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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
Complainant,	)	
	)	File No. CSR-8258-P
v.	)	
	)	
Comcast Cable Communications, LLC,	)	
Defendant	)	

To: The Commission

PETITION FOR FURTHER PROCEEDINGS AND REAFFIRMATION OF ORIGINAL DECISION

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

Counsel to The Tennis Channel, Inc.

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SUMMARY

On July 24, 2012, after lengthy hearings and an ALJ's Initial Decision, the Commission found that "Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus [its two wholly-owned national sports networks] on the basis of affiliation," in violation of Section 616 of the Communications Act.[1] The Commission based this conclusion on its determinations that, among other things: (1) Tennis Channel and Comcast's Golf Channel and Versus are similarly situated networks competing for viewers, advertisers, and programming; (2) Comcast treated these networks differently by distributing Golf Channel and Versus broadly while relegating Tennis Channel to a narrowly penetrated premium-pay sports tier; (3) Comcast followed a consistent practice of favoring affiliates over nonaffiliates; and (4) Comcast's discrimination created significant competitive benefits for its two affiliated networks. The Commission held that, in light of these findings, there was sufficient evidence to conclude that Comcast violated Section 616, "absent any persuasive evidence or argument that the reasons for the differential treatment were nondiscriminatory." Because it found no such evidence, the Commission determined that Comcast had impermissibly discriminated against Tennis Channel.

Although the Commission believed these findings compelled the conclusion that Comcast was violating Section 616, the D.C. Circuit vacated the Commission's order on the grounds that the Commission had not found that broader distribution of Tennis Channel would provide a *net benefit* to Comcast's distribution business (or, alternatively, would result in a lower *net loss* than its ongoing broad distribution of Golf Channel or Versus). The court determined that the Commission's decision had pointed to no evidence on these issues and therefore vacated the decision as not supported by substantial evidence. The court observed that it also would have been sufficient for the Commission to conclude that Comcast's invocation of business considerations to justify its actions was mere pretext. The court stated, however, that the Commission had not invoked this concept.

The D.C. Circuit made clear its view that it was following — not changing — the standards for Section 616 enforcement adopted and implemented by the Commission. But the D.C. Circuit's decision plainly added new tests for Section 616 cases — tests as to which the Commission had made no factual findings because it had not understood such findings to be required. Nonetheless, the existing voluminous record contains ample evidence that satisfies the new tests: The evidence demonstrates that Comcast's distribution business would reap a net benefit from carrying Tennis Channel broadly (or, at a minimum, that any incremental losses that might be incurred by its distribution business from broad carriage of Tennis Channel would be smaller than those it was incurring from broad carriage of Golf Channel or Versus). The record also demonstrates that Comcast's purported business justifications for restricting Tennis Channel's carriage were merely pretexts designed to obscure a discriminatory purpose, in violation of Section 616 — a conclusion that the court thought the Commission had not previously reached.

[1] The Commission further found that Comcast's discriminatory conduct had unreasonably restrained Tennis Channel's ability to compete and concluded that Comcast's actions violated Section 616 of the Communications Act.

Against this background, Tennis Channel respectfully requests that the Commission set a new briefing cycle directing the parties to file limited proposed findings of fact and conclusions of law on the narrow issues that the panel's decision has left unresolved. Additional briefing on these narrow issues is necessary because in the prior proceedings before the Commission, neither the parties nor the Commission had an opportunity to evaluate the record evidence against the tests that have now been articulated by the court. Tennis Channel further requests that, upon completing its further review, the Commission affirm its initial decision holding that Comcast has violated Section 616 and the Commission's rules, and that it reinstate the remedies it initially imposed.

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To: The Commission

PETITION FOR FURTHER PROCEEDINGS AND REAFFIRMATION OF ORIGINAL DECISION

This matter is now before the Federal Communications Commission ("FCC" or "Commission") following a decision of the D.C. Circuit granting Defendant Comcast Cable Communications, LLC's ("Comcast's") petition for review and vacating the Commission's decision that Comcast had violated Section 616 of the Communications Act by discriminating against The Tennis Channel, Inc. ("Tennis Channel") with respect to the terms and conditions of carriage.

Tennis Channel requests that the Commission initiate further proceedings in this docket focused on the limited question of whether the record evidence satisfies any one of the three findings that the D.C. Circuit has now stated may establish that Comcast discriminated against Tennis Channel in violation of Section 616.[2] We believe that the Commission will

[2] This Petition is filed pursuant to Sections 4 and 616 of the Communications Act of 1934, as amended, *see* 47 U.S.C. §§ 154(i), 536, and 47 C.F.R. § 1.41 ("Except where formal procedures (continued…)

conclude that it can and should affirm its prior conclusion upon this further review because the evidence clearly establishes that the court's new tests are fully satisfied.

Further proceedings are required because the parties have never previously briefed before the Commission, and the Commission has not previously evaluated, the record in light of the panel's new tests. Indeed, Comcast had never asked the Commission to apply the tests enunciated by the court in evaluating evidence of discrimination, and its proposed findings — like those of Tennis Channel — were therefore unsurprisingly not tailored to meeting them. But the tests adopted by the panel are now the law of the case, and the Commission has the authority and responsibility to determine in the first instance whether record evidence satisfies the tests envisioned by the court.

INTRODUCTION

This case presents important questions regarding the relationship between the Commission's primary responsibility for the administration of the Communications Act and its own rules and what constitutes appropriate judicial oversight of agency actions — questions that did not receive significant attention in the D.C. Circuit's decision. The case also poses important substantive issues about the standards applicable to program carriage cases under Section 616

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are required . . . , requests for action may be submitted informally."); *see also id.* § 1.1. To the extent necessary, Tennis Channel also seeks the Commission's leave to file this Petition, which seeks further action that serves the public interest and is consistent with past Commission practice. *See, e.g.*, 47 C.F.R. § 1.276(c)(2) ("In any case in which an initial decision is subject to review . . . the Commission may, on its own initiative or upon appropriate requests by a party, take any one or more of the following actions: . . . Require the filing of briefs . . . ."); *Applications of Certain Broadcast Stations Serving Communities in the States of Indiana, Kentucky & Tennessee*, 100 F.C.C.2d 1237, 1239 n.3 (1985); *WSTE-TV, Inc.*, 75 F.C.C.2d 52, 53 n.1 (1979); *Lebanon Valley Radio, Inc.*, 50 F.C.C.2d 383, 384 (1974) ("We believe that the Court's opinion raises significant questions which have not heretofore been adequately addressed. Our deliberation on these questions will be enhanced by limited further participation of the parties."); *cf. E. Carolinas Broad. Co. v. FCC*, 762 F.2d 95, 99–100 (D.C. Cir. 1985).

that must be resolved before the Commission can complete an evaluation of Comcast's proposed merger with Time Warner Cable.

As to the former question, we are not seeking here to re-litigate what the D.C. Circuit decided. Its creation of new tests for Section 616 enforcement are now the law of this case. But these new tests for Section 616 enforcement are not self-executing and cannot appropriately result in ultimate resolution of the issues without further Commission action. It was not the task or apparent intent of the panel to consider how the record before the Commission intersected with the tests it thought appropriate. Only the Commission can undertake that responsibility, and, consistent with the D.C. Circuit's decision, the Commission must now do so.

As to the second issue, the Commission adopted, as an important condition of the Comcast-NBCU merger, a prohibition against Comcast's discrimination in video programming distribution on the basis of affiliation — a condition that substantially replicates the Section 616 requirement at issue in this case.[3] Before the Commission acts on Comcast's proposed merger with Time Warner Cable, it likely will be asked by various parties to consider issues relating to Comcast's vertical integration and horizontal size, and therefore the Commission will be faced

[3] *Compare* Tennis Channel Ex. 13, *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, Appendix A, Part III, ¶ 1 (2011) [hereinafter "*Comcast/NBCU Merger Order*"] ("Comcast shall not *discriminate in Video Programming distribution on the basis of affiliation or non-affiliation of a Video Programming Vendor in the selection, price, terms or conditions of carriage* (including but not limited to on the basis of channel or search result placement).") (emphasis added), *with* 47 U.S.C. § 536(a)(3) (requiring the Commission to "prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by *discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage* of video programming provided by such vendors") (emphasis added). *See also Comcast/NBCU Merger Order* ¶ 121.

with the need to determine the meaning and utility of this condition, and of Section 616, in the wake of the D.C. Circuit's decision. Only by adopting Tennis Channel's interpretation of the panel's decision can the Commission give life to the condition applied in the *Comcast-NBCU* merger order. Otherwise, neither the condition nor Section 616 itself offers protection against Comcast's incentive and ability to discriminate against nonaffiliated programmers.

STATEMENT OF FACTS

In a Memorandum Opinion and Order released on July 24, 2012, the Commission held that Comcast violated Section 616 of the Communications Act by discriminating on the basis of affiliation against the nonaffiliated Tennis Channel and in favor of Comcast's affiliated networks, Golf Channel and Versus.[4] The Commission substantially affirmed the Initial Decision of Chief Administrative Law Judge Richard L. Sippel ("Initial Decision"), which had reached the same conclusion,[5] and denied Comcast's Application for Review and virtually all of Comcast's Exceptions to the Initial Decision.[6]

In its Order, the Commission found that the "tremendous similarities" between Tennis Channel, Golf Channel, and Versus demonstrate that they are similarly situated within the meaning of Section 616 and the Commission's rules and policies.[7] All three networks broadcast comparable sports-related content that "target[s] and reach[es] similar audiences," share a

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[4] *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 27 FCC Rcd. 8508 (July 24, 2012) [hereinafter "Order"]. Versus was previously known as Outdoor Life Network until it was renamed Versus in the mid-2000s. *Id.* ¶ 48 & n.150. After Tennis Channel filed its complaint, Versus was renamed NBC Sports Network. *Id.* ¶ 112.

[5] *See The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 11D-01 (Dec. 20, 2011) [hereinafter "Initial Decision"].

[6] *See* Order ¶¶ 107–13. The Commission granted Comcast's exception with respect to an equitable channel placement remedy ordered by the ALJ. *Id.* ¶¶ 91, 109.

[7] *Id.* ¶¶ 51, 56.

"remarkable overlap in advertisers," and have "almost identical" ratings in the geographical areas where they compete.[8] It also found that Tennis Channel and Versus compete for some of the same tennis events, including those licensed for carriage by Tennis Channel.[9] And the Commission held that Comcast had an economic incentive to protect Golf Channel and Versus from competition from Tennis Channel.[10]

Comcast did not dispute that it treated Golf Channel and Versus differently from Tennis Channel by giving its affiliates "dramatically broader carriage" while "relegat[ing] Tennis Channel to the [limited-penetration, premium-priced] Sports Tier."[11] Indeed, the Commission found that with respect to sports services, "Comcast engaged in a general practice of favoring affiliates over nonaffiliates."[12] And the Commission noted, among other things, Comcast senior executives' admissions that "affiliated networks are 'treated like siblings as opposed to like strangers,' and that affiliates 'get a different level of scrutiny' than unaffiliated networks."[13]

The Commission concluded that the facts before it "provide sufficient evidence to support the finding that Comcast discriminated against Tennis Channel and in favor of Golf

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[8] *Id.* ¶¶ 52–55.

[9] *Id.* ¶ 65.

[10] As the ALJ concluded, "[t]here is an economic benefit realized by Comcast in . . . carrying Tennis Channel (and other unaffiliated sports networks) exclusively on the Sports Tier, while carrying affiliated sports networks on widely penetrated tiers." *Id.* ¶ 21 (quoting Initial Decision ¶ 79); *see also id.* ¶ 85 ("Because limiting the distribution of Tennis Channel shrinks the network's potential audience and discourages advertising placements, Golf Channel and Versus are effectively provided with a competitive advantage.").

[11] *Id.* ¶ 68 ("While Golf Channel and Versus reach [redacted] of Comcast's subscribers, Tennis Channel reaches only [redacted].").

[12] *Id.* ¶ 45.

[13] *Id.* ¶ 46.

Channel and Versus on the basis of affiliation, absent any persuasive evidence or argument that the reasons for the differential treatment were nondiscriminatory."[14] The Commission then considered and rejected virtually all of Comcast's evidence on this point — for example, a supposed "cost-benefit analysis" that in fact "failed to consider the benefits" of carrying Tennis Channel broadly and was never applied to measure the economic efficacy of Comcast's continued broad carriage of Golf Channel and Versus. The Commission also rejected a purported poll of regional Comcast distribution managers regarding their level of interest in carrying Tennis Channel more broadly, which it found was conducted solely for litigation-protective purposes and had not even been completed when Comcast communicated its rejection of Tennis Channel's request for broader carriage.[15]

Comcast made no additional evidentiary showings to support the assertions of its executives that broader carriage of Tennis Channel was not worth the additional per-subscriber license fees doing so would entail. Accordingly, the Commission concluded that Comcast discriminated against Tennis Channel on the basis of affiliation, further concluded that this discrimination unreasonably restrained Tennis Channel's ability to compete in violation of Section 616, and ordered Comcast to provide Tennis Channel with "carriage equal to that of its similarly situated affiliates, Golf Channel and Versus (now NBC Sports Network)."[16]

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[14] *Id.* ¶ 69.

[15] *Id.* ¶ 77.

[16] *Id.* ¶ 112.

Comcast petitioned the D.C. Circuit for review of the Commission's decision, asking that court to "vacate the FCC's Order."[17] On May 28, 2013, the panel granted Comcast's petition.[18]

In vacating the Commission's Order, the panel held that the evidence on which the Commission relied did not suffice to establish that Comcast discriminated against Tennis Channel. The panel indicated that it intended to apply the Commission's broadly articulated principle that differential treatment is not discriminatory if it is based on a reasonable business purpose unrelated to affiliation.[19] The panel then held that there was not sufficient evidence of discrimination to uphold the Commission's Order. However, the court reached that conclusion only by applying new tests for whether the discrimination standard was met — tests that the Commission has never articulated or applied, either in this case or in any other case under Section 616.

In particular, the panel identified three types of additional findings that the Commission *could* make to support a finding of discrimination. *First*, the Commission could find that Comcast's distribution business could have obtained a "net benefit" from carrying Tennis Channel more broadly, but that it sacrificed this benefit — a decision that presumably

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[17] Final-Form Opening Brief for Petitioner at 62, *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) (No. 12-1337); *see also id.* at 2 ("vacate the Order in its entirety"); Final-Form Reply Brief for Petitioner at 31, *Comcast*, 717 F.3d 982 ("vacate the FCC's Order").

[18] *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 987 (D.C. Cir. 2013). Tennis Channel filed for rehearing *en banc*, and when that was denied, filed a petition for certiorari to the Supreme Court, which was denied on February 24, 2014.

[19] *Id.* at 985 ("There is also no dispute that the statute prohibits only discrimination *based on* affiliation. Thus, if the MVPD treats vendors differently based on a reasonable business purpose (obviously excluding any purpose to illegitimately hobble the competition from Tennis), there is no violation. The Commission has so interpreted the statute, and the Commission's attorney conceded as much at oral argument." (Citations omitted.)).

evidences Comcast's real motive as seeking to reap illegitimate advantages for its affiliated and competing programming services.[20] The court explained that Comcast's refusal to incur the greater license fees associated with carrying Tennis Channel more broadly was not itself discriminatory unless Comcast had reason to expect that the benefits of such broad carriage to its distribution business would outweigh that cost.[21] Such an analysis of benefits could be qualitative and need not be quantitative, the court noted, and it suggested that evidence of subscriber "churn" — that is, evidence that Comcast was losing subscribers solely because of its refusal to give Tennis Channel broader carriage — might have been one place to start, but was absent in this record.[22] Endorsing a non-exclusive list of qualitative factors raised in the testimony of a Comcast executive, the court indicated that the benefits of carrying a network could also be assessed by "the nature of the programming content involved; the intensity and size of the fan base for that content; . . . [and] the network's carriage on other MVPDs."[23]

Second, the Commission could conclude that Comcast's carriage decision was discriminatory if it found that "incremental losses from carrying Tennis in a broad tier would be the same as or less than the incremental losses Comcast was incurring from carrying Golf and Versus in such tiers."[24] In other words, even if carrying Tennis Channel on a broadly distributed tier did not provide a "net benefit" for Comcast, the D.C. Circuit understood that failing to carry

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[20] *Id*.

[21] *Id.* ("Tennis showed no corresponding benefits that would accrue to Comcast by its accepting the change. . . . Of course the record is very strong on the proposed increment in licensing fees, in itself a clear negative. The question is whether the other factors, and perhaps ones unmentioned by Comcast, establish reason to expect a net benefit. But neither Tennis nor the Commission offers such an analysis on either a qualitative or a quantitative basis.").

[22] *Id.*

[23] *Id.*

[24] *Id.* at 986.

it on that tier would be discriminatory if Comcast were willing to carry its own affiliated networks on that tier at an even *greater* net loss to Comcast's distribution business.[25] This alternative finding also permitted both qualitative and quantitative evidence regarding the relative benefits of carrying each network broadly. Acknowledging "evidence of important *similarities* between Tennis on the one hand and Golf and Versus on the other," the court noted that the Commission could find either an affirmative net benefit or lesser incremental losses by means of a "comparative" analysis of the relative costs and benefits of broad distribution of these networks.[26]

Third, the court held that the Commission could rely on a finding that Comcast's "otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose."[27] The Court found that the Commission had not "invoked th[is] concept."[28]

After outlining these ways the Commission could find discrimination under Section 616, the D.C. Circuit vacated the Commission's Order for lack of substantial evidence establishing discrimination.[29] The panel left undisturbed virtually all of the Commission's findings on the issues unrelated to whether Comcast had a valid business purpose for denying

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[25] Of course, Comcast may have been paying the license fees for Golf Channel and Versus from one side of its business to another, but the test contemplated by the court requires consideration of the relative value proposition to Comcast's distribution business alone.

[26] *Id.* at 987. What the Commission found — that the three networks are "similarly situated" when "compared along a series of important axes," Order ¶ 51 — was not the same as the finding required by the D.C. Circuit, because the Commission's more general findings of similarities were not specifically aimed at assessing the relative costs and benefits for Comcast's distribution business with respect to broad carriage of each network. *See Comcast*, 717 F.3d at 987.

[27] *Id.*

[28] *Id.*

[29] *Id.*

Tennis Channel's request for carriage comparable to that which it gave Golf Channel and Versus. And it did not discuss how the test it articulated should operate together with the Commission's pre-existing legal framework for Section 616 cases, which had led the Commission to focus on other matters, including the undeniable competitive and economic benefits that Comcast's programming services obtained by relegating Tennis Channel to Comcast's narrowly penetrated premium-pay sports tier.

ARGUMENT

In light of the D.C. Circuit's decision, Tennis Channel requests that the Commission set a new briefing cycle in this proceeding on the narrow questions of whether the record evidence satisfies any one of the three tests that the D.C. Circuit has now set forth for establishing MVPD discrimination. As we discuss below, a great deal of evidence in this record is germane to these new tests. Some of it was not previously relied upon by the Commission for any purpose and thus was not before the panel. Some was considered by the Commission in contexts unrelated to the new tests articulated by the panel. But because none of the parties had reason to expect that the court would add these new tests for discrimination under Section 616, all of that evidence is available for consideration by the Commission now.[30] We believe that, when these steps are taken, the Commission will be compelled to conclude that even when reviewed under the court's new tests, Comcast's actions violated Section 616.

[30] The Commission has already reviewed and considered the record evidence with respect to a number of questions that remain relevant following the D.C. Circuit's decision. The Commission's invitation to the parties to submit further briefing should make clear that the Commission will reinstate its previous findings with respect to issues that were left undisturbed by the D.C. Circuit's decision and that such further briefing should be limited to the question of whether the record evidence also satisfies the tests for discrimination as articulated by the D.C. Circuit.

I. THE COMMISSION IS REQUIRED TO ISSUE A NEW ORDER RESOLVING THE CASE THAT APPLIES THE D.C. CIRCUIT'S NEW TESTS TO THE RECORD.

Procedurally, this case returns to the Commission following the D.C. Circuit's decision to vacate the Commission's Order. When an appellate court vacates an agency order, the effect is to return the proceeding to its procedural posture prior to entry of the order, which in this case means that there is no final Commission ruling on Tennis Channel's complaint.[31] The court's vacatur, in other words, necessarily operates as a remand to the Commission for further proceedings to resolve the complaint.[32] Thus, the Commission must issue a new Order that takes account of evidence in the record supporting findings on the three issues identified by the court.[33]

Here, the D.C. Circuit concluded that the Commission's prior Order had not pointed to evidence on any of three factual findings it determined would have been sufficient to support it: (1) qualitative or quantitative evidence that Comcast had reason to expect a "net benefit" in its distribution business from carrying Tennis Channel as broadly as Golf Channel or Versus; (2) qualitative or quantitative evidence that Comcast's distribution business incurred

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[31] "It is axiomatic that 'where a court, in the discharge of its judicial functions, vacates an order previously entered, the legal status is the same as if the order had never existed.'" *Abo State v. Gonzales*, 215 F. App'x 134 (3d Cir. 2007) (unpublished opinion); *see also, e.g.*, *V.I. Tel. Corp. v. FCC*, 444 F.3d 666, 671–72 (D.C. Cir. 2006); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847 (D.C. Cir. 1987); *Sierra Club v. Johnson*, 374 F. Supp. 2d 30, 32–33 (D.D.C. 2005).

[32] *See also* 47 U.S.C. § 402(h) ("In the event that the court shall render a decision and enter an order reversing the order of the Commission, *it shall remand the case to the Commission* to carry out the judgment of the court and it shall be the duty of the Commission . . . to forthwith give effect thereto . . . .") (emphasis added); *E. Carolinas Broad. Co.* , 762 F.2d at n.6; *see also Gonzales v. Thomas*, 547 U.S. 183 (2006) (summarily reversing the Ninth Circuit for violating the "ordinary remand" rule).

[33] The Commission has wide discretion to resolve issues in giving effect to the D.C. Circuit's decision, including the authority to reopen the record in appropriate circumstances. *See E. Carolinas Broad. Co.*, 762 F.2d at 95 (reversing the Commission as having acted unreasonably in determining that it did not have the discretion to reopen the record).

greater "incremental losses" from carrying Golf Channel or Versus on a broader tier than it would incur from carrying Tennis Channel on such a tier; or (3) evidence that Comcast's purported business justifications for carrying Tennis Channel broadly were merely "pretextual cover" masking a discriminatory purpose to benefit its affiliated and competing services at Tennis Channel's expense. As explained in Part II of this brief, the underlying record developed by the parties includes evidence to support all three findings.

While the court discussed some of the evidence relied upon by the Commission, the court did not (and, indeed, could not) independently assess whether the entire voluminous record — large portions of which the Commission had not deemed necessary to recite in its original Order — supported a finding of discrimination under any of the court's three theories. Indeed, the court properly did not look beyond the portions of the record on which the Commission had relied.[34] For that reason, it is not surprising that the court said it saw no evidence to support a finding for Tennis Channel on these new tests. It is thus now the

[34] A reviewing court may not, of course, make its own findings on the basis of the record evidence, "even though a plausible alternative interpretation of the evidence would support a contrary view [to that of the agency]," because "[s]ubstantial evidence review . . . . does not allow a court to 'supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.'" *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)); *see also, e.g.*, *Pasternack v. Nat'l Transp. Safety Bd.*, 596 F.3d 836, 838–39 (D.C. Cir. 2010) (concluding that an agency's "reasoning . . . was not supported by substantial evidence" because although there was testimony that supported the agency's conclusion, "the ALJ made no credibility determination" with respect to that testimony and the "findings of fact simply did not address that factual issue"); *Jochims v. NLRB*, 480 F.3d 1161, 1169 (D.C. Cir. 2007) ("We can only look to the [agency]'s stated rationale. We cannot sustain its action on some other basis the [agency] did not mention.") (quoting *Park Point Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006)). Indeed, if on remand the Commission were to find the record insufficient, the Commission could and should reopen the record to take additional evidence before making its findings. *See infra* Part III.

Commission's responsibility under basic principles of administrative law to apply the tests articulated by the panel to the full administrative record.

II. THE COMMISSION SHOULD SEEK THE PARTIES' VIEWS REGARDING WHETHER THE AMPLE EVIDENCE ALREADY IN THE RECORD SATISFIES THE D.C. CIRCUIT'S REQUIREMENTS.

Although neither the parties nor the Commission previously had reason to consider whether the voluminous record evidence developed in this proceeding supports findings regarding the new tests subsequently articulated by the D.C. Circuit, it is clear that the record contains such evidence. *First*, there is record evidence that Comcast had reason to expect a "net benefit" for its distribution business from carrying Tennis Channel as broadly as Golf Channel or Versus — or at least that Comcast would necessarily expect to incur greater "incremental losses" from carrying Golf Channel or Versus on a broadly distributed tier than it would incur from carrying Tennis Channel on that tier. We will deal with these two tests together in Section II.A. *Second*, the record contains incontrovertible evidence supporting an explicit finding that Comcast's claimed justifications for its refusal to distribute Tennis Channel more broadly were merely "pretextual cover" hiding its discriminatory purpose. Convincing evidence is present in the record to support each of these findings of fact, any one of which would provide — under the court's test — an independent basis for the Commission to reaffirm the ALJ's Initial Decision.

A. Record Evidence Demonstrates that, Within the Meaning of the Panel's Tests, Comcast's Distribution Business Had Reason to Expect a "Net Benefit," or At Least Smaller "Incremental Losses," from Carrying Tennis Channel as Broadly as Golf Channel and Versus.

New proposed findings of fact and conclusions of law would elucidate for the Commission strong evidence throughout the existing record that Comcast knew of but chose not to maximize the value that Tennis Channel would bring to its distribution business and that the value proposition of broad carriage of Tennis Channel was the same as or better than that of

broad carriage of Golf Channel or Versus. Under the D.C. Circuit's test, this evidence establishes that Comcast's decision not to grant Tennis Channel broader coverage was discriminatory, and not based on a legitimate business purpose.

First, Comcast's own actions manifest that it perceived value in carrying Tennis Channel broadly. Evidence in the record shows that Comcast carries Tennis Channel more broadly in markets in which it faces greater MVPD competition then it does in markets it regards as less competitive, a fact that clearly reflects Comcast's understanding that broader carriage of Tennis Channel affords its distribution business a significant competitive benefit.[35] This evidence grew out of similar findings made by the Commission's own Office of Chief Economist in a study concluding that Comcast engaged in discriminatory protection of the very same affiliated networks that are the subject of this case.[36] Comcast evidently was aware that broader carriage of Tennis Channel improved its competitive position as a distributor, and that the value of that enhanced competitive position was more than worth the incremental increase in license fees. However, Comcast apparently concluded that it could afford to provide greater protection of its own program affiliates in local markets where its distribution business did not face such significant competition.

Second, the record evidence demonstrates that broad distribution of Tennis Channel was *substantially less expensive* than broad distribution of Golf Channel or Versus,

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[35] Initial Decision ¶ 59 n.205 ("The record evidence shows that Comcast Cable is more likely to carry Tennis Channel [redacted] in markets in which it faces significant competition from another distributor.") (citing Singer Written Direct ¶ 22).

[36] *Comcast/NBCU Merger Order*, Appendix B ¶ 65 ("[O]ur analysis of Comcast's data on carriage and channel placement shows (1) that Comcast currently favors its affiliated programming in making [carriage and channel placement] decisions and that (2) this behavior stems from anticompetitive motives rather than due to reasons that arise from vertical efficiencies.").

despite the fact that Tennis Channel was *at least as valuable* to an MVPD as Golf Channel or Versus. Broad distribution of Golf Channel and Versus cost Comcast [redacted] more than such distribution of Tennis Channel would have cost: In 2010, Comcast's distribution business paid license fees of [redacted] respectively for broad carriage of Golf Channel and Versus.[37] By contrast, Comcast would have had to pay Tennis Channel only [redacted] to carry it at the same expanded level of distribution — nearly [redacted] less.[38]

Despite Tennis Channel's much lower cost, record evidence of the relative popularity of the sports programming involved and the similarity of the ratings and demographic results achieved by the networks establishes that Tennis Channel would offer at least the same benefits to Comcast's distribution business as Comcast's affiliated sports networks. The court left undisturbed the Commission's findings supporting its conclusion that the three networks feature "[s]imilar [s]ports [p]rogramming," including "sporting events and other types of similar non-event sports-related content, such as lifestyle and instructional sports programming," and further that "Tennis Channel and Versus have a history of repeatedly sharing or seeking rights to the same sporting events."[39] The Commission also found, and the court did not question, that "the three networks target and reach similar audiences" and have "almost identical" ratings.[40] Indeed, Comcast has acknowledged that tennis is "similar to [professional golf] in its appeal," attracting "dedicated viewers with higher financial means, education and sophisticated

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[37] Order ¶ 78; Initial Decision ¶ 77 & n. 257; Bond Tr. 2218–19, 2221; Gaiski Tr. 2376.

[38] Initial Decision ¶ 77. The above figure ignores that, in seeking broader carriage on Comcast systems, Tennis Channel offered [redacted] that it was charging to Comcast. Tennis Channel Ex. 70; Comcast Ex. 588; Bond Tr. at 2099:17-2100:11.

[39] Order ¶ 52.

[40] *Id.* ¶¶ 53, 55.

lifestyles."[41] And with respect to ratings, Tennis Channel and Golf Channel averaged identical total-day household ratings of [redacted], and Versus was within hundredths of a rating point at [redacted], in households able to view all three networks.[42]

Simply put, if the three networks performed comparably — which they did — and were equally attractive to the same audience and advertisers — which they were — the one whose carriage cost the least would necessarily be the better carriage value to the distributor. Moreover, while it is clear that Tennis Channel was at least as valuable as Golf Channel and Versus, the record is also replete with other evidence that the benefits to Comcast's distribution business from broad carriage of Tennis Channel would have been expected to be *greater* than the benefits of broad carriage of Golf Channel or Versus. The record evidence established that, over recent years, tennis as a sport has increased in popularity, while most other major sports, including golf, have shown a decline.[43] And within the confines of each sport, Tennis Channel offered far more event programming to viewers. Tennis Channel dedicated far more air time [redacted] than Golf Channel [redacted] or Versus [redacted] to event coverage, which Comcast's own media expert characterized as the [redacted]

[41] Tennis Channel Ex. 108.

[42] Order ¶ 55.

[43] Tennis is "the fastest-growing sport in America among individual traditional sports," Tennis Channel Ex. 315, with participation in the sport growing [redacted] from 2000 to 2008. Tennis Channel Ex. 63; Tennis Channel Ex. 14, Written Direct Testimony of Ken Solomon, at ¶ 3 [hereinafter "Solomon Written Direct"]; Tennis Channel Ex. 16, Written Direct Testimony of Hal J. Singer, at ¶ 68 [hereinafter "Singer Written Direct"]. Most other major sports, including golf, showed [redacted] in participation during the same time period. Tennis Channel Ex. 63; Tennis Channel Ex. 17, Written Direct Testimony of Timothy Brooks, at ¶ 52. In 2009, the United States Tennis Association (USTA) reported that 30.1 million Americans play tennis — a figure that is at a 25-year high. Tennis Channel Ex. 86; Solomon Written Direct ¶ 4.

programming on the three networks.[44] And Comcast has repeatedly tried to secure rights for Versus to telecast some of the very same premier tennis events that are telecast by Tennis Channel and has described them in internal communications as [redacted].[45] Indeed, Comcast stipulated during the hearing before the ALJ that it was seeking rights to one of the Grand Slam major events of tennis (Wimbledon), for which Tennis Channel has rights, even while the hearing was proceeding.[46] By contrast, Comcast broadly distributed Versus when it first acquired the network, despite Comcast's executives' recognition in internal emails that the network was "a crappy channel that was dead in the water,"[47] and it placed Golf Channel on its broadest tier the year that the network first began operation and had no track record at all.[48] The evidence thus not only plainly establishes that Tennis Channel delivers equal or greater benefit than Golf Channel and Versus, at a substantially lower cost — the very definition of a better value — but that Comcast's carriage decisions for Golf Channel and Versus were not motivated by any of the business considerations that the court believed should be comparatively evaluated.

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[44] *See* Egan Tr. at 1507:4-12 (noting that sporting events are [redacted]; *id.* at 1640:2-6; *see also id.* at 1506:9-13, 1648:18-1649:5.

[45] *See, e.g.*, Tennis Channel Ex. 41, at COMTTC_00005844; Egan Tr. at 1671:1-7, 1708:1-15; Tennis Channel Ex. 35; Donnelly Tr. at 2592:5-8; Tennis Channel Ex. 119 [redacted] Orszag Tr. at 1407:3-9; Tennis Channel Ex. 179; *see also* Egan Tr. at 1668:20-1669:1 (agreeing that the U.S. Open is a [redacted]). Comcast's expert agreed that the U.S. Open is a [redacted] Egan Tr. at 1670:22-1671:14.

[46] Tennis Channel Ex. 179; Orszag Tr. at 1407:3-9.

[47] Order ¶ 48; Tennis Channel Ex. 26; *see also* Tennis Channel Ex. 143, Deposition of Jeffrey Shell Designations, at 39:13-20.

[48] *See* Tennis Channel Exs. 21, 61.

Third, the evidence in the record shows precisely what the D.C. Circuit identified as probative — that other MVPDs carried Tennis Channel more broadly than Comcast, and carried Golf Channel and Versus less broadly than Comcast. The Commission found that other MVPDs carry Tennis Channel at [redacted] the average penetration rate at which it is carried by Comcast, and with respect to the largest MVPDs, Tennis Channel's average penetration rate was [redacted] than on Comcast's systems.[49] If other MVPDs unburdened by the need to protect the affiliated and competing Golf Channel and Versus distribute Tennis Channel more broadly than Comcast does, the clear implication is that Comcast could also benefit from such carriage but chooses not to do so because it is protecting them. In contrast, Golf Channel and Versus are carried at [redacted] penetration rates, respectively, by Comcast than by other MVPDs,[50] which also calls into question the credibility of the heightened value Comcast places on those affiliated networks.

Fourth, whether Tennis Channel and Comcast's affiliated sports networks drive subscriber churn based on their carriage level is not a differentiator for the value of the networks in light of the record evidence in this case. Although the court suggested that "[a] rather obvious type of proof" would be a quantitative analysis of the additional subscribers Comcast could expect to gain from carrying Tennis Channel more broadly,[51] the Commission, in an exercise of its expertise, had separately found (in proceedings not before the D.C. Circuit) that almost no

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[49] Order ¶ 71.

[50] *Id.* ¶ 72. Moreover, there is reason to think that carriage of Golf Channel and Versus by other MVPDs is inflated as a result of Comcast's substantial market share. *See* Initial Decision ¶ 73. In addition, the evidence suggests that Comcast's suppression of Tennis Channel creates a "ripple effect" that results in other MVPDs carrying Tennis Channel on less broadly penetrated tiers. Order ¶ 73; Initial Decision ¶ 82.

[51] *Comcast*, 717 F.3d at 986.

programming networks are "must-haves" that *individually* drive subscribership up or down, but that MVPDs are nonetheless willing to pay them substantial fees in order to acquire a desirable *cluster* of programming.[52] In any event, there is no credible evidence on the record in this proceeding that broad carriage of Golf Channel or Versus protected Comcast against subscriber churn,[53] and there is ample evidence that Tennis Channel attracts a similar audience (both in terms of quality and size) as Golf Channel and Versus but at a substantially lower price.

In sum, the foregoing evidence and other record evidence of the relative value of the networks satisfies the new test articulated by the D.C. Circuit's opinion. That evidence makes clear that (1) Comcast could have expected to derive benefits from broadly carrying Tennis Channel but chose not to do so, and (2) whatever the benefits Comcast's distribution business actually derived from broad carriage of Golf Channel and Versus, Tennis Channel offered the prospect of equal or greater benefits at a substantially lower cost. Moreover, even to the extent that carrying Tennis Channel more broadly would be expected to cause losses for Comcast's distribution business, the evidence demonstrates that it should still have outperformed Golf Channel and Versus at lower cost. It is clear that, after applying the additional tests

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[52] *See, e.g.*, *Revision of the Commission's Program Access Rules*, 27 FCC Rcd. 12605, 12639 & n.205 (2012); *Implementation of the Cable Television Consumer Protection & Competition Act of 1992*, 17 FCC Rcd. 12124, 12139 (2002).

[53] Indeed, there is evidence that limiting distribution of Versus *does not* drive subscriber churn: After DirecTV, LLC ("DirecTV") decided to drop Versus from its line-up during its renewal negotiation with Versus in 2009, Comcast executives acknowledged that subscribers were unlikely to switch service providers — or even make a telephone call to DirecTV to complain — following the loss of Versus. Tennis Channel Ex. 80, at COMTTC_00015420 [redacted]; Bond Tr. at 2261:3–2262:5. DirecTV ultimately restored Versus after Comcast executives made a quid pro quo agreement to carry DirecTV's regional sports networks in exchange for carriage of Versus. *See* Tennis Channel Ex. 89 (internal discussion of proposal regarding [redacted]; Bond Tr. at 2232:32:11–2233:17.

contemplated by the D.C. Circuit to the facts on this record, the Commission necessarily must find that Comcast discriminated against Tennis Channel in violation of Section 616.

B. Record Evidence Establishes that Comcast's Purported Justifications for Refusing to Carry Tennis Channel Widely Were Merely "Pretextual Cover" Masking Its Discriminatory Purpose.

In addition to the foregoing, the record contains significant evidence to support a finding, consistent with the D.C. Circuit's opinion, that Comcast's claimed business justifications were merely pretextual cover for its true purpose of discrimination — which would provide an alternative basis for the Commission to find a violation of Section 616. The D.C. Circuit's decision found that the Commission had not previously sought to make a case that Comcast's business justifications were pretext for discrimination (as opposed to merely inadequate).[54] The Commission is now free (and, indeed, obligated) to make factual findings on the basis of the record, in light of the court's conclusion that no finding of pretext had been made.[55] In light of this procedural posture, the underlying factual findings set forth in the

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[54] Order ¶ 52 (acknowledging that the networks feature "[s]imilar [s]ports [p]rogramming," including "sporting events and other types of similar non-event sports-related content, such as lifestyle and instructional sports programming," and that "Tennis Channel and Versus have a history of repeatedly sharing or seeking rights to the same sporting events").

[55] A reviewing court may not make its own findings on the basis of the record evidence, "even though a plausible alternative interpretation of the evidence would support a contrary view [to that of the agency]," because "[s]ubstantial evidence review . . . . does not allow a court to 'supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.'" *Allied Mech Servs., Inc.*, 668 F.3d at 771 (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)); *see also, e.g.*, *Pasternack*, 596 F.3d at 838–39 (concluding that an agency's "reasoning . . . was not supported by substantial evidence" because although there was testimony that supported the agency's conclusion, "the ALJ made no credibility determination" with respect to that testimony and the "findings of fact simply did not address that factual issue"); *Jochims*, 480 F.3d at 1169 ("We can only look to the [agency]'s stated rationale. We cannot sustain its action on some other basis the [agency] did not mention.") (quoting *Park Point Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006)). As the Commission has found in prior cases, "a restrictive interpretation of [a reviewing] Court's mandate . . . would be inconsistent with the weight of authority concerning the judicial review (continued…)

Commission's Order may be treated as probative of whether Comcast was acting with a discriminatory purpose.

The panel made clear that the Commission could rely on a finding that Comcast's "otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose."[56] And such a finding is clearly supported by the record evidence. Beyond broad assertions, Comcast offered limited evidence of a business justification for its carriage decision when it had the opportunity before the Commission, and what little it marshaled was discredited by the Commission in its Order. Specifically, to determine that there was no benefit to carrying Tennis Channel broadly, Comcast claimed as a business justification for its carriage decision that it relied on a cost-benefit analysis. However, the Commission rejected this justification based on its conclusion that "Comcast made no attempt to analyze benefits at all."[57] This conclusion was supported by the record evidence, including, for example, the admissions of Comcast decision-makers that, although they considered the costs of broad carriage of Tennis Channel, they did not give "any thought to preparing an analysis of what Comcast might gain by moving Tennis Channel to a more widely distributed tier."[58] In addition, the Commission found that Comcast made no effort to do a cost-benefit analysis of its carriage of Golf Channel and Versus.[59]

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function" *See Meadville Master Antenna, Inc.*, 36 F.C.C.2d 591, 592-93 (1972), *abrogated on other grounds, E. Carolinas Broad. Co.*, 762 F.2d at n.6.

[56] *Comcast*, 717 F.3d at 987.

[57] Order ¶ 79.

[58] Gaiski Tr. at 2438; Initial Decision ¶ 76.

[59] Although the D.C. Circuit characterized the Commission as having found that the cost-benefit analysis "was too hastily performed," *Comcast*, 717 F.3d at 987, in fact, the Commission found not haste, but structural deficiency. Order ¶ 77.

The Commission likewise found that Comcast made its decision to reject broader carriage of Tennis Channel "before [the regional] executives" in a purported "poll" "had a reasonable opportunity to present their findings,"[60] thereby rendering the poll irrelevant to Comcast's decision. In any event, the Commission found, "Comcast [senior management] had clearly indicated to its regional executives that it did not favor broad carriage of Tennis Channel, rendering the results of [such] a 'poll' of those executives unpersuasive."[61]

Arrayed against these almost non-existent efforts at justification is significant evidence that Comcast was motivated by a desire to protect Golf Channel and Versus, and not to maximize the profitability of its MVPD operations. Two Comcast executives admitted that they treat "siblings" more favorably than nonaffiliated networks.[62] They stated that affiliated networks like Golf Channel and Versus receive a "different level of scrutiny" and have "greater access" than an unaffiliated network like Tennis Channel.[63] Comcast even gave Versus broad distribution despite the fact that the executive in charge of Comcast's programming division described it at the time as "a crappy channel that was dead in the water,"[64] and it gave Golf

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[60] Order ¶ 80.

[61] *Id*. Comcast had also asked those executives to update their findings in "a day or two" after consulting with local personnel and then decided to reject Tennis Channel's carriage request the next day, before receiving the updated findings. *Id*. Comcast further claimed that it had consulted consumer surveys showing low consumer demand for Tennis Channel, but the Commission pointed out that those surveys had been consulted in preparation for testimony and that there was no evidence they were reviewed in connection with Comcast's actual decisions regarding Tennis Channel's carriage. *Id.* ¶ 81.

[62] *Id.* ¶ 46; Initial Decision ¶ 55 ("Mr. Steven Burke, then President of Comcast Cable and Chief Operating Officer of Comcast Corporation, acknowledged that Comcast's affiliated networks such as Golf Channel and Versus 'get treated like siblings as opposed to like strangers.'"); Tennis Channel Ex. 7; Bond Tr. at 2249.

[63] Initial Decision ¶ 55; Tennis Channel Ex. 7; Bond Tr. at 2249.

[64] Initial Decision ¶ 58 ("Mr. Jeff Shell, head of Comcast's programming division, characterized OLN, the network subsequently renamed Versus, as 'a crappy channel that was dead in the (continued…)

Channel broad carriage the same year it began operation and therefore had no track record at all.[65]

The record makes it unmistakably clear that the important variable that determines how broadly sports networks are carried on Comcast systems is not whether such carriage provides net benefits, or is economically useful to Comcast's distribution business, but whether Comcast owns all or some of the network. Significantly, this is the same conclusion reached by the Commission's Office of the Chief Economist in an economic study prepared in conjunction with the Comcast/NBC merger.[66]

The record here shows that the greater the degree of Comcast's ownership in a network, the broader the carriage that network receives on its distribution systems.[67] As Tennis Channel's economist noted, "*none* of the sports networks carried exclusively on Comcast's 'Sports Entertainment' tier [where Tennis Channel is carried] is affiliated with (or owned by) Comcast."[68] By contrast, Comcast's wholly-owned national sports networks, Golf Channel and Versus, are carried on Comcast's highly penetrated "Digital Starter" tier.[69] And the three national sports networks in which Comcast owns a minority stake are carried on Comcast's

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water.' Notwithstanding that low estimation of Versus's worth by a top Comcast executive, Comcast Cable maintained its broad distribution of that 'crappy channel' and did not consider repositioning that network to the Sports Tier.") (quoting Tennis Channel Ex. 26; Tennis Channel Ex. 143, Deposition of Jeffrey Shell Designations, at 39).

[65] *See* Tennis Channel Exs. 21, 61.

[66] *Comcast/NBCU Merger Order*, Appendix B ¶ 65 ("[O]ur analysis of Comcast's data on carriage and channel placement shows (1) that Comcast currently favors its affiliated programming in making [carriage and channel placement] decisions and that (2) this behavior stems from anticompetitive motives rather than due to reasons that arise from vertical efficiencies.").

[67] Initial Decision ¶ 59.

[68] Singer Written Direct ¶ 20.

[69] *Id.* ¶ 20 & Table 1.

intermediate "Digital Preferred" tier. Indeed, "Comcast moved the NHL Network from its [narrowly penetrated premium-pay] Sports Tier to its [intermediately penetrated] Digital Preferred Tier shortly after acquiring equity in the network, and Comcast launched MLB Network on Digital Preferred after acquiring equity in the network."[70] This direct relationship between Comcast's network ownership and breadth of carriage is illustrated in Table 1 of Tennis Channel's economist's testimony:[71]

TABLE 1: NATIONAL SPORTS NETWORKS ON COMCAST BY TIER AS OF APRIL 2011

"Digital Starter"	Affiliation	"Digital Preferred"	Affiliation	"Sports Entertainment"	Affiliation
ESPN	No	ESPN News	No	Fox College Sports	No
ESPN2	No	ESPN U	No	**Tennis Channel**	**No**
Golf Channel	Yes	MLB Network	Yes*	CBS College Sports	No
Versus	Yes	NBA TV	Yes**	GolTV	No
		NHL Network	Yes***	NFL Red Zone	No^^
		NFL Network	No^	The Soccer Network	No
				ESPN Classic	No

Sources: Comcast Sports Programming Packages, *available at* http://www.mostlivesports.com/sportsprogramming/ (accessed on Apr. 5, 2011); affiliation is from 13th Annual Report, Appendix C, Table C-1; Comcast 8-K, filed 12/04/09 for the Period Ending 12/03/09, at 6.

Notes: In systems where "Expanded Analog Basic" is still available, Comcast carries ESPN, ESPN2, Golf Channel and Versus on that tier. Table 1 lists the package on which a network is generally carried. Comcast carries some sports networks on multiple tiers in some systems. For example, NHL Network and NBA TV are carried on both the Digital Preferred and Sports Entertainment tiers for some systems. When a network is carried by Comcast on two tiers, I list the tier with the broadest penetration. Although TNT and TBS are listed on Comcast's webpage for sports *programming*, they are not considered national sports *networks*. For example, TNT carries regular-season NBA games on Tuesday and Thursday nights only.

* Comcast owns 8.3 percent of MLB Network. ** Comcast holds equity in NBA TV through its ownership in the National Basketball Association. *** Comcast owns 15.6 percent of the NHL Network, and the League provides anchor programming for Versus. ^ Comcast carries NFL Network pursuant to a settlement of a program carriage dispute. ^^ Comcast also sells the HD version of the NFL Red Zone as part of its extra-charge HD package.

Plainly, the value that Comcast historically has assigned to carriage of national sports networks

[70] *Id.* ¶ 20. "Digital Starter" was Comcast's broadest digital tier, reaching [redacted] of Comcast's subscribers. "Digital Preferred" was the second most highly penetrated Comcast digital tier, reaching [redacted] Comcast customers. The "Sports Entertainment" tier had very limited penetration, reaching approximately [redacted] of Comcast's subscribers. Order ¶ 12 & n.42.

[71] Singer Written Direct ¶ 20 Table 1. Only ESPN and ESPN2 (in addition to Golf Channel and Versus and other Comcast-owned sports services) receive carriage on the first tier, and that is because ESPN is uniquely one of the handful of networks that are "must haves." Two additional ESPN channels are grouped on the second tier with several Comcast owns in part. Non-owned NFL Network appears on this tier, following a settlement of the NFL's Section 616 case against Comcast. *See id.*

is linked closely to its ownership interest in the networks rather than an independent cost-benefit analysis.

In addition to this evidence that Comcast routinely favored its affiliated sports networks at the expense of unaffiliated networks, the record also contains ample evidence that Comcast, as the owner of Golf Channel and Versus, had an economic motivation to suppress carriage of Tennis Channel. Among other things, Versus was a competitor for rights to the same premiere tennis events as Tennis Channel.[72] Its efforts to win the rights to telecast these events were clearly benefited by limiting Tennis Channel's distribution — a fact of which Comcast executives were aware.[73] Indeed, a Comcast executive admitted that it was "not viable" for an ad-supported sports network to survive or thrive on the narrowly penetrated premium-pay sports tier.[74] Being on the sports tier greatly reduces the number of potential viewers that Tennis Channel can offer advertisers and thereby gives Golf Channel and Versus a competitive

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[72] *See* Initial Decision ¶ 26; Tennis Channel Ex. 40; Tennis Channel Ex. 143, Deposition of Jeffrey Shell Designations, at 41:4-5 (noting that Versus bid unsuccessfully for rights to the U.S. Open); Tennis Channel Ex. 179; Orszag Tr. at 1407:3-9 (stipulating that Comcast pursued rights to Wimbledon events for Versus); Solomon Written Direct ¶¶ 5, 42 n.10 (noting that Tennis Channel won rights to telecast U.S. Open matches and presently holds rights to telecast Wimbledon events).

[73] Comcast recognized that its failure to grant broad coverage to Tennis Channel threatened Tennis Channel's ability to survive, noting that the U.S. Tennis Association's investment in Tennis Channel "increas[ed] the chances that the channel [would] survive." Tennis Channel Ex. 35; Donnelly Tr. at 2580:15–21; *see also* Tennis Channel Ex. 84; Gaiski Tr. at 2393:10–2398:3 (noting that Comcast ensured Comcast cable systems provided Versus at least a [redacted] penetration level to be competitive for the right to telecast professional hockey games from NHL).

[74] Tennis Channel Ex. 9 (Comcast Programming chief explaining that Comcast's narrowly penetrated premium-pay sports tier is "not viable" for an ad-supported network); *see also* [redacted]

advantage in competing for these advertising revenues.[75] Comcast's own programming business internally concluded that, as Tennis Channel's distribution increased, its value correspondingly increased.[76]

In light of this compelling evidence of Comcast's discriminatory pattern of conduct and other relevant record evidence that Comcast was acting with a discriminatory purpose, the Commission should find, consistent with the D.C. Circuit's mandate, that Comcast's unconvincing explanations for relegating Tennis Channel to the narrowly penetrated premium-pay sports tier were merely pretextual cover for a discriminatory purpose. That is simply putting the correct label on the evidence that appeared on record with respect to the bona fides of Comcast's purported justifications for not carrying Tennis Channel broadly.

III. IF THE COMMISSION CONCLUDES IT NEEDS ADDITIONAL EVIDENCE TO SATISFY THE D.C. CIRCUIT'S REQUIREMENTS, IT SHOULD DESIGNATE THE ISSUES REQUIRING FACTUAL ENHANCEMENT AND REOPEN THE RECORD.

Tennis Channel believes that the existing record includes more than enough evidence for the Commission to find that Comcast had reason to expect a net benefit, or at least lesser incremental losses than those associated with Golf Channel and Versus, from carrying Tennis Channel more broadly, and that Comcast's stated reasons for declining to do so were merely pretext. However, if the Commission disagrees and on this record is unable to make findings that would resolve the outstanding factual issues identified by the D.C. Circuit, it should

[75] Goldstein Tr. at 2750:3–16 (stating that as an advertiser, "we would go for the one . . . that delivered more viewers than less," and "being broadly distributed helps the network").

[76] Donnelly Tr. at 2550:3–21.

— indeed, must — allow the parties to produce additional evidence that sheds light on the new tests raised by the court's opinion.[77]

CONCLUSION

For the reasons set forth above, the Commission should establish a new limited briefing cycle in this case, in the form of limited proposed findings of fact and conclusions of law submitted by the parties, and thereafter, applying the D.C. Circuit's new tests that are now the law of the case, affirm its initial decision and require equal carriage of Tennis Channel at the contract rate Comcast agreed to pay.

Respectfully submitted,

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

Counsel to The Tennis Channel, Inc.

March 11, 2014

[77] *See Inquiry into Policies to Be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico*, 8 FCC Rcd. 63, 72 n.90 (1992); *see also E. Carolinas Broad. Co.*, 762 F.2d at 103–04 (finding that the Commission acted arbitrarily when it did not reopen the record after remand from the D.C. Circuit).

CERTIFICATE OF SERVICE

I, Elizabeth Canter, hereby certify that on this 11th day of March, 2014, I caused a true and correct copy of the foregoing Petition for Further Proceedings and Reaffirmation of Original Decision to be served by electronic mail (or, in the case of the Secretary of the Commission, by hand delivery) upon:

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Gary Oshinsky
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Suite 4-C330
Washington, D.C. 20554

William Knowles-Kellett
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Counsel to the Enforcement Bureau

Miguel A. Estrada
Cynthia E. Richman
Jonathan C. Bond
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

David B. Toscano
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017

James L. Casserly
David P. Murray
Michael Hurwitz
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, D.C. 20006-1238

David H. Solomon
J. Wade Lindsay
WILKINSON BARKER KNAUER, LLP
2300 N Street, NW, Suite 700
Washington, D.C. 20037

Counsel to Comcast Cable Communications, LLC

/s/Elizabeth Canter