

The Commission and two appellate courts already have rejected challenges like the one Comcast raises here. First, the U.S. Court of Appeals for the D.C. Circuit examined and upheld an FCC rule providing, like the rule at issue here, that orders issued under delegated authority are both effective upon issuance and subject to further Commission review. The court held that

the “effective but not final” procedure did not deprive appellant of the opportunity to challenge the assignment before the Commission and this Court. Rather, the procedure merely prevented appellant from insisting on the maintenance of the status quo pending review.²²

The court also held that “as the Commission’s rule represents a permissible construction of its organic statute, it is entitled to deference,” and that there was “no reason to set aside a practice that has been in effect for more than a quarter of a century.”²³ The Commission is entitled to the same deference here.

The Second Circuit recently denied an emergency stay on comparable facts.²⁴

Cablevision and an affiliated network challenged two Media Bureau orders requiring them,

of this section whether or not there has been presented or determined an application [for an appeal to superior agency authority] . . . , unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative.”)

²² *Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986).

²³ *Id.* at 114-115, 119. The Commission’s rules make the HDO and Initial Decision immediately effective in order to implement a statutory directive, in this case Section 616 and its mandate for expedited review. *See* 47 U.S.C. § 536(a)(4). The Commission’s interpretation of its statutory mandate and the applicable regulatory scheme is entitled to deference. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44, 866 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In enacting Section 616 (which emphasizes expedition) and the program carriage rules (which do the same), Congress and the Commission certainly were aware of the APA and its requirements; as Comcast itself says, government officials are presumed to know the law. Exceptions to Initial Decision, at 6 & nn.25-26 (Jan. 19, 2012) [hereinafter “Exceptions”].

²⁴ *See Cablevision Systems Corp. v. FCC*, No. 11-4104, Order, Doc. 86, (2d Cir. Nov. 11, 2011).

under the program access rules, to license their programming services to two competing MVPDs, arguing based on the APA provision cited by Comcast that “the order under review should not go into effect during the pendency of [ongoing] administrative appeals.”²⁵ The Commission’s brief outlined why Cablevision’s request for a stay was “foreclosed by the Commission’s longstanding interpretation of the Communications Act – an interpretation that has been upheld by the D.C. Circuit,” and it urged the court to reject Cablevision’s attempt to “invoke[] the general principles governing the finality of administrative decisions under Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704” to avoid the immediate effectiveness of the delegated decisions of FCC officials.²⁶ Comcast has offered no reason why the reasoning of the Commission, and its acceptance by courts, should be ignored. Nor has it even acknowledged the Commission’s clear stance on the issue and the deference to which that stance is entitled.²⁷

Although Comcast frames its argument as relating to the Administrative Law Judge’s authority, the legal consequence of the rule that it urges would be to fundamentally debilitate the Commission’s conduct of its day-to-day business. Under Comcast’s interpretation, *no* staff decision under delegated authority could become effective if a party sought review by the full Commission.²⁸ As Congress has recognized, the Commission must be able to delegate

²⁵ *Cablevision Systems Corp. v. FCC*, Emergency Request for a Stay Pursuant to the All Writs Act, Doc. 1, at 11 (Oct. 7, 2011).

²⁶ *Cablevision Systems Corp. v. FCC*, Opposition of FCC to Emergency Request for a Stay Pursuant to the All Writs Act, Doc. 51, at 16-19 (Oct. 20, 2011).

²⁷ The fact that the *WEAM* and *Cablevision* cases involved a bureau decision rather than an ALJ ruling is irrelevant, both because initial decisions are (like bureau decisions) subject to a statutory exhaustion requirement, and because an initial decision issued after extensive discovery and a full evidentiary hearing is entitled to at least as much weight and effectiveness as a bureau order.

²⁸ *See, e.g.*, 47 C.F.R. § 1.102(b); *id.* § 76.10(c)(2).

many of the voluminous tasks under its purview to staff in order for the agency to function properly.²⁹ The APA cannot be read to require the Commission to grind to a halt so that the full Commission can vote on every action taken by the staff before it can become effective.³⁰

II. THE FOUR-FACTOR STAY TEST UNDERScores THE NEED FOR PROMPT COMPLIANCE.

Comcast must satisfy a heavy burden to obtain a stay and thereby avoid compliance with the Commission's program carriage rules.³¹ "Both the courts and [the] Commission have made it abundantly clear that a stay of an administrative action is not an automatic right. It is extraordinary relief and will be granted only where the movant can

²⁹ For this reason, the Communications Act provides that, "[w]hen necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions." 47 U.S.C. § 155(c)(1) (excepting certain functions not applicable here). The ALJ's release of an initial decision after the issuance of an HDO is clearly an exercise of delegated authority. *See generally* 47 C.F.R. § 0.341(f).

³⁰ Indeed, in a recent program carriage rulemaking, the Commission created a procedure for granting immediately effective temporary relief to networks, before their complaints have even been resolved or heard by an ALJ, in order to enforce Section 616. *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, Part III*, MB Docket No. 07-42, FCC 11-119, 76 Fed. Reg. 60652, ¶ 27 (Sept. 29, 2011). The Commission noted that "[t]he Supreme Court has affirmed the Commission's authority to impose interim injunctive relief . . . pursuant to Section 4(i) [of the Communications Act]." *Id.* ¶ 26 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968)); *see also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions."). The case for relief is even stronger here, since it follows a full hearing completed at the direction of the Commission and the Media Bureau's action on delegated authority.

³¹ As the moving party, Comcast has the burden of proof in support of its request. *See Game Show Network, LLC v. Cablevision Systems Corp.*, Order, File No. CSR-8529-P, 2011 WL 6096674, DA 11-1993, ¶ 10 (Dec. 7, 2011); *Amendment of Part 22 of the Commission's Rules*, Order, 8 FCC Rcd 5087, 5087 ¶ 2 (1993).

demonstrate [that it has satisfied four separate criteria].”³² Specifically, Comcast must 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 substantially harm other interested parties; and (4) a stay would serve the public interest.³³ As the Commission has explained, “the test for a stay requires a balancing of all factors, and only when they are ‘heavily tilted in the movant’s favor’ is the extraordinary relief of a stay appropriate.”³⁴

Comcast makes no effort to meet this standard, arguing with respect to the first element that it need only show that “a serious legal question is presented”³⁵ and that the issues raised “bear further analysis.”³⁶ Longstanding Commission precedent is to the contrary,³⁷ and

³² *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 F.C.C.2d 648, 648 ¶ 3 (1972).

³³ In determining whether to stay the effectiveness of one of its rules, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington 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, ¶ 9 (2006).

³⁴ *Implementation of Video Description of Video Programming*, 17 FCC Rcd. at 6177 ¶ 6.

³⁵ Stay Petition at 8-9 (citing *Wash Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).

³⁶ *Id.* (citing *Brunson Commc’ns, Inc. v. RCN Telecom Servs., Inc.*, 15 FCC Rcd 12883, ¶ 5 (2000)).

³⁷ The Commission will not grant a stay unless the petitioner can show that success on appeal is “probable” — a threshold that Comcast cannot meet. See *Wash Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Indeed, in an analogous context Comcast itself has argued that the first criterion requires a showing of a “substantial” likelihood of success on the merits. See Comcast *Ex Parte* Letter, M.B. Docket No. 07-42, at 3 (July 25, 2011).

The line of case law that Comcast cites out of context instead stands for the proposition that the less strong a petitioner’s chances for success on the merits, the *stronger* a showing the petitioner must make that “the balance of harms weigh in his favor.” *Time Warner Cable, A Division of Time Warner Entm’t Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016, (continued...)

the fact that an issue might “bear further analysis” is a far cry from meeting the heavy standard that would warrant an order permitting Comcast to continue to engage in its discriminatory carriage of Tennis Channel.

A. Comcast Fails To Establish That It Is Likely To Succeed on the Merits.

Comcast cannot credibly argue that it is likely to prevail in defending its discriminatory carriage of Tennis Channel under Section 616. Comcast’s Stay Petition simply resurrects arguments that the Media Bureau, Enforcement Bureau and the Chief Administrative Law Judge (“ALJ”) explicitly rejected, generally without acknowledging, let alone addressing, the reasons why those arguments were rejected.³⁸ The Commission typically declines to find a probability of success on the merits where the merits arguments have already been fully addressed and decided³⁹; here, after the Media Bureau made a *prima facie* finding of discrimination and rejected Comcast’s time-bar defense, both the Presiding Judge and the Enforcement Bureau thoughtfully addressed the issues and explicitly found willful discrimination.

¶ 9 (2006) (“[T]he degree of harm that a petitioner must demonstrate varies with its chances for success on the merits. . . . [t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in this favor; the less likely he is to win, the more need it weigh in his favor.”).

As described in Section II.B, *infra*, the relatively routine, cost-of-doing-business expenses that Comcast has cobbled together fail to meet even a minimum threshold showing of “irreparable harm,” much less any sort of *heightened* standard.

³⁸ See, e.g., HDO ¶¶ 11-16; Enforcement Bureau’s Comments (July 8, 2011); Initial Decision ¶¶ 62-78, 102-04.

³⁹ See *APCC Services, Inc. v. Netwikip, 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*.”).

1. Tennis Channel's Complaint Was Timely Filed.

Comcast's lead attempt to show a likelihood of success is not an actual merits argument; instead, Comcast leads with a procedural timeliness argument that is plainly at odds with the law and irrational in application. Specifically, Comcast asks the Commission to misapply the one-year time limit rule so as to allow Comcast (and presumably all other MVPDs) to discriminate freely at any point after the first year of a contract with an unaffiliated program service, and to do so with immunity from Section 616. This argument, along with its primacy in Comcast's Stay Petition, perfectly signals Comcast's broader inability to establish a likelihood of success on the merits.

As demonstrated more fully in Tennis Channel's opposition to Comcast's application for review of the HDO, and as the Media Bureau properly held, Tennis Channel's complaint was timely.⁴⁰ As required by the Commission's rules, the complaint was filed within a month of Tennis Channel's provision to Comcast of the requisite prefiling notice⁴¹; in other words, it was timely filed "within one year of the date on which . . . [a] party has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the [program carriage] rules."⁴² The complaint also was filed less than a year after the

⁴⁰ See generally *Opposition to Application for Review of Comcast Cable Communications, LLC* (Feb. 6, 2012) [hereinafter "Opposition to Application for Review"]; HDO ¶ 11.

⁴¹ Program Carriage Complaint, ¶ 7 & Ex. 29 (Jan. 5, 2010) [hereinafter "Compl."]; see also 47 C.F.R. § 76.1302(b), (f)(3). Section 76.1302(f) has since been moved unaltered to Section 76.1302(h).

⁴² 47 C.F.R. § 76.1302(f)(3); 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, ¶¶ 38, 70, 105 (2008) [hereinafter "*Omnibus HDO*"]. Subsection (f)(1) of the rule, requiring complainants to bring their claims within one year of the execution of a contract, is not applicable here. Comcast argues that Tennis Channel's "one-year window opened in 2005, when it entered its still-operative carriage agreement with Comcast." Stay Petition at 10. However, as has been clear (continued...)

act of discrimination about which Tennis Channel complains — Comcast’s June 9, 2009 denial of Tennis Channel’s request for expanded carriage, following Tennis Channel’s presentation of a clear case of improvements putting the network at or above the level of Golf Channel and Versus — further confirming the timeliness of the complaint under governing precedent.⁴³

Comcast advances an unsupportable contrary reading of the time-limit rule that would require any claim relating to a contract to be brought within one year of signing the contract, regardless of how much later during the term of the contract the actual discrimination occurred, or when the demand for fair carriage took place. This misreading of the rule would imperil the very networks Section 616 seeks to protect. In Comcast’s view, whenever a new network enters into a carriage agreement affording the distributor tiering flexibility (to allow the network’s distribution to improve as it develops), the distributor could (as Comcast has done here) refuse to expand the network’s distribution or engage in any other form of predatory behavior after the first year of the contract, without regard to the network’s improvements and even as it gives its similarly situated affiliated services better treatment for the purpose of protecting them against the new network’s competition. Comcast would render a network in this situation without remedy under Section 616; if the network sues in the first year, the distributor

since the outset of this case, and as the Media Bureau found, Tennis Channel is not challenging the terms of the 2005 affiliation agreement. *See, e.g.*, Reply ¶¶ 61, 64 (Mar. 23, 2010). Comcast has offered no plausible reason why Tennis Channel would have [REDACTED], and it has utterly failed to confront the fact that Tennis Channel is [REDACTED] based on developments that occurred after the date of the documents upon which Comcast relies. More importantly, the law does not permit a distributor to discriminate at will simply because it has a contract that gives it carriage discretion. *See* Opposition to Application for Review, at 3-4.

⁴³ *See* HDO ¶¶ 11-16; *Omnibus HDO* ¶¶ 69-70, 102-105; *see also* Compl. ¶¶ 51-52; Reply at 3-4; Solomon Written Direct ¶ 28; Comcast Ex. 78, Gaiski Written Direct ¶ 17; Bond Tr. at 2128:1-14, 2215:9-11; Gaiski Tr. at 2413:1-16.

could be expected to claim that the network had not developed enough to be treated in the same way as affiliated networks receiving broader carriage, and if it waits until it had achieved significant growth, it would, in Comcast's view, have waited too long. Barring a network's claim as inevitably either too early or too late would "frustrate enforcement of the statute and rules" and is not the law.⁴⁴

Unable credibly to challenge the merits of the Media Bureau's timeliness ruling, Comcast claims that it was prevented by the Media Bureau's HDO from presenting evidence that would have been relevant to the timeliness issue, in violation of its due process rights.⁴⁵ But due process in these circumstances simply requires notice and an opportunity to be heard.⁴⁶ Comcast was aware of the precedents governing timeliness and raised the argument before the hearing designation in its pleadings to the Media Bureau; indeed, it specifically requested in its Answer that the Media Bureau rule on the question of timeliness and attached to its Answer declarations and documents (among nearly forty exhibits) that addressed the timing of the parties' negotiations.⁴⁷ It thus had ample opportunity to be heard on the timeliness issue. The Media Bureau considered Comcast's argument on the basis of the pleadings, and it rejected Comcast's

⁴⁴ *Omnibus HDO* ¶ 70; *see also id.* ¶ 72 ("Whether or not Comcast had the right to [make a particular tiering decision] pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules.").

⁴⁵ *See* Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 12-14. This argument in reality is an appeal from the HDO and should have been raised in Comcast's application for review of the HDO. In the event that the Commission chooses to consider it, Tennis Channel address it here.

⁴⁶ *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *see also Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 205 (D.C. Cir. 2001) (due process is a flexible standard that depends on the situation).

⁴⁷ *See* HDO ¶¶ 11-16; *see also* Comcast Answer ¶¶ 30-37 & Exs. 1, 14, 18.

theory as a matter of law.

Comcast's attempt to argue new evidence — evidence that simply shows that Tennis Channel was aware of the Commission's ongoing program carriage rulemaking proceeding and its rights under the existing rules to receive fair carriage, but that it first sought to fully build its network to achieve that carriage through negotiations⁴⁸ — does nothing to impugn the Media Bureau's ruling. It certainly does not support a Due Process argument.⁴⁹

2. The Initial Decision Applies The Correct Legal Framework To Find Discrimination in Violation of Section 616.

It is perhaps unusual for the Commission to have available for its review in a stay context each party's complete statement of its position regarding the merits of the decision subject to appeal. Here, however, both Comcast's Exceptions and Tennis Channel's Reply to Comcast's Exceptions are before the Commission, and the record is thus complete on that subject. Tennis Channel incorporates its Reply to Comcast's Exceptions herein and will limit

⁴⁸ Comcast claims that it "first discovered" relevant evidence after the HDO issued. *Opposition to Tennis Channel's Petition to Compel Comcast's Compliance* at 13-14. Comcast also argues that testimony and documents adduced at trial established that Tennis Channel was ready to bring a case under Section 616 at least a year before it actually did so, and that it should not be precluded from using that evidence to challenge the Media Bureau's holding. *See id.*; Solomon Tr. 269:20-271:6; Comcast Exs. 24, 125, 126, 136, 137, 271, 522, 626. The documents and testimony excerpts upon which Comcast relies in making this argument do not establish that Tennis Channel delayed bringing a program carriage claim. They simply indicate that Tennis Channel made a business case to Comcast once it had made significant programming acquisitions and other improvements, and that Tennis Channel was aware of the relevant regulatory framework. *See Opposition to Application for Review*, at 4-5 & n.18.

⁴⁹ Due process does not require additional and unnecessary procedures, particularly where, as here, the facts are clear and the result is compelled as a matter of law. *See generally Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Nat'l Council of Resistance of Iran*, 251 F.3d at 209. Courts, of course, routinely resolve statute of limitations questions on the basis of the complaint alone, the full set of pleadings, or the pleadings plus written evidence. *See Fed. R. Civ. P. 8, 12, 56; see also Fed. R. Civ. P. 56(a).*

itself in this Opposition to a brief restatement of some of the key points establishing why Comcast cannot claim any likelihood of success on the merits.

As explained more fully in Tennis Channel's Reply to Comcast's Exceptions, Comcast's critiques of the Initial Decision have little to do with the factual record in this case or with the Presiding Judge's careful application of the law to that record. Instead, Comcast takes issue with the statute itself, offering an interpretation of Section 616 under which no set of facts would ever be sufficient to show discrimination. That Comcast disagrees with Congress's judgment to adopt Section 616 provides no justification for staying effectiveness of the Initial Decision.⁵⁰ Under a fair application of Section 616, Tennis Channel satisfied each element of the statute.

Tennis Channel, Golf Channel, and Versus Are Similarly Situated. The Presiding Judge correctly concluded that "Tennis Channel, Golf Channel, and Versus are similarly situated networks."⁵¹ As demonstrated in Tennis Channel's Reply to Comcast's Exceptions, which contains a more extended discussion of the relevant factors and Comcast's objections, this conclusion was clearly correct.⁵² The networks' similarity is apparent from their nature — they are all "national cable networks," offering "the same *genre* . . . of programming" in the "year-round sports" programming category.⁵³ "Tennis Channel and Golf Channel each are devoted to

⁵⁰ See generally Reply to Exceptions, Sections I.A, I.B, I.C.2 (outlining flaws in Comcast's efforts to nullify Section 616) (Feb. 6, 2012).

⁵¹ Initial Decision ¶ 24; see also *id.* ¶¶ 24-52, 106.

⁵² See generally Reply to Exceptions at Section I.B.

⁵³ Initial Decision ¶ 25; Brooks Tr. at 703:5-1; see generally Reply to Exceptions at Section I.B.1.

the broadcast of a single sport with ‘high levels of audience participation.’”⁵⁴ And Tennis Channel and Versus “have a history of sharing or seeking rights to the same sporting event that continues to the present.”⁵⁵

Moreover, the Presiding Judge found additional, significant similarities.⁵⁶ The three networks “attract[] similar types of viewers”: affluent adults with a skew toward males.⁵⁷ They also “target the same advertisers,”⁵⁸ a conclusion Comcast does not challenge before the Commission. As the record established, in 2010, ██████████ of Golf Channel’s revenue from its 30 largest non-endemic advertisers, and ██████████ of Versus’s, came from companies that had recently either purchased or considered formal proposals for purchasing advertising on Tennis Channel⁵⁹; moreover, out of Tennis Channel’s 30 largest advertisers in 2010, ██████████ advertised on Golf Channel that year, and ██████████ advertised on Versus.⁶⁰ The Presiding Judge also found, based on a “systematic ratings comparison of the three channels” by Tennis Channel’s media expert, that the three networks “have remarkably similar ratings” among viewers who can receive all three.⁶¹ Comcast did not counter this proof of ratings similarity with any ratings evidence of its own.

⁵⁴ Initial Decision ¶ 25 (quoting Singer Written Direct ¶ 28).

⁵⁵ *Id.* ¶ 26.

⁵⁶ *See generally* Reply to Exceptions at Sections I.B.2 - I.B.5.

⁵⁷ Initial Decision ¶¶ 24, 37-39, 42.

⁵⁸ *Id.* ¶¶ 24, 40, 45-47, 106

⁵⁹ *Id.* ¶ 45; *see also* Tennis Channel Ex. 15, Herman Written Direct ¶¶ 8-9 & Ex. B.

⁶⁰ Initial Decision ¶ 46; *see also* Herman Written Direct ¶ 10 & Ex. C.

⁶¹ *Id.* ¶¶ 48-49.

These findings were bolstered by Comcast documents showing that it views the channels as comparable.⁶² And they were reinforced by the Presiding Judge's conclusions that the expert testimony Comcast offered from Michael Egan in an effort to distinguish the networks was "not credible," "inconsistent," and "concocted for this case."⁶³

The Initial Decision Properly Found Discriminatory Treatment. Comcast also faults the Initial Decision for "fail[ing] to apply the proper analysis to determine whether Comcast deliberately discriminated 'on the basis of' affiliation."⁶⁴ But as demonstrated in Tennis Channel's Reply to Comcast's Exceptions, the Presiding Judge properly found that Comcast deliberately discriminates on the basis of both affiliation and non-affiliation.⁶⁵

First, as the Presiding Judge found, the record provides ample evidence of discrimination.⁶⁶ Versus and Golf Channel enjoy the broadest carriage from Comcast, reaching [REDACTED] of Comcast's customers, and they have received this broad carriage specifically because Comcast wanted its affiliated networks to succeed, even when they were struggling.⁶⁷ Similarly, when Comcast has acquired equity interests in other sports networks, it

⁶² See Reply to Exceptions at Sections I.B.5 - I.B.6; Tennis Channel Ex. 82, at COMTTC_00010949; Egan Tr. at 1744:5-18; Tennis Channel Ex. 39, at COMTTC_00009009; [REDACTED]; Donnelly Tr. at 2547:14-2548:1; Tennis Channel Ex. 67; see also Donnelly Tr. at 2549:8-2550:2.

⁶³ Initial Decision ¶¶ 27-36; Reply to Exceptions at Section I.B.6.

⁶⁴ Stay Petition at 15.

⁶⁵ See generally Reply to Exceptions at Section I.C.

⁶⁶ See generally Reply to Exceptions at Sections I.C.1 & I.C.3.

⁶⁷ Initial Decision ¶¶ 54, 55 n.192 (citing Tennis Channel Exs. 61 & 21); *id.* ¶ 58; Orszag Tr. at 1275:8-19; Bond Tr. at 2225:21-2228:8, 2234:15-2235:7; 2297:12-20; Gaiski Tr. at 2419:2-5.

has promptly expanded their carriage.⁶⁸ Comcast carries Tennis Channel, meanwhile, on its narrowly distributed sports tier — a tier to which no Comcast-affiliated channel has ever been relegated.⁶⁹ Comcast also gives its networks the most favorable channel placement, while it has often restricted Tennis Channel to channel numbers in the 700s.⁷⁰

This different treatment, the Presiding Judge found, is motivated by Comcast’s decision to act on its “clear economic incentive to retain popular *unaffiliated* networks on the sports tier” and to “protect its affiliated sports networks.”⁷¹ The record provided ample evidence proving that Comcast acted on this incentive, showing that Comcast repeatedly took special steps for its channels only: it treats them like “siblings” instead of “strangers,”⁷² and it grants them special benefits by virtue of affiliation.⁷³ Comcast’s incentive to discriminate against Tennis Channel is has been heightened by its desire to acquire tennis programming for Versus that Tennis Channel also sought.⁷⁴ Comcast itself acknowledged that Tennis Channel’s “distribution issues” — caused in large part by Comcast — harmed the network’s ability to compete with Comcast for this very content.⁷⁵

⁶⁸ Initial Decision ¶ 59.

⁶⁹ *Id.* ¶¶ 54, 27, 77 & n.256. *Cf.* Tennis Channel Ex. 9, *NFL Enters. LLC v. Comcast Cable Comms., LLC*, Tr. of R. at 1911:16-1912:6 (testimony of Jeffrey Shell that that carriage on the sports tier is “not viable” for an advertising-supported network).

⁷⁰ *Id.* ¶¶ 53, 61.

⁷¹ *Id.* ¶¶ 79-80.

⁷² *Id.* ¶¶ 55, 60-61.

⁷³ *See id.* ¶¶ 60-61.

⁷⁴ *See, e.g., id.* ¶ 26; Tennis Channel Exs. 32, 34, 35, 40, 41, 179; Orszag Tr. at 1407:3-9; Donnelly Tr. at 2626:19 - 2627:17.

⁷⁵ *Id.*

Comcast's response is a futile attempt to redefine the discrimination standard.⁷⁶ It does so by glaringly ignoring its favorable, cost-is-no-object treatment of its affiliated networks; by inventing a smoking-gun standard of proof of "deliberate discrimination" that could rarely be met and that is contrary to the law⁷⁷; and (as Tennis Channel has shown) by incorrectly suggesting that the affiliation agreement between it and Tennis Channel negates its obligation to comply with Section 616.⁷⁸

Comcast also seeks to justify its carriage of Tennis Channel by comparing its carriage level to those of only selected MVPDs.⁷⁹ But the Presiding Judge correctly rejected this argument, holding that this analysis is defective because it "ignore[s] a sizable segment of the industry, *e.g.*, telephone companies and satellite MVPDs — indeed, the very MVPDs that Comcast has recognized to be its chief competitors."⁸⁰ When Comcast's market test is properly applied, and *all* of the major MVPDs in the industry are considered, Comcast's discrimination is plain: Comcast's penetration rate for Tennis Channel is dwarfed by the industry average; at the same time, its favoritism for Golf Channel and Versus is clear.⁸¹ Even Comcast's internal

⁷⁶ See generally Reply to Exceptions at Section I.C.2.

⁷⁷ In its *Second Report and Order*, the Commission recognized that direct "documentary evidence . . . may not exist at all," *Second Report & Order* ¶¶ 12-13, and that an unaffiliated network can show affiliation-based discrimination "by providing . . . circumstantial evidence of discrimination," *id.* ¶¶ 12-14 (permitting complainants to establish affiliation-based discrimination by "provid[ing] evidence that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD" and that "the defendant MVPD has treated . . . the complainant . . . differently than the similarly situated [affiliate] with respect to the selection, terms, or conditions of carriage").

⁷⁸ See generally Tennis Channel Opp. to Comcast App. for Review (Feb. 6, 2012).

⁷⁹ Exceptions at 14-16, 18-19.

⁸⁰ Initial Decision ¶ 68; see generally Reply to Exceptions at Section I.C.3.

⁸¹ Singer Written Direct ¶ 54, tbl. 6; see also Initial Decision ¶ 66 (citing Mr. Orszag's acknowledgment that Comcast's penetration rates for Golf Channel and Versus are (continued...))

variation in its carriage of Tennis Channel establishes discrimination: it discriminates less [REDACTED] in markets where it faces greater competition, and where there is a market penalty for discriminating, and it discriminates more [REDACTED] [REDACTED] where it is not subject to competition.⁸²

Finally, the Presiding Judge properly rejected as pretexts Comcast's attempts to justify its discrimination.⁸³ Comcast claims to have rejected Tennis Channel's request for fair carriage because it would have cost Comcast too much to carry it broadly, but Comcast has never considered or questioned the much greater costs it incurs to carry the similarly-situated Golf Channel and Versus at this level of distribution.⁸⁴ The Presiding Judge also rejected Comcast's claim that its rejection was motivated by a supposed "cost-benefit analysis,"⁸⁵ finding no credible evidence that Comcast had performed any evaluation at all of the benefits associated with Tennis Channel's proposal,⁸⁶ and no evidence that Comcast performed a cost-benefit analysis in deciding where to carry Versus and the Golf Channel when it launched them or renewed their carriage arrangements around the same time.⁸⁷ The Presiding Judge concluded that Comcast's "field test" — where it claimed to survey the field regarding interest in Tennis Channel (without, again, ever requiring a field test for Golf Channel or Versus, and without

approximately [REDACTED] percent higher, respectively, than the rest of the market); *id.* ¶ 67 (citing Dr. Singer's data which show that Tennis Channel's average penetration rate among large MVPDs other than Comcast is almost [REDACTED] times Tennis Channel's penetration rate on Comcast).

⁸² Initial Decision ¶ 59 n.205 (citing Singer Written Direct ¶ 22).

⁸³ *See generally* Reply to Exceptions at Section I.C.4.

⁸⁴ Initial Decision ¶ 77 & n.257.

⁸⁵ Exceptions at 17.

⁸⁶ Initial Decision ¶ 76.

⁸⁷ *Id.* ¶ 77; Bond Tr. at 2225:21-2228:8.

waiting for the field's response before rejecting Tennis Channel's request for enhanced carriage) — was merely a “ploy” to avoid liability and not a reflection of *bona fide* consideration of Tennis Channel's proposal.⁸⁸ Finally, the Presiding Judge rejected Comcast's “date test” — its argument that Tennis Channel simply launched too late — because this argument would grandfather Comcast's affiliated networks into favored status regardless of their quality, because Comcast has since broadened carriage of other, later-launched sports networks as it acquires an equity interest in them, and because it has unquestioningly renewed broad carriage of Versus and Golf Channel during this time period.⁸⁹

Comcast's Harm Arguments Lack Merit. Much of Comcast's merits argument amounts to a claim that even the largest MVPD in the country is too small to competitively harm Tennis Channel.⁹⁰ As set forth in more detail in Tennis Channel's Reply to Comcast's Exceptions, this theory does not withstand any meaningful scrutiny, and the Presiding Judge properly rejected it.⁹¹

As an initial matter, it strains credibility for Comcast to assert that its decision to deny [REDACTED] subscribers to Tennis Channel imposes no significant harm on the network because there are other subscribers to whom Comcast does not control access. The number of subscribers Comcast denies to Tennis Channel, but freely grants the channels it owns, is more than the total subscriber base of all but one other MVPD in the United States.

⁸⁸ Initial Decision ¶ 22.

⁸⁹ Initial Decision ¶¶ 72-74.

⁹⁰ Stay Petition at 13-14.

⁹¹ See *generally* Reply to Exceptions at Section I.A.

In any event, the record clearly showed, and the Presiding Judge properly found, that Tennis Channel is harmed in its ability to compete by Comcast's discrimination.⁹² As the Initial Decision states, Comcast's limited distribution of Tennis Channel restricts its subscriber revenues, making it difficult for Tennis Channel to make programming and other investments.⁹³ This limited distribution, along with poor channel placement, hinders Tennis Channel's ability to attract viewers.⁹⁴ It also prevents Tennis Channel from securing "certain valuable programming rights,"⁹⁵ from selling advertising to many advertisers, and from making as much revenues as it otherwise could on the advertising it does sell.⁹⁶

Furthermore, the Presiding Judge correctly held that because of the "ripple effect," a phenomenon recognized by Comcast in its own internal documents, Comcast's suppression of Tennis Channel's carriage has a market-wide impact, further multiplying the competitive harms caused by Comcast's discrimination.⁹⁷ But while Comcast now belittles this consequence of its discrimination, the hearing record shows that Comcast was [REDACTED] [REDACTED] — specifically because the action of one distributor could adversely affect the carriage decisions of

⁹² See generally Reply to Exceptions at Section I.A.1.

⁹³ Initial Decision ¶ 83 (citing Solomon Written Direct & Singer Written Direct).

⁹⁴ *Id.* ¶ 85.

⁹⁵ *Id.* ¶¶ 87-88.

⁹⁶ *Id.* ¶¶ 90-71.

⁹⁷ *Id.* ¶¶ 65, 82; Tennis Channel Ex. 38, at COMTTC_00052319; see also Orszag Tr. at 1388:1-5, 1391:8-20; Rigdon Tr. at 1903:3-1904:10.

others — and even [REDACTED]

[REDACTED]⁹⁸

Unable to rebut these findings of competitive harm to Tennis Channel, Comcast seeks to create a standard of harm that is foreign to Section 616. It claims that Congress intended Section 616 to impose the “essential facilities” antitrust standard, under which it could never be liable under Section 616, because networks can survive and limp along by obtaining fair carriage on other distributors. This argument is incorrect as a matter of law, and as explained in Tennis Channel’s Reply to Comcast’s Exceptions, it has been rejected by the Commission.⁹⁹ The same can be said of Comcast’s suggestion that the competitive concerns underlying Section 616 no longer exist, and that the standard of harm under Section 616 is now so high that it could virtually never be met.¹⁰⁰

Taken together, Comcast’s merits arguments are grounded in its mistaken belief that the Commission should simply read the program carriage rules and Section 616 out of existence — a suggestion the Commission has rejected time and time again, most recently last summer, when it held that the substantial government interests underlying Section 616 remain and that Congress’s finding that MVPDs have the “incentive and ability to favor their affiliated

⁹⁸ See Initial Decision ¶ 63; Tennis Channel Ex. 38 at COMTTC 00053219; Tennis Channel Ex. 140, Deposition of Gregory Rigdon, at 113:21-114:16; Orszag Tr. at 1388:1-5, 1391:8-20; Rigdon Tr. at 1903:3-1904:10.

⁹⁹ See generally Reply to Exceptions at Section I.A.2. As the Presiding Judge found, Tennis Channel is not going out of business because of Comcast’s discrimination — a fact that itself establishes the value that Tennis Channel offers to distributors and advertisers — but that level of market foreclosure or competitive harm is not required for the Commission to find that Comcast violated Section 616. Initial Decision ¶ 92; see also *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd. 15783, ¶¶ 30-31 (MB 2008) [hereinafter “TCR”], *rev’d on other grounds*, 25 FCC Rcd. 18099, ¶ 11 (FCC 2010).

¹⁰⁰ See generally Reply to Exceptions at Section II.C.

programming vendors” still stands.¹⁰¹ Indeed, even when it approved the Comcast-NBC Universal merger, the Commission noted that the transaction would “result in an entity with increased ability and incentive to harm competition in video programming,” “highlighting the continued need for an effective program carriage complaint regime.”¹⁰²

3. The Initial Decision Is Consistent With The First Amendment.

As explained in more detail in Tennis Channel’s Reply to Comcast’s Exceptions,¹⁰³ Comcast’s final effort to undermine the Initial Decision is to repeat the very First Amendment argument that the Commission and the courts have repeatedly rejected. Here, Comcast faces the additional challenge that, whatever its *theoretical* dispute may be with the program carriage rules, the Initial Decision *in this case* does not, as Comcast argues, implicate First Amendment interests of the kind at issue in *Tornillo*, a case involving a requirement that a newspaper make space available for a political candidate to respond to critical or adverse editorializing.¹⁰⁴ Unlike *Tornillo*, in this case, there is no suggestion that Comcast is being required to carry or prohibited from carrying any particular content. To the contrary, as Comcast repeatedly has asserted, “Comcast makes Tennis Channel available to nearly all of its subscribers who are willing to purchase access to the network.”¹⁰⁵

Because Comcast has carried Tennis Channel for many years and, far from desiring to discontinue that carriage, has sought to acquire Tennis Channel’s content for itself,

¹⁰¹ *Second Report & Order* ¶ 33.

¹⁰² *NBCU Order* ¶ 116; *Second Report and Order* ¶ 33.

¹⁰³ *See* Reply to Exceptions, Part II.

¹⁰⁴ *See* Exceptions at 30-31 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974)).

¹⁰⁵ *Id.* at 9.

this is not a case about whether Comcast should be required to carry particular content. Instead, the critical question is whether Comcast can engage in discrimination by charging its customers more to access Tennis Channel than to access the affiliated networks with which Tennis Channel competes. Comcast's desire to charge high, discriminatory prices to its customers is not a protected First Amendment interest.¹⁰⁶

Even if the First Amendment were implicated, Comcast is wrong to suggest that the decision should be subject to strict scrutiny — a suggestion that courts and the Commission repeatedly have rejected. As the D.C. Circuit concluded in another case involving the Commission's authority to regulate cable carriage, “[a]lthough the [Initial Decision] ‘might in a formal sense be described as content-based’ given that [it considers] whether the programming at issue involves sports, there is absolutely no evidence, nor even any serious suggestion, that the Commission issued its regulations to disfavor certain messages or ideas” or that the Presiding Judge adopted the Initial Decision for that purpose.¹⁰⁷ Accordingly, though the Initial Decision referred to content — which is, after all, the “product” being distributed by Comcast — that is no basis for triggering a strict scrutiny requirement.¹⁰⁸

¹⁰⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (quoting Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *Vand. L. Rev.* 265, 270 (1981)) (The First Amendment “does not protect the right to ‘fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.’”).

¹⁰⁷ *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (quoting *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998)).

¹⁰⁸ *Second Report & Order* ¶ 32 (citing *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996)) (“The D.C. Circuit has already decided that the leased access provision of the 1992 Cable Act is not content-based [and] does not favor or disfavor speech on the basis of the ideas contained therein; rather it regulates speech based on affiliation with a cable operator.”).

The courts repeatedly have found the governmental interests furthered by Section 616 — promoting diversity and competition in the video programming market — to be important interests for the purpose of the intermediate scrutiny analysis.¹⁰⁹ And, even if Comcast were, *arguendo*, correct that the Initial Decision imposes an incidental burden on its speech, that burden would be far more limited than the more expansive cable carriage regulations that the courts have upheld under the intermediate scrutiny test.¹¹⁰ Accordingly, Comcast’s First Amendment argument lacks merit, and it should, yet again, be rejected.

B. Comcast Makes No Serious Showing That It Would Suffer Irreparable Injury If It Were Forced To Comply With The Initial Decision.

The Initial Decision ordered Comcast to remedy its discrimination by providing equal carriage treatment “as soon as practicable.”¹¹¹ Comcast has not shown that this requirement, which by its terms gives Comcast a reasonable amount of time to comply, is unduly burdensome. Comcast should not be given a stay, permitting it to escape any compliance responsibility, where the order it complains of requires it only to comply “as soon as practicable.”

1. Comcast Improperly Seeks To Supplement A Closed Record With Untested Testimony That Should Have Been Introduced At Trial.

As an initial matter, to support its Stay Petition Comcast seeks to introduce declarations from executives Jennifer Gaiski and Jay Kreiling, who assert that it would be

¹⁰⁹ See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Time Warner, supra*. As described in Tennis Channel’s Reply to Comcast’s Exceptions, Comcast’s suggestion that a requirement of nondiscrimination does not promote diversity or competition is fundamentally nonsensical. See Reply to Exceptions Section II.C.

¹¹⁰ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 215-16 (1997) [hereinafter “*Turner II*”]; *Time Warner*, 93 F.3d at 967-71; *Time Warner Entm’t Co., L.P. v. U.S.*, 211 F.3d 1313, 1323 (D.C. Cir. 2000).

¹¹¹ Initial Decision ¶¶ 119, 127.

burdensome for Comcast to comply with the Initial Decision.¹¹² The proposed declarations are an improper attempt by Comcast to supplement the record with new evidence well after the Presiding Judge closed the record in this case.¹¹³ The question of whether Comcast should be ordered to modify Tennis Channel's carriage arrangements was raised specifically in the Complaint¹¹⁴ and was expressly designated for hearing by the Media Bureau, which directed the Presiding Judge

to determine whether Comcast should be required to carry The Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers and, if so, the price, terms, and conditions thereof; and/or whether Comcast should be required to implement such other carriage-related remedial measures as are deemed appropriate.¹¹⁵

The designation order thus clearly contemplated that evidence would be taken on the level of carriage Comcast should afford to Tennis Channel, and the conditions of that carriage. If Comcast had wanted to introduce evidence designed to support a remedy it deemed practical, or to challenge allegedly impractical remedies, it was free to do so; instead, it waived the right to

¹¹² Stay Petition, at Exs. A & B.

¹¹³ Comcast earlier sought to improperly supplement the record with new and untested evidence, *see* Comcast's Supplemental Notice to Update Certain Record Evidence (Sept. 9, 2011) — an effort with the Presiding Judge correctly rejected. Initial Decision ¶ 70; *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 11M-26 (rel. Sept. 26, 2011).

¹¹⁴ The complaint specifically discussed Comcast's discrimination with respect to channel placement and the harms arising from such discrimination, *see* Compl. ¶¶ 71-73, and it broadly requested relief in the terms and conditions of carriage, *see id.* ¶ 101. The Media Bureau recognized channel placement as an issue Tennis Channel had raised, *see* HDO ¶ 19, and Tennis Channel further reiterated its request for relief from channel-placement discrimination in its pre-trial briefing, *see* Trial Brief of The Tennis Channel, Inc., at 25 n.101 (Apr. 15, 2011); *see also id.* at 14-15. Thus, Comcast was amply put on notice of the issue before the hearing.

¹¹⁵ HDO ¶ 24(b). The HDO also designated for hearing the issue of "whether a forfeiture should be imposed on Comcast." *Id.* ¶ 24(c).

present this evidence when it chose not to present this evidence at the hearing.¹¹⁶ Having chosen not to offer any evidence at the time on that subject, it should not now be permitted to supplement the record with testimony that has been neither presented to the Presiding Judge nor tested by discovery and cross-examination.¹¹⁷

Accordingly, Tennis Channel requests that the untested declarations offered by Ms. Gaiski and Mr. Kreiling, and any portion of Comcast's Stay Petition relying on the assertions contained therein, be stricken in their entirety and not be given any consideration by the Commission.¹¹⁸

¹¹⁶ Comcast's witnesses could have been called on this subject. Comcast makes no effort to explain why it could not have offered Mr. Kreiling as a witness at trial. And Ms. Gaiski gave both written and oral testimony on the other issues, including at a deposition and at the hearing. The facts contained in her Stay Petition declaration are not newly discovered; they could have been included in her prior testimony.

Significantly, the Commission will only "entertain a request to reopen a proceeding after the close of the record" where the petitioner's contentions are based on "newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier." *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Mem. Op. & Order, 26 FCC Rcd 8971, 8986 ¶ 46 (2011) [hereinafter "*WealthTV*"] (internal citations omitted). In *WealthTV*, Comcast opposed WealthTV's request for the Commission to reopen the record. *See WealthTV, Herring Broad., Inc. d/b/a/ WealthTV v. Comcast Corp.*, Opposition To Motion To Reopen The Record For Further Hearing, MB Docket No. 08-214, File No. CSR-7907-P (Mar. 15, 2010). As it argued in that proceeding, Comcast's attempt to introduce new testimony here is "nothing more than an attempt to divert the Commission's attention from [the Presiding Judge's] well-reasoned decision." *Id.* at 2.

¹¹⁷ Given the serious flaws that the Presiding Judge identified in Ms. Gaiski's prior testimony in this proceeding, *see* Initial Decision ¶¶ 21-22, it would be particularly unfair to accept Ms. Gaiski's assertions without subjecting them to thorough examination.

¹¹⁸ In the alternative, if the Commission concludes it should grant a stay and intends to rely on Comcast's submission of additional testimony, Tennis Channel requests that it be given the same opportunity to introduce supplemental testimony on the issue of remedy and to subject that given by Ms. Gaiski and Mr. Kreiling to cross-examination by deposition prior to the ruling.

2. Comcast's Purported Burdens Are Insufficient To Constitute Irreparable Injury And Are Belied By The Record.

Even as shored up by the extra-record declarations, the purported “burdens” that Comcast cites as a justification for a stay are little more than the day-to-day tasks it regularly encounters in the normal course of its business. They are plainly insufficient to justify the extraordinary relief it seeks. The routine expenditures of money, time, and energy that Comcast identifies are simply not of the magnitude or type of harm that the Commission generally considers irreparable.¹¹⁹

The Presiding Judge determined that the nondiscriminatory carriage required here encompasses two separate components: (1) carriage at the same level of distribution as Golf and Versus; and (2) nondiscriminatory channel placement.¹²⁰ Notwithstanding Comcast's efforts to conflate these two separate remedial steps, they raise distinct issues.

As to the first, Comcast is in fact able to begin distributing Tennis Channel to the same number of homes as Golf Channel and Versus almost immediately. That is because the Tennis Channel signal is already present on the vast majority of Comcast systems. Comcast could implement a change in tiering electronically and with very little effort. As the ALJ found, “The vast majority of Comcast's systems carry Tennis Channel,”¹²¹ and on these systems,

¹¹⁹ See *Auction of Interactive Video and Data Service Licenses Scheduled To Begin Feb. 18, 1997*, Order, DA 97-13, 12 FCC Rcd 19, 21 (1997).

¹²⁰ Initial Decision ¶¶ 119-20.

¹²¹ Initial Decision ¶ 17; see also Bond Tr. at 1988:17-1990:22. Comcast itself acknowledges that it makes its Sports Entertainment Package available to “almost all of its subscribers.” Stay Petition at Ex. A, Declaration of Jennifer Gaiski, ¶ 11 [hereinafter “Gaiski Declaration”]. The Tennis Channel signal is not illuminated on the set-top boxes of customers who have not paid the extra sports tier fee, but it is already part of the signal delivered to these subscribers' set-top boxes. See Tennis Channel Ex. 137, Deposition of Jennifer Gaiski, at 197:15-21 [hereinafter “Gaiski Dep.”] (in systems where Tennis Channel is already carried on (continued...))

Comcast faces neither bandwidth constraints nor tiering obstacles in granting Tennis Channel broader digital carriage.¹²² Nothing in Comcast's Stay Petition or in the attached declarations refutes these basic facts.¹²³

Even for the remaining few subscribers who are on systems that do not currently offer Tennis Channel programming, Comcast only suggests, but fails to demonstrate in a concrete way, that particular systems lack sufficient capacity to carry Tennis Channel but do have the capacity to carry Golf Channel and Versus broadly. To the extent that such systems *are* capacity-constrained, the Presiding Judge has held that Comcast need not displace existing networks in order to find a place for Tennis Channel, provided Comcast actually establishes capacity constraints.¹²⁴

the sports tier, moving it to a more widely distributed digital tier would require [REDACTED] extra bandwidth).

¹²² See Gaiski Dep. at 33:5-19; Tennis Channel Ex. 139, Deposition of Madison Bond, at 76:11-17; Orszag Tr. at 1428:16-1429:1.

¹²³ Comcast states that local franchise authorities require it to provide advance notice to customers before illuminating Tennis Channel on the Digital Starter tier. It also claims that it would need to train approximately 25,000 customer service representatives to respond to calls and to update websites and electronic guides to reflect the changes. Gaiski Declaration ¶ 28.

Presumably, these are necessary considerations in any tiering change, and there is no evidence that they are so difficult that changes cannot be made. In fact, Comcast makes these changes as a routine part of its business. At most, they might in some markets affect the speed at which changes can be phased in and do not on their face suggest why the obligation to take on this task should be stayed.

Even to the extent that there are certain local franchise authorities that would require Comcast to notify consumers in this circumstance and/or other administrative costs associated with illuminating Tennis Channel, Comcast's suggestion that these costs are undue is simply wrong. Channel placement changes are routine, business-as-usual costs for Comcast.

¹²⁴ Initial Decision ¶ 119 n.353. In any event, Comcast has elsewhere indicated that it would complete its company-wide digital migration by the end of 2011. See Comcast, General Electric Co. & NBC Universal, Inc., *In re Applications for Consent to the Transfer of Control of Licenses: General Electric Co., Transferor, to Comcast Corp., Transferee, Applications & Public Interest Stmt.*, at 112. If that is true, and Comcast has completed or has nearly completed (continued...)