

Comcast's carriage agreements have been introduced into the record in this case, it has not pointed to even one that specifies a particular channel number on which Comcast is required to carry a network. In any event, MVPDs may not contract around Section 616 compliance<sup>135</sup> — a principle that clearly would be implicated if Comcast could point to its contractual relationships with other networks, and particularly its affiliated sports networks, to avoid nondiscriminatory channel placement with respect to Tennis Channel.

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

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

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<sup>135</sup> See *Omnibus HDO* ¶¶ 70-72, 105.

<sup>136</sup> Stay Petition at 26.

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

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

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

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

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

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

<sup>140</sup> Stay Petition at 27.

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

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

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

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

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

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

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

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

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

<sup>145</sup> See 47 U.S.C. § 536(a)(4).

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

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

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

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

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

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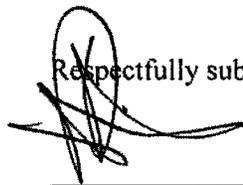
<sup>148</sup> *Second Report & Order* ¶ 25.

<sup>149</sup> Stay Petition, at 28.

<sup>150</sup> See Section II.B.2, *supra*.

**CONCLUSION**

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

 Respectfully submitted.

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February 6, 2012

**CERTIFICATE OF SERVICE**

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

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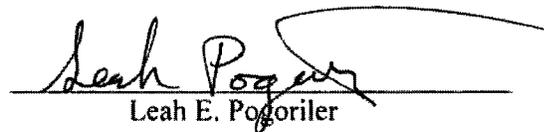
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