

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.<sup>71</sup> 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.”<sup>72</sup> 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

[REDACTED]

<sup>70</sup> When Comcast entered into a carriage agreement with its partially-owned MLB Network, it [REDACTED]

[REDACTED] See Tennis Channel Ex. 55, at COMTTC\_00052327.

<sup>71</sup> 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 [REDACTED] channel number changes to its standard-definition lineup and an additional [REDACTED] 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.

<sup>72</sup> Stay Petition at 20.

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customers, thus suggesting Comcast recognizes that its customers value having more programming options.<sup>73</sup>

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.<sup>74</sup> 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."<sup>75</sup> At the time, Comcast understood — and indeed argued — that the Initial Decision would become effective once the Commission had completed its review.<sup>76</sup> 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.<sup>77</sup>

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<sup>73</sup> 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.

<sup>74</sup> *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.

<sup>75</sup> Opposition to Petition to Compel at 5 n.11.

<sup>76</sup> 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).

<sup>77</sup> *Id.* at 5 n.11.

Relying on these representations, the Commission warned Comcast two months ago to be ready to comply.<sup>78</sup> 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”<sup>79</sup> of program carriage complaints. That mandate, along with the Commission’s Order requiring prompt remediation,<sup>80</sup> 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.”<sup>81</sup> As a result of its limited distribution, Tennis Channel

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<sup>78</sup> Conditional Stay Order ¶ 5 n.22.

<sup>79</sup> See 47 U.S.C. § 536(a)(4).

<sup>80</sup> Order ¶ 113.

<sup>81</sup> *Id.* ¶ 84.

“collects less in licensing fees . . . cutting into the network’s largest source of revenue.”<sup>82</sup> This reduction in income, coupled with limitations on Tennis Channel’s audience size, “make it difficult for the network to acquire programming rights” and, indeed, to compete with networks like Versus for valuable tennis programming.<sup>83</sup> And the network’s limited distribution “discourage[s] advertisers from placing advertisements on the network,” reducing Tennis Channel’s advertising revenues.<sup>84</sup>

As the Commission also found, these harms are particularly great because Comcast is the nation’s largest MVPD; indeed, its discrimination results in a loss of access to approximately [REDACTED] subscribers.<sup>85</sup> Due to its size and influence, Comcast’s carriage decisions have also caused a “ripple effect” in the industry, multiplying the harmful effects of Comcast’s discrimination.<sup>86</sup> While it seeks now to minimize the significance of this phenomenon, Comcast was concerned about precisely these effects for its own networks when an MVPD a fraction of its size [REDACTED]

[REDACTED]<sup>87</sup>

Comcast dismisses any potential harm to Tennis Channel in a single paragraph. It claims that Tennis Channel cannot be harmed because a stay would simply preserve the status

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* ¶ 86.

<sup>86</sup> *Id.* ¶¶ 83, 87, 89.

<sup>87</sup> *Id.* ¶ 73 (citing Comcast’s internal document reflecting a concern that [REDACTED]). *See also* Tennis Channel Exh. 38 at COMTTC00052319 [REDACTED].

quo.<sup>88</sup> But the status quo is precisely the problem Tennis Channel faces, and its preservation would require Tennis Channel to continue to withstand the competitive injuries cited in the Commission's decision for an extended period of time pending the conclusion of judicial review, when it has already suffered from that discrimination for more than three years.<sup>89</sup>

Tennis Channel has no mechanism under the program carriage rules for seeking compensation for the past harms it has endured from Comcast's discrimination. It cannot recover lost subscriber fees, advertising revenues, or monetary relief. And it cannot retroactively correct the various impairments it has suffered on its ability to compete for viewers, advertising, and programming rights. Its only option at this point is to obtain prospective relief against Comcast's continued discrimination. And each day that Tennis Channel is denied that relief is another day that Tennis Channel is harmed without any possibility of being made whole.

This harm exceeds simple monetary loss. The premise of Section 616, and of the Commission's application of it to these facts, is that discriminatory carriage can irreparably impact an independent network's ability to compete. The Commission has determined that Comcast's conduct has done precisely that to Tennis Channel. Allowing Comcast to continue its discrimination pending exhaustion of appellate review will only compound the harm from this illegal conduct, and it would constitute a tangible reward to Comcast that in critical respects would vindicate its decision to violate the law.

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<sup>88</sup> Stay Petition at i-ii, 2, 22, 27.

<sup>89</sup> This is far more onerous than asking Tennis Channel to wait a few months for Commission review of the Initial Decision, and thus, contrary to Comcast's claim in its Stay Petition, the arguments Comcast made to the Commission earlier this year cannot simply be recycled. *See, e.g.*, Stay Petition at i, 2, 23.

**D. The Public Interest Would Be Disserved By Allowing Comcast To Continue To Engage In Anticompetitive Discrimination.**

The public interest lies squarely in favor of prompt compliance with Section 616. Comcast's arguments to the contrary are based not on any specific facts of this case but rather on a fundamental disagreement with these interests. Congress enacted Section 616 with the express goal of promoting competition and diversity in programming by preventing MVPDs from favoring their own networks over unaffiliated networks.<sup>90</sup> Congress went further and determined that, in light of the importance of the public interest goals underlying Section 616, Section 616 complaints should be resolved promptly through "expedited review."<sup>91</sup> The Commission's rules and the Media Bureau's Hearing Designation Order implement this goal by expressly holding that the Initial Decision would become effective immediately upon release.<sup>92</sup> The Commission chose to delay briefly Comcast's obligation to comply only to ensure the Commission had adequate time to provide sufficient guidance to the parties and to future litigants on the issues adjudicated and remedies prescribed — and it did so with an express warning to Comcast that it should be prepared to comply.<sup>93</sup>

It would be fundamentally at odds with these legislative and regulatory policy interests to allow further delay. Comcast's discrimination has extended for more than three years. Every body charged with reviewing Comcast's conduct — from the ALJ to the Enforcement Bureau, and now the full Commission on the basis of a full trial record — has

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<sup>90</sup> See Pub. L. No. 102-385, 106 Stat. 1460, § 2 (1992); 2011 Program Carriage Order ¶ 32.

<sup>91</sup> 47 U.S.C. § 536(a)(4).

<sup>92</sup> 47 C.F.R. §§ 76.10(c)(2), 76.1302(g)(1); HDO ¶ 23 n.119.

<sup>93</sup> Conditional Stay Order ¶ 5 n.22.

found discrimination so serious it merits the fullest sanction allowed by law. On the facts of this case, delay cannot be squared with the core purposes of Section 616.

Comcast argues that a delay is appropriate because implementation would require it to raise prices for its customers, but it has made no showing of that assertion nor addressed the offsetting benefits from carrying Tennis Channel broadly. And it ignores the fact that it has any number of options to lower its costs, including by paying itself [REDACTED] than the multiples it pays Golf Channel and Versus for carriage — each of which is individually roughly [REDACTED] [REDACTED] to carry broadly than Tennis Channel.<sup>94</sup>

Comcast's other public interest arguments merely re-hash its arguments on the merits. But Comcast does not address the fact that compliance with the Order would offer Comcast customers an additional channel, and thus added programming choice, rendering Comcast's speculative assertions about customer frustration and loss of goodwill entirely pretextual.<sup>95</sup> Instead Comcast argues that minimal disruption for [REDACTED] of Comcast's 22.1 million subscribers somehow outweighs the benefits of additional programming choice for its remaining [REDACTED] subscribers who will suffer no disruption at all. But even assuming a small subset of Comcast's viewers experience initial inconvenience by the addition of Tennis Channel to their lineup — a blanket assertion for which Comcast has offered no evidentiary support — “any short-term disruption that Comcast viewers might experience is outweighed by

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<sup>94</sup> See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Proposed Findings of Fact and Conclusions of Law of The Tennis Channel, Inc. ¶ 217 (Jun. 7, 2011); see also Order ¶ 78.

<sup>95</sup> See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Enforcement Bureau's Comments on Conditional Petition for Stay ¶ 6 (Feb. 6, 2012). (“There is no merit to Comcast's claim that frustration and confusion among its viewers supports a stay of the [carriage remedy]. Whether there would be any such confusion or frustration at all is speculative, given that cable companies modify their channel lineups with relative frequency.”).

the long-term benefits they would enjoy from the diversity in programming brought about by implementing the [carriage remedy].”<sup>96</sup>

Comcast essentially concedes the benefits of programming diversity by expressing concern that its customers would be upset if Tennis Channel were removed from its lineup in the unlikely event that Comcast prevails on appellate review. If additional programming choice is not a positive good for consumers, Comcast cannot explain why reducing channel options would disrupt “settled expectations” and cause customer frustration.

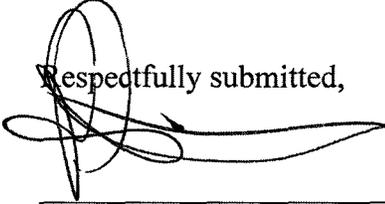
In light of the important interests served by prompt resolution of program carriage complaints, and Comcast’s inability to offer any countervailing interests that justify the extraordinary relief of a stay, Comcast’s request to further defer its compliance with the law should be rejected. Grant of a stay would, in fact, reward Comcast for predatory and unreasonable behavior that is flatly prohibited by Section 616 and the Commission’s program carriage rules.

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<sup>96</sup> *Id.*

**Conclusion**

For the reasons set forth above, Tennis Channel respectfully requests that the Commission deny Comcast's Petition for Stay and require that Comcast comply fully and promptly with the remediation prescribed in the Commission's July 24, 2012 Order.

Respectfully submitted,  


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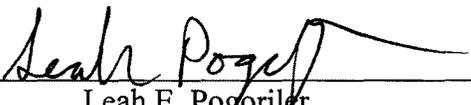
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**

To: The Commission

**FEB - 6 2012**

Federal Communications Commission  
Office of the Secretary

**OPPOSITION TO COMCAST'S CONDITIONAL PETITION FOR STAY**

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## SUMMARY

In 2009, The Tennis Channel, Inc. (“Tennis Channel”) asked Comcast Cable Communications, LLC (“Comcast”) to carry it on terms that fairly reflected the material improvements it has made in its quality and service since its carriage on Comcast systems began, and that were consistent with the broader distribution that Comcast afforded to similarly situated networks that it owned. To date, Comcast has refused to provide Tennis Channel with the fair carriage its performance merits, instead continuing to discriminate against Tennis Channel by providing it with materially poorer terms of carriage than the [REDACTED] carriage it provides to its similarly-situated sports channels, Golf Channel and Versus. Comcast also continues to provide discriminatorily favorable carriage to other affiliated sports networks as it acquires equity in them.

The Presiding Judge and the Commission’s Enforcement Bureau have now found, following a full hearing, that Comcast is discriminating against Tennis Channel in violation of Section 616. The Presiding Judge found that Comcast’s discriminatory treatment of the network unreasonably restrains its ability to compete, and he ordered that Comcast stop discriminating “as soon as practicable.” Rather than comply with that directive, and despite the repeated findings that it has violated the law, Comcast asks the Commission to sanction further discrimination while Comcast pursues a legal attack that does not so much challenge the application of Section 616 in this circumstance as it does the Commission’s very authority to regulate program carriage discrimination. Tennis Channel respectfully requests that the Commission reject that request — which is inconsistent with the foundational purposes of Section 616 and unjustified on these facts — and instead order Comcast to comply with the Initial Decision’s appropriate carriage and channel placement remedies now.

Comcast first contends that the Administrative Procedure Act (“APA”) requires a stay — arguing that it is unlawful for the Commission to allow *any* staff order under delegated authority to become effective unless the full Commission first approves it. That contention is contrary to established law and longstanding Commission practice. Indeed, the Commission has the authority, which it has exercised here, to make the Media Bureau’s Hearing Designation Order (“HDO”) and the Initial Decision effective upon release. Nothing in the APA prevents this practice — a practice that the Commission and two appellate courts have upheld. The APA provision on which Comcast relies governs the circumstances in which parties to administrative actions are entitled to judicial review, an entirely separate question from whether those actions are legally effective, and the provision does not in any event apply to this case.

Comcast’s other arguments for a stay fare no better. The stay that Comcast seeks is an extraordinary form of relief that the Commission would grant only if Comcast showed that all of the following factors are “heavily tilted” in favor of its grant: (1) it is likely to succeed on the merits; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm Tennis Channel; and (4) a stay would serve the public interest. Far from justifying a stay, any fair analysis of these factors only reinforces the need for prompt compliance.

*First*, Tennis Channel, not Comcast, is likely to succeed on the merits. Based on a careful analysis of an extensive documentary record and lengthy witness testimony, the

Presiding Judge issued a carefully-reasoned Initial Decision. That decision, which was consistent with the Media Bureau's *prima facie* findings and the Enforcement Bureau's conclusions following the hearing, concluded that Tennis Channel, Golf Channel, and Versus are similarly-situated within the meaning of Section 616, competing for viewers, advertisers, and even programming. Despite this similarity, Comcast grants below-market carriage to Tennis Channel and [REDACTED] carriage to Versus and Golf Channel (along with a series of other benefits not available to unaffiliated channels). The decision explicitly rejected as pretexts the justifications Comcast continues to put forward for its discrimination, all of which were undermined or contradicted by its own documents and by the substantial weight of the evidence. And the decision properly found that Comcast's discrimination seriously harms Tennis Channel's ability to compete in a number of ways, including through the loss of the [REDACTED] [REDACTED] subscribers that Comcast unquestioningly grants to Versus and Golf Channel but denies to Tennis Channel, through the impact that suppressed carriage from the nation's largest provider has on Tennis Channel's ability to secure fair carriage from other MVPDs, and through its impact on Tennis Channel's competition for content and advertisers.

Comcast also contends that the Hearing Designation Order improperly resolved the question of whether Tennis Channel's complaint was timely filed and rendered it impossible for Comcast to obtain a fair hearing on its view that the complaint was not timely. But the Media Bureau properly found this to be a question of law, not fact, that was resolved readily by prior precedent and the plain language of the governing rule, and it correctly resolved the question itself. Tennis Channel filed its complaint within one month of delivering its pre-filing notice to Comcast, as specified by the rules, and within seven months of Comcast's rejection of its efforts to negotiate fair carriage. Under Section 76.1302(f)(1) of the Commission's rules and applicable Commission precedent, the complaint was timely.

As for Comcast's First Amendment argument, which the Commission in another context has called "oft-repeated (and oft-rejected)," the Initial Decision does not violate Comcast's rights. Comcast is already carrying Tennis Channel; it has already made an editorial judgment that it wants to carry tennis content — so much so, in fact, that it seeks tennis programming for Versus. Accordingly, the only interest at stake here — Comcast's financial interest in charging a discriminatory and unjustified fee to subscribers who wish to receive Tennis Channel — is not an interest that is protected by the First Amendment.

Even if the First Amendment were implicated here, the Initial Decision survives intermediate scrutiny, which is the proper test that courts and the Commission have used to evaluate this type of regulation under the First Amendment. Comcast cannot plausibly assert that the Initial Decision seeks to favor or to disfavor particular speech based on its content. And like Section 616, the Initial Decision serves important government interests and does not burden speech more than necessary to achieve those interests.

*Second*, Comcast has not shown that it would suffer irreparable injury absent a stay. In support of its claim that a change in Tennis Channel's carriage would cause such injury, Comcast seeks to present new evidence on that question that cannot properly be introduced now. Comcast waived a presentation of this evidence below where it would have been subject to fair

review and challenge by Tennis Channel, even though both the Complaint and the HDO made clear that this issue was to be presented to the Presiding Judge. But even if this evidence were considered, it simply establishes that compliance requires Comcast to do no more than what it does every day — adjust line-ups and modify the tiering and channel location of program services. The record is replete with examples of Comcast's ability, when it has chosen, to do precisely what it disclaims the ability to do for Tennis Channel.

*Third*, the absence of irreparable injury to Comcast stands in stark contrast to the ongoing harm that Tennis Channel will suffer if Comcast can continue to discriminate while it seeks review of every aspect of the Initial Decision. For nearly three years, Tennis Channel has been competitively disadvantaged by Comcast's discrimination. The Initial Decision establishes the magnitude of that harm. Section 616 as implemented does not allow Tennis Channel compensation for the effects of Comcast's past discrimination, but it requires prompt going-forward relief now that Comcast's misconduct has been adjudicated, a proposition especially true in light of the Presiding Judge's imposition on Comcast of the maximum forfeiture available to him because of the egregiousness of Comcast's actions. To delay further would perpetuate the very harm that Section 616 was enacted to prevent.

*Fourth*, the public interest goals that underlie the program carriage rules will continue to be disserved if Comcast is permitted to delay compliance with the law through continued litigation. Violations of the program carriage rules undermine the public's interest in diversity and competition in the video programming market. Especially in light of the import of these public interest objectives, Comcast's unsupported and self-serving statements that viewers will be harmed if Comcast allows them to receive Tennis Channel without paying an excessive and discriminatory fee fall far short of justifying the extraordinary relief of a stay.

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**BACKGROUND**

Tennis Channel is a national cable sports network launched in 2003, dedicated to airing tennis and tennis-related programming.<sup>1</sup> Two years after its launch, the network signed a carriage contract with Comcast, the nation’s largest distributor. That agreement gives Comcast flexibility regarding the level of carriage to provide Tennis Channel [REDACTED]

[REDACTED].<sup>2</sup>

Exercising that discretion, Comcast launched Tennis Channel on its pay-extra sports tier — a tier that reaches only [REDACTED] of Comcast’s subscribers and on which only unaffiliated networks are carried exclusively.<sup>3</sup>

Comcast wholly or partly owns several sports networks, including Golf Channel and Versus, each of which it carries on its Expanded Basic/Digital Starter tier, reaching [REDACTED] of its subscribers.<sup>4</sup> Comcast has consistently guaranteed those networks [REDACTED] carriage and prime channel positioning since their launch, never

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<sup>1</sup> *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 11D-01, ¶ 5 (rel. Dec. 20, 2011) [hereinafter “Initial Decision”]; Tennis Channel Ex. 14, Written Direct Testimony of Ken Solomon, ¶ 5 [hereinafter “Solomon Written Direct”].

<sup>2</sup> Initial Decision ¶ 16; Tennis Channel Ex. 144 § 5.1.3, 6.2.1; Bond Tr. at 1985:20-1986:3. See also Solomon Tr. at 257:8-20; Bond Tr. at 2158:18-2159:18(acknowledging that the agreement did not specify a level of carriage, allowing the network “to grow and to move up”).

<sup>3</sup> Initial Decision ¶¶ 14, 57; Tennis Channel Ex. 130; Bond Tr. at 2012:14-2013:1, 2198:15-21, 2292:1-2293:12.

<sup>4</sup> Initial Decision ¶¶ 12, 54; Tennis Channel Ex. 16, Written Direct Testimony of Hal Singer, ¶ 20 & tbl. 1 [hereinafter “Singer Written Direct”]; Tennis Channel Exs. 100, 131, 132; Bond Tr. at 1950:18-1951:17, 2096:8-17, 2115:21-2116:12, 2160:19-2161:21, 2120:5-2220:15.

questioning whether their performance justifies this treatment or the high cost of these networks.<sup>5</sup>

During the years following its launch on Comcast, Tennis Channel invested heavily in its service, obtaining rights to virtually every major tennis tournament in the world and to all four tennis Grand Slam tournaments, hiring well-recognized tennis figures as commentators, launching a high-definition service, and making other technical upgrades. After acquiring rights to the last Grand Slam, Tennis Channel in early 2009 presented a proposal to Comcast that included expanded carriage from Comcast.<sup>6</sup> On June 9, 2009, after protracted discussions, Comcast rejected Tennis Channel's offer, and the terms on which it was based, without making a counteroffer.<sup>7</sup> As the Presiding Judge recognized, Comcast's reasons for rejecting the offer were pretexts.<sup>8</sup>

On the basis of these and other facts established at the six-day hearing in this case, the Presiding Judge concluded that Comcast discriminates against Tennis Channel in favor of its similarly situated affiliates, Golf Channel and Versus, solely because of affiliation.<sup>9</sup> That

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<sup>5</sup> Initial Decision ¶¶ 53-54, 61, 66; Tennis Channel Ex. 100; Orszag Tr. at 1300:1-5, 1300:17-22.

<sup>6</sup> Initial Decision ¶ 19; Solomon Written Direct ¶¶ 5, 11-15, 20-21, 26-27; Tennis Channel Ex. 70; Solomon Tr. at 261:13-264:14, 267:1-271:6; Bond Tr. at 2172:17-2178:15, 2203:16-2204:3.

<sup>7</sup> Initial Decision ¶ 23; Solomon Written Direct ¶ 28; Bond Tr. at 2128:1-14, 2215:9-11.

<sup>8</sup> *See, e.g.*, Initial Decision ¶¶ 21-22 (characterizing Comcast's "field inquiry" as a "ploy to shore up its defense strategy"); ¶¶ 62-68 (concluding the carriage decisions of other distributors show that Comcast discriminates in favor of its networks and against Tennis Channel); ¶¶ 72-74 (rejecting Comcast's "year of launch" excuse because Comcast has granted favorable carriage to networks launched both before and after Tennis Channel); ¶¶ 75-78 (rejecting Comcast's cost-based arguments, in part because Golf Channel and Versus are significantly more expensive than Tennis Channel).

<sup>9</sup> Initial Decision ¶ 122.

discrimination, he found, unreasonably restrains Tennis Channel’s ability to compete in the cable marketplace generally, and against Golf Channel and Versus specifically, in violation of Section 616.<sup>10</sup> Accordingly, he ordered Comcast to cease discriminating and to afford Tennis Channel treatment equal to its own sports networks. Specifically, he required Comcast to carry Tennis Channel at the same level of carriage as and at channel positions comparable to those of Golf Channel and Versus.<sup>11</sup>

The Presiding Judge’s decision is consistent with the Enforcement Bureau’s post-hearing recommendation that Comcast be assessed the maximum fine allowable for willfully violating Section 616. It is also consistent with the Commission’s recent recognition in its Comcast-NBC Merger Order, based on the very Comcast channels at issue in this matter, that “Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons.”<sup>12</sup>

Despite the fact that Section 616 requires expedited action on complaints filed pursuant to it,<sup>13</sup> that the program carriage rules and the HDO expressly provide for the Initial Decision to “become effective upon release,”<sup>14</sup> and that the Initial Decision recognized the need

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<sup>10</sup> *Id.* ¶ 123.

<sup>11</sup> *Id.* ¶¶ 119-21, 126-27.

<sup>12</sup> *See Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Mem. Op. & Order, MB Docket No. 10-56, ¶ 117, Tech. App. ¶¶ 65-71 (FCC rel. Jan. 20, 2011) [hereinafter “NBCU Order”].

<sup>13</sup> *See* 47 U.S.C. § 536(a)(4).

<sup>14</sup> 47 C.F.R. §§ 76.1302(g)(1) (citations are to the version of the regulation in effect when this case began; the relevant language has not changed); *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, MB Docket No. 10-204, File No. CSR-8258-P, DA 10-1918, ¶ 23 n.119 (rel. Oct. 5, 2010) [hereinafter “HDO”].

for remediation “as soon as practicable,”<sup>15</sup> Comcast now seeks the Commission’s permission to continue violating the law, and it has refused to comply with the Initial Decision until it exhausts what appears to be an extended appeals strategy. Thus, it has opposed the Petition to Compel Compliance that Tennis Channel has been forced to file, and it has filed this alternate Conditional Petition for Stay.<sup>16</sup>

### ARGUMENT

Two years after Tennis Channel invoked program carriage rules that are intended to provide prompt relief, and after the Presiding Judge to whom the Commission delegated this case has found willful discrimination (supported by the same finding of the Enforcement Bureau), Comcast still seeks to delay ending its discrimination. But Comcast has failed to justify the stay it seeks while it continues to litigate this matter. Its Administrative Procedure Act (“APA”) argument misreads the statute and the law applying it, and the argument would fundamentally undermine the Commission’s ability to carry out its mission. Moreover, the interests that must be considered in justifying a stay, far from being “heavily tilted” in favor of a stay,<sup>17</sup> instead point directly to the importance of Comcast’s prompt compliance with the Presiding Judge’s equal treatment remedy. In short, the Commission should deny Comcast’s request and instead order Comcast to comply fully and promptly with the Initial Decision’s equal treatment remedy.

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<sup>15</sup> Initial Decision ¶ 127.

<sup>16</sup> See *Opposition to Tennis Channel’s Petition to Compel Comcast’s Compliance with Initial Decision*, at 11 (Jan. 25, 2012); *Comcast’s Conditional Petition for Stay*, at 11 (Jan. 25, 2012) [hereinafter “Stay Petition”].

<sup>17</sup> See *Implementation of Video Description of Video Programming*, 17 FCC Rcd. 6175, 6177 ¶ 6 (2002).

**I. REQUIRING COMCAST TO REMEDY ITS DISCRIMINATION PENDING COMMISSION REVIEW IS CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT.**

The HDO and the Commission's rules expressly provide that the remedy ordered in the Initial Decision became effective upon release.<sup>18</sup> Section 10(c) of the APA does not require otherwise. Comcast argues that under this provision, the Initial Decision must remain inoperative pending Commission review,<sup>19</sup> but this argument misreads the APA. The section on which Comcast relies<sup>20</sup> relates only to whether and when an agency action is reviewable in court; it does not in terms or effect purport to limit the agency's ability to take immediately effective action through delegated authority.<sup>21</sup> Comcast's contrary reading is unsupported by law and would undermine not just the program carriage rules, which make Initial Decisions effective upon release, but the entire basis on which the Commission conducts its day-to-day business.

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<sup>18</sup> See 47 C.F.R. §§ 76.10(c)(2), 76.1302(g)(1); HDO ¶ 23 n.119. Because the Initial Decision can be read only as complying with the mandate in the Commission's rules and the HDO requiring effectiveness upon release, *see* Initial Decision ¶ 127, Comcast's claim that Tennis Channel is filing an "exception" to the Initial Decision or seeking alteration of its terms, *see* Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 4-5 & nn.9-10, is unfounded.

Recognizing these rules, the Enforcement Bureau recently filed comments urging that "carriage in the manner specified in the [Initial Decision] should commence immediately." Enforcement Bureau's Comments on Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision, ¶ 3 (Jan. 25, 2012).

<sup>19</sup> Stay Petition at 7; Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 9-12.

<sup>20</sup> Comcast makes the same APA argument in both its Stay Petition and its Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision. Tennis Channel's response herein applies to both of Comcast's pleadings on this subject. Notably, in its Application for Review, Comcast failed to seek review of the Media Bureau's ruling that the Initial Decision "will become effective upon release and will remain in effect pending appeal," HDO ¶ 23 n.119.

<sup>21</sup> See 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes (continued...)")