a stay.

In a vast majority of Comcast's systems, Tennis Channel's signal is already delivered to subscribers' set-top boxes but is only illuminated for those customers who pay the extra $7 to 9 per month Comcast charges for the sports tier.[64] With relative ease, the signal can be illuminated electronically for all digital basic subscribers in these systems, thereby effecting the mandated tier change. Comcast simply does not meaningfully address the simplicity with which this change can be accomplished.

Although Comcast's declarants complain of significant bandwidth constraints affecting the switch, they have previously admitted that moving Tennis Channel to a more widely distributed digital tier would require [redacted] extra bandwidth in the approximately [redacted] of Comcast systems that already carry the network at some level.[65] In her most recent declaration, Comcast's Jennifer Gaiski refers to the few systems in which Tennis Channel's signal is not currently available, but concedes that nearly half of those have available

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63 *Auction of Interactive Video and Data Service Licenses Scheduled To Begin Feb. 18, 1997*, DA 97-13, Order, 12 FCC Rcd 19, 21 ¶ 5 (1997). More broadly, "economic loss does not, in and of itself, constitute irreparable harm." *Wisc. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. 1985).

64 Comcast acknowledges that the Sports Entertainment Package is available to "almost all of its subscribers." Stay Petition at Ex. C, Declaration of Jennifer Gaiski ¶ 11 [hereinafter "Gaiski Declaration"]; *see also* Initial Decision ¶ 17; Bond Tr. at 1988:17-1990:22.

65 *See* Tennis Channel Ex. 137, Deposition of Jennifer Gaiski, at 33:5-19; 197:15-21 [hereinafter "Gaiski Dep."]; Tennis Channel Ex. 139, Deposition of Madison Bond, at 76:11-17; Orszag Tr. at 1428:16-1429:1; Bond Tr. at 1988:17-1990:22; *see also* Gaiski Dep. at 19:17-21, 19:25-20:3.

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bandwidth to launch the network on the broad digital basic tier.[66] Accordingly, Comcast's "parade of horribles" on the need to move or delete networks, rebuild cable lines, or take other costly steps to release new bandwidth and accommodate broader carriage of Tennis Channel are purely conjectural and, at most, relevant to a very small proportion of Comcast's total number of cable systems. Whatever problems Comcast might face in these few remaining systems — which serve a fraction of a percent, or [redacted] of its total subscriber base — do not justify staying compliance with the law.[67] Nor can they begin to compare to the substantial harms Comcast's discrimination has imposed on Tennis Channel's ability to compete effectively in the cable marketplace.

Comcast further argues that the Order's equal carriage remedy requires it to comply with customer notice requirements; update websites, databases, and programming guides; print new channel lineups; remap lineup maps; and produce new rate cards.[68] But all of these steps are routinely undertaken by Comcast as part of its day-to-day business operations. The record in this case clearly establishes that Comcast frequently changes its channel lineups and orders nationwide tiering changes at-will.[69] And, not surprisingly, Comcast willingly facilitates such changes in service of its own networks.[70]

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66 Gaiski Declaration ¶ 16.

67 Comcast has elsewhere stated that it would complete its company-wide digital migration by the end of 2011. *See Applications for Consent to the Transfer of Control of Licenses General Electric Co. to Comcast Corp.*, Applications & Public Interest Stmt., at 112. To the extent this migration is not yet complete, and Comcast continues to offer analog services, the Commission and ALJ excluded from their equal carriage remedies any "analog systems where the addition of Tennis Channel would require displacement of existing networks." Order ¶ 25 n.92 (quoting Initial Decision ¶ 119 n.353).

68 Stay Petition at 19.

69 For instance, after settling a program carriage dispute with the NFL Network in May 2009, Comcast [redacted]
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In all of these cases, there was no evidence that Comcast was concerned about obtaining state or local regulatory approvals. Notably, Comcast has not challenged the clear record evidence on these points that Tennis Channel presented in its earlier filings before the Commission.[71] Nor could it, as the evidence stems from its own internal documents.

Comcast also fails to explain why offering its customers an additional channel will result in "consumer confusion and loss of goodwill."[72] The assertion that offering *more* programming choice to consumers would result in a loss of goodwill contradicts common sense. Comcast itself concedes this point, since it separately argues that stripping away Tennis Channel in the unlikely event of a later reversal of the Commission's decision would frustrate its

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[70] When Comcast entered into a carriage agreement with its partially-owned MLB Network, it *See* Tennis Channel Ex. 55, at COMTTC_00052327.

[71] Tennis Channel also previously presented data to the Commission showing that Comcast regularly moves channels on its channel lineup. Between January 2010 and January 2012, Comcast made channel number changes to its standard-definition lineup and an additional changes to its high-definition lineup. MediaCensus C 2012 MediaBiz (Feb. 2012) (commissioned analysis based on Comcast's February 2012 channel lineups and third-quarter 2011 subscribership figures, performed by Media Business Corporation, or "MediaBiz," an industry-leading analytics consultancy that, among other matters, tracks programming distribution and packaging by MVPDs). Significantly, neither in its reply there, nor in its instant stay petition, has Comcast challenged the accuracy of the information Tennis Channel gathered and provided.

[72] Stay Petition at 20.

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customers, thus suggesting Comcast recognizes that its customers value having more programming options.[73]

Comcast also takes issue with the Commission's requirement that it comply with the equal carriage remedy within forty-five days, arguing the tiering change will take time to implement.[74] But Comcast has had months to begin the process of implementation and to take the various steps outlined by Ms. Gaiski and Mr. Kreiling in their declarations. As early as January, Comcast stated it was "engaging in good-faith planning for compliance with and implementation of the Initial Decision, should it become effective."[75] At the time, Comcast understood — and indeed argued — that the Initial Decision would become effective once the Commission had completed its review.[76] It represented to the Commission that it "fully intend[ed] to continue its planning and its discussions with Tennis Channel [about compliance]" so that it would be "prepared to implement the [equal carriage remedy prescribed in the Initial Decision] as soon as practicable" thereafter.[77]

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[73] Comcast's argument that its costs would be "doubled," *see id.* at 21, if it were to comply and if the Commission's decision later were reversed assumes that it would then be forced to move the network back up to the sports tier, which is of course not the case. Comcast would not be required to incur a second set of costs and indeed might in the interim recognize that Tennis Channel is of greater value to it on the broad digital tier. That Comcast wholly ignores this possibility only underscores its unwillingness even to consider the worth of Tennis Channel in light of the competitive threat that the network poses to its owned services.

[74] *Id.* at 19. Comcast even demands an expedited timetable for the Commission's consideration of its Stay Petition on this basis. *Id.* at ii, 5, 23.

[75] Opposition to Petition to Compel at 5 n.11.

[76] Comcast stated in its Opposition to Tennis Channel's Petition to Compel Compliance that "[a]lthough it is certainly true that an ordering clause of the Initial Decision requires remediation of the alleged violations to occur 'as soon as practicable,' there is nothing odd or unusual in saying that an *order will become effective upon Commission review and that it must be implemented as soon as practicable thereafter*." *Id.* at 7 (emphasis added).

[77] *Id.* at 5 n.11.

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Relying on these representations, the Commission warned Comcast two months ago to be ready to comply.[78] If Comcast failed to heed this warning, that is a problem of its own making, and prompt relief to Tennis Channel should not be further deferred because of Comcast's failure.

C. Tennis Channel Would Continue To Suffer Substantial Harm If A Stay Is Granted.

The speculative and routine monetary costs Comcast cites stand in sharp contrast to the significant impairments that Tennis Channel has suffered, and continues to suffer, to its ability to compete in the market for viewers, advertisers, and programming rights. The so-called burdens Comcast asserts it will face in order to comply in what amounts to a fraction of a percent of its subscriber base are vastly outweighed by the severe and debilitating competitive injuries that Tennis Channel has endured over the past three years.

In enacting Section 616, Congress provided for "expedited review"[79] of program carriage complaints. That mandate, along with the Commission's Order requiring prompt remediation,[80] reflects a recognition that a successful program carriage complainant has, by definition, suffered real competitive injury as a result of the operator's discrimination and is thus entitled to prompt relief. Specifically here, the Commission has concluded that Tennis Channel is suffering substantial ongoing harm as a result of Comcast's discrimination. Comcast's placement of Tennis Channel on a narrowly-penetrated sports tier "affect[s] its ability to compete in a variety of direct and indirect ways."[81] As a result of its limited distribution, Tennis Channel

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78 Conditional Stay Order ¶ 5 n.22.

79 *See* 47 U.S.C. § 536(a)(4).

80 Order ¶ 113.

81 *Id.* ¶ 84.

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