

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

In the Matter of)
)
The Tennis Channel, Inc.,)
Complainant)
 v.)
Comcast Cable Communications, LLC,)
Defendant)

MB Docket No. 10-204
File No. CSR-8258-P

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**COMCAST'S OPPOSITION TO TENNIS CHANNEL'S PETITION FOR FURTHER
PROCEEDINGS AND REAFFIRMATION OF ORIGINAL DECISION**

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SUMMARY

Tennis Channel's petition asks the Commission to commence further administrative proceedings that the U.S. Court of Appeals for the D.C. Circuit has already rejected in order to consider an issue that the court has already decided. The petition is a transparent invitation to defy the D.C. Circuit's mandate by reaffirming the very ruling that the court already found devoid of evidentiary support. The Commission should decline.

The D.C. Circuit's decision leaves no doubt that Tennis Channel's claim is meritless, and its ruling forecloses further litigation of the case. After reviewing the entire record, the D.C. Circuit unanimously held that, "even under the *Commission's* interpretation of § 616," Tennis Channel failed to prove that Comcast discriminated on the basis of affiliation. *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 984 (D.C. Cir. 2013) (emphasis added). There is "no evidence" in the record, the court concluded, that Tennis Channel's proposal "would have afforded Comcast *any* benefit," which doomed Tennis Channel's claim. *Id.* (first emphasis added). That decision is not open to debate. The *en banc* D.C. Circuit denied Tennis Channel's request for rehearing; not a single judge called for a vote. And the Supreme Court denied Tennis Channel's petition for a writ of certiorari, without even requesting a response from the Commission or Comcast. The D.C. Circuit's decision is as final as a federal-court ruling can be. The Commission is bound to follow it.

Tennis Channel, however, asks the Commission to flout the D.C. Circuit's ruling. It invites the Commission to pretend that the court did *not* decide whether the record demonstrates discrimination, and instead left that question open to the Commission on remand. But Tennis Channel's arguments are nothing more than direct attacks on the court's decision. Even though it concedes that the court "made clear *its* view that it was *following—not changing—the* standards for Section 616," Tennis Channel openly urges the Commission to conclude that the court *actually* announced "*new* tests for Section 616." Pet. for Further Proceedings ii (emphases added). And even though the D.C. Circuit itself explicitly applied the Commission's legal standard to the record and found "no evidence" of discrimination, 717 F.3d at 984, 987, Tennis Channel would have the Commission conclude that the court *really* meant for the agency to apply that standard to the evidence and to draw its *own* conclusions.

Tennis Channel's claims are flatly contradicted by the panel's opinion. Indeed, the suggestion that the court left the discrimination issue open to reconsideration is refuted by the court's express reservation of judgment on multiple additional, *independent* legal grounds Comcast raised that would completely foreclose Tennis Channel's claim (including that Tennis Channel's claims were time-barred, that Section 616 requires a showing of market power, and that application of Section 616 in the circumstances of this case violated the First Amendment). The panel did not decide those issues only because its rejection of Tennis Channel's claim on its facts—applying the Commission's own test—made resolving those issues unnecessary. Had the panel contemplated, however, that its analysis of the evidence concerning discrimination did *not* definitively resolve the parties' dispute, it could not have avoided conclusively adjudicating those legal issues.

If the panel's opinion left any doubt that it did not send the case back for a do-over, that doubt is erased by Tennis Channel's own admission that the panel's opinion did *not* remand the

case for further proceedings—and by the D.C. Circuit’s rejection of Tennis Channel’s request that the court change its ruling to grant just such a remand. In seeking rehearing, Tennis Channel conceded that the panel did “*not* reman[d] the case for further proceedings to determine whether” the evidence proves discrimination under the test the court articulated, and it asked the court to amend the decision to do so. Pet. for Reh’g 11, No. 12-1337 (D.C. Cir. July 12, 2013) (emphasis added). But both the panel and the *en banc* court declined. Tennis Channel never mentions this. But its admission belies any assertion that if the Commission squints hard enough, it can find a remand buried between the lines of the panel’s opinion. And the court’s *refusal* to remand the case to the Commission to hold the very “further proceedings” Tennis Channel now proposes plainly forecloses such proceedings now.

Tennis Channel’s fallback claim, which it never advanced in the D.C. Circuit, that the court was *required* by 47 U.S.C. § 402(h) to remand the case is merely another collateral attack on the court’s ruling, which the Commission cannot properly entertain. In any event, that claim is both wrong and ultimately irrelevant. Section 402(h) does not apply to Comcast’s petition for review in the D.C. Circuit; as the Commission previously recognized, Section 402(h) governs appeals under Section 402(b), not petitions for review under Section 402(a). But even if Section 402(h) were applicable, all it would require is that the “Commission ... *carry out* the judgment of the court and ... *give effect* thereto.” 47 U.S.C. § 402(h) (emphases added). That statutory command to implement the court’s ruling hardly empowers the Commission to ignore the decision and to revisit issues that the court itself has already adjudicated. Construing Section 402(h) to allow an agency to disregard a judicial decision turns the statute upside-down.

Tennis Channel’s claims, in short, boil down to its own disagreement with the D.C. Circuit’s ruling. That disagreement has no bearing on the Commission’s authority or obligations now. The court’s mandate is not a suggestion. It is a binding judicial decree, which all parties to the case must obey. Accepting Tennis Channel’s invitation to second-guess the D.C. Circuit’s decision would not only be unlawful in this case, but could undermine the Commission’s ongoing credibility with the D.C. Circuit.

Moreover, even if the Commission could ignore the court of appeals’ mandate, Tennis Channel’s request is meritless on its own terms. What Tennis Channel seeks is really reopening of the existing proceedings, but its petition does not come close to satisfying the Commission’s high standard for doing so. Tennis Channel had ample opportunity to present any evidence and arguments it wished in the four years that this proceeding already consumed. Allowing Tennis Channel to relitigate those issues and present new arguments with the benefit of hindsight would be palpably inequitable. And permitting it to adduce new *evidence* would not only be unfair, but unlawful, under 28 U.S.C. § 2347(c)—or, if it were applicable, 47 U.S.C. § 402(h)—both of which bar taking further evidence absent a court order.

Tennis Channel’s petition thus asks the Commission to do what it should not and cannot. The Commission lacks authority to conduct further proceedings focused on an issue the D.C. Circuit has already, definitively decided. And it assuredly cannot reinstate a ruling that a federal court of appeals overturned, based on the Commission’s disagreement with the court’s conclusions. The only course open to the Commission is to deny the petition and take any further ministerial action that the Commission may deem necessary to bring this case, at long last, to an end.

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INTRODUCTION

Tennis Channel's petition seeks relief that the Commission may not lawfully grant because it is a direct assault on the D.C. Circuit's decision. The D.C. Circuit applied the Commission's own existing standard for discrimination under Section 616, and concluded, after reviewing the whole record, that Tennis Channel failed to prove its case. The court's ruling left no doubt that it believed the matter was closed; the court declined to address independent grounds for rejecting Tennis Channel's claims, which two judges found compelling, precisely because its analysis of Tennis Channel's purported evidence of discrimination was dispositive. The D.C. Circuit, moreover, considered but *rejected* Tennis Channel's request to remand the case to the Commission for the very purpose Tennis Channel now advocates: holding further proceedings to determine—based on the existing record, or even with new evidence—whether Comcast unlawfully discriminated against Tennis Channel under the standard the court itself had applied.

By asking the Commission nevertheless to conduct such proceedings and to “reaffir[m]” a ruling that the D.C. Circuit rejected, Tennis Channel invites the Commission to defy the D.C. Circuit's mandate, and to ignore the court's ruling denying identical relief. And Tennis Channel urges the Commission to do so on the basis that the D.C. Circuit's *substantive* conclusions are wrong. Neither Tennis Channel nor the Commission is free to second-guess a federal court's ruling rejecting the agency's conclusions and overturning the agency's order. But in any event, the Commission has no basis to do so here. Its own precedent precludes reopening proceedings in these circumstances. And allowing Tennis Channel to relitigate issues it had ample opportunity to address previously would work a tremendous injustice to Comcast and serve no purpose but to delay the inevitable end of the proceedings while imposing needless burdens on the Commission and Comcast.

The Commission should swiftly deny Tennis Channel's petition and take any further ministerial action that the Commission may deem necessary to terminate the proceeding.¹

BACKGROUND

1. This now-completed program-carriage litigation stems from Tennis Channel's dissatisfaction with a contract it signed nearly nine years ago. Tennis Channel, a tennis-focused network launched in 2003, sought carriage on Comcast's "sports tier," an optional package of 10-15 sports channels that Comcast's subscribers can access for a small monthly fee.² In 2005, the parties entered a carriage contract granting Comcast the "right to carry" Tennis Channel, and to do so "on any ... tier of service."³ Comcast has carried Tennis Channel on its sports tier ever since.⁴ Both before and after entering its agreement with Comcast, Tennis Channel struck similar deals with other multichannel video-programming distributors ("MVPDs").⁵

In the years that followed, Tennis Channel adopted a new strategy. In 2006 and 2007, it attempted to achieve wider distribution by offering Comcast and other MVPDs an equity stake in Tennis Channel in exchange for broader carriage. Two major MVPDs agreed,⁶ but Comcast

¹ Tennis Channel does not currently seek a ruling on the merits of the discrimination issue; its petition requests only an opportunity to submit additional briefing (and possibly further evidence) addressing affiliation-based discrimination. *See* Pet. for Further Proceedings and Reaffirmation of Original Decision 1-2 (Mar. 11, 2014) ("Pet."). Nevertheless, Tennis Channel devotes a substantial portion of its petition to relitigating the merits of the discrimination issue. *Id.* at 13-26. Because the D.C. Circuit's decision forecloses relitigation of those issues and the further proceedings that Tennis Channel proposes, Comcast does not address here the substance of Tennis Channel's evidentiary arguments, and will do so only in the event that the Commission grants Tennis Channel's petition and orders further proceedings concerning these issues.

² *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 984 (D.C. Cir. 2013).

³ *Id.*; *see* Comcast Exh. 84, at 9-10.

⁴ 717 F.3d at 984.

⁵ *See* Comcast Exhs. 120, 165, 235.

⁶ *See* Hr'g Tr. 407-15, 419-20; Comcast Exhs. 503, 701, 703, 704.

declined, after examining the costs and benefits and concluding that it would lose money from Tennis Channel's proposal.⁷

2. Tennis Channel then developed and executed a plan to secure broader carriage from Comcast through litigation. In 2009, it approached Comcast seeking carriage to millions of additional subscribers, and proposed an agreement under which Comcast would pay Tennis Channel a per-subscriber fee for the increased carriage.⁸ Tennis Channel offered its own analysis of the total fee Comcast would pay under the proposal.⁹ Even with discounts Tennis Channel included in its proposal, the cost to Comcast would be "substantial."¹⁰ Nothing in Tennis Channel's analysis, however, "made (much less substantiated) projections of any resulting increase in revenue for Comcast, let alone revenue sufficient to offset the increased fees."¹¹ In fact, there was no indication that accepting Tennis Channel's proposal would attract new subscribers or yield Comcast any other offsetting benefit.¹² Other MVPDs that Tennis Channel approached rejected similar proposals.¹³

In 2010—five years after the parties entered their carriage agreement—Tennis Channel filed a program-carriage complaint based on Comcast's rejection of its proposal.¹⁴ Tennis Channel claimed that Comcast violated Section 616 of the Communications Act,¹⁵ and the

⁷ See Comcast Exh. 75, ¶¶ 25-27; Comcast Exh. 112.

⁸ See 717 F.3d at 984.

⁹ *Id.* at 984-85.

¹⁰ *Id.* at 985; see Hr'g Tr. 2127.

¹¹ *Id.* at 985.

¹² See Hr'g Tr. 2121-25; Comcast Exh. 75, ¶¶ 16-18; Comcast Exh. 78, ¶¶ 14-16; Comcast Exhs. 467, 588.

¹³ See Comcast Exhs. 31-32, 201, 529, 534, 545, 632, 1103.

¹⁴ See 717 F.3d at 985.

¹⁵ 47 U.S.C. § 536.

Commission's implementing regulations, by carrying Tennis Channel less broadly than Comcast carried two affiliated networks, then known as Golf Channel and Versus.¹⁶ Notably, every other major MVPD—including Tennis Channel's partial owners, DirecTV and Dish Network—also carried Tennis Channel less broadly than Golf Channel and Versus.¹⁷

Comcast opposed Tennis Channel's complaint on numerous grounds, including that it was barred by the statute of limitations established in the Commission's rules.¹⁸ The Media Bureau disagreed, and it concluded that Tennis Channel had pleaded a prima facie case of discrimination, and set the case for a hearing before an administrative law judge ("ALJ").¹⁹

During the ensuing six-day trial before the ALJ, both parties presented evidence concerning Tennis Channel's claim. Among other evidence, Comcast presented testimony that it made a "straight up financial" decision to reject Tennis Channel's proposal: It determined that accepting the proposal would come at a significant cost—in terms of increased subscriber fees and potentially reduced revenue from the sports tier—with no offsetting benefits.²⁰ Tennis Channel, meanwhile, presented the testimony of two Tennis Channel executives and two expert witnesses, and also had the opportunity to cross-examine four Comcast executives and three expert witnesses. Nonetheless, Tennis Channel presented no evidence that its proposal would afford Comcast "any benefit," much less a benefit great enough to offset the increased costs.²¹

¹⁶ See Compl. ¶¶ 56-100.

¹⁷ See Comcast Exhs. 1102-03.

¹⁸ See Answer ¶¶ 30-125; Comcast App. for Review (Jan. 19, 2012).

¹⁹ See *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 25 FCC Rcd. 14,149 (MB 2010).

²⁰ See Hr'g Tr. 2127; see also *id.* at 2110-12, 2121-26.

²¹ See 717 F.3d at 984, 987.

After the trial, the ALJ ruled for Tennis Channel.²² The Commission affirmed.²³

3. Comcast petitioned for review of the Commission's order affirming the ALJ's decision in the D.C. Circuit.²⁴ Comcast challenged the Commission's ruling on multiple legal and factual grounds, including (*inter alia*) that Tennis Channel's claim was time-barred under the statute of limitations; that the Commission had misinterpreted Section 616, and under a correct reading of that provision and the First Amendment, Tennis Channel's claim could not prevail; and that even under the Commission's *own* interpretation of Section 616, Comcast had not discriminated against Tennis Channel based on affiliation, and Tennis Channel failed to prove otherwise.²⁵ Comcast asked the court to "hold unlawful, vacate, enjoin, and set aside the [Commission's] Order."²⁶

The panel unanimously granted Comcast's petition.²⁷ The court noted the various broader issues that Comcast raised—regarding the statute of limitations, Section 616, and the First Amendment.²⁸ Although two judges wrote concurring opinions, each embracing distinct reasons why Tennis Channel's case failed as a matter of law, the panel as a whole expressly reserved judgment on these broader issues, explaining that the court "need not reach" those questions because "Comcast prevails" on its argument "that even under the Commission's interpretation of § 616 (the correctness of which [the court] assume[d] for purposes of [its]

²² See *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P (Dec. 20, 2011).

²³ *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Mem. Op. and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78 (July 24, 2012).

²⁴ Pet. for Review 2, No. 12-1337 (D.C. Cir. Aug. 1, 2012).

²⁵ See *id.*; Comcast Final Br. 18-62, No. 12-1337 (D.C. Cir. Dec. 3, 2012).

²⁶ Pet. for Review 2, No. 12-1337 (D.C. Cir. Aug. 1, 2012).

²⁷ 717 F.3d at 983-87.

²⁸ *Id.* at 984.

decision), the Commission has failed to identify adequate evidence of unlawful discrimination.”²⁹ The court agreed with Comcast “that the Commission could not lawfully find discrimination because [Tennis Channel] offered no evidence that its rejected proposal would have afforded Comcast *any* benefit.”³⁰ The Commission accordingly “ha[d] nothing to refute Comcast’s contention that its rejection of [Tennis Channel’s] proposal was simply ‘a straight up financial analysis.’”³¹ The court noted various types of evidence that Tennis Channel *could* have offered, but concluded that there was no such evidence in the record.³² Indeed, even assuming *arguendo* that Tennis Channel had pleaded a prima facie case of discrimination, “and that in those circumstances [the Commission] could shift the burden” to Comcast to disprove that prima facie case, Tennis Channel’s claim *still* failed because “the record simply lacks material evidence that the [Tennis Channel] proposal offered Comcast any commercial benefit.”³³

While joining the panel’s opinion in full, two judges wrote separately to express their agreement with additional Comcast arguments that would have independently foreclosed Tennis Channel’s claim. Judge Edwards agreed with Comcast that “Tennis Channel’s complaint” should have been dismissed at the outset because it “was untimely filed under the applicable statute of limitations encoded in 47 C.F.R. § 76.1302(f) (2010).”³⁴ That provision, Judge Edwards explained, required Tennis Channel to file suit within one year of entering its carriage agreement with Comcast in 2005, yet Tennis Channel waited *five* years, until 2010, to sue.³⁵

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* (citation omitted).

³² *See id.* at 985-86.

³³ *Id.* at 987.

³⁴ *Id.* at 995 (Edwards, J., concurring); *see id.* at 994-1007.

³⁵ *See id.* at 996, 1007.

Judge Edwards rejected the Commission’s rationale for deeming Tennis Channel’s complaint timely, agreeing with Comcast that the agency violated the Administrative Procedure Act by adopting an interpretation that “not only rewrites the statute of limitations, but also nullifies it by allowing a party to a carriage contract to bring suit at any time.”³⁶ And, as Judge Kavanaugh explained, Tennis Channel’s claim was independently foreclosed because both Section 616 and the First Amendment require a network to prove that the MVPD “possesses market power” in the relevant market—which Comcast “does not have” in the nationwide market at issue in this case.³⁷ Without disagreeing with these additional grounds—each of which would foreclose liability—the panel reserved judgment on them, because its analysis of the evidence of discrimination resolved the parties’ dispute.³⁸

4. Tennis Channel filed a petition in the D.C. Circuit for panel or *en banc* rehearing.³⁹ It argued that the panel applied the wrong legal standard to determine whether Comcast discriminated against Tennis Channel, departing from the statute and the Commission’s prior interpretation of it.⁴⁰ In the alternative, Tennis Channel argued that the panel “erred in not remanding the case for further proceedings to determine whether” any evidence of discrimination of the kind the panel held was required by the Commission’s legal standard “exists” in the record.⁴¹ Tennis Channel urged the court to alter the panel’s ruling to remand the case to the Commission “for consideration, in light of the panel’s decision, of whether Comcast violated

³⁶ *Id.* at 996 (citation and emphasis omitted).

³⁷ *Id.* at 988 (Kavanaugh, J., concurring); *see id.* at 987-94.

³⁸ *Id.* at 984 (majority opinion).

³⁹ Pet. for Reh’g, No. 12-1337 (D.C. Cir. July 12, 2013).

⁴⁰ *Id.* at 4-11.

⁴¹ *Id.* at 11.

Section 616.”⁴² But “even if the existing record did not contain evidence” sufficient to prove discrimination under the standard the court applied, Tennis Channel argued that the case *still* should be remanded so that the parties could present *additional* evidence.⁴³

Both the panel and the *en banc* court summarily denied Tennis Channel’s petition. Not a single judge called for a vote on Tennis Channel’s rehearing request.⁴⁴

Tennis Channel then filed a petition in the Supreme Court for a writ of certiorari to review the D.C. Circuit’s decision.⁴⁵ Both the Commission and Comcast waived their right to file a response unless the Court requested one.⁴⁶ On February 24, 2014, the Supreme Court denied certiorari without calling for a response.⁴⁷

ARGUMENT

I. Granting The Petition’s Request To Hold Further Proceedings And To Reaffirm The Commission’s Prior Order Would Contravene The D.C. Circuit’s Mandate.

It is a bedrock tenet of federal law that agencies must obey court rulings. “Judgments within the powers vested in courts by” Article III “may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”⁴⁸ “Nor may an administrative agency choose simply to ignore a federal-court judgment.”⁴⁹ Indeed, “[i]f an administrative

⁴² *Id.* (capitalization omitted).

⁴³ *Id.* at 15.

⁴⁴ See Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013) (denying panel rehearing); En Banc Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013) (denying rehearing *en banc*, noting “the absence of a request by any member of the court for a vote”).

⁴⁵ Pet. for Cert., No. 13-676 (U.S. Dec. 3, 2013).

⁴⁶ See Commission Waiver, No. 13-676 (Dec. 31, 2013); Comcast Waiver, No. 13-676 (Dec. 11, 2013).

⁴⁷ See Order, No. 13-676 (U.S. Feb. 24, 2014).

⁴⁸ *Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948).

⁴⁹ *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993).

agency were entitled to ‘completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render.’”⁵⁰ Moreover, as Tennis Channel concedes, “[t]he ‘law of the case’ doctrine ... applies to administrative agencies on remand,” and requires agencies to follow earlier judicial rulings in the case unless and until they are overturned.⁵¹ Consequently, “once a court has issued a legal ruling on a disputed issue,” an agency “is bound to follow the court’s judgment unless and until it is reversed by the Supreme Court.”⁵² An agency that instead defies a court’s mandate does so at its own risk.⁵³

Here, Tennis Channel invites the Commission to do exactly that. It asks the Commission to hold further proceedings for the sole purpose of second-guessing the D.C. Circuit’s decision—and ultimately to “reaffirm” the very order the court invalidated.⁵⁴ And it urges the Commission to do so in the teeth of the court’s further ruling *rejecting* Tennis Channel’s request to remand the case to the agency to conduct such proceedings. This the Commission cannot properly do.

A. The D.C. Circuit’s Definitive Holding That There Is No Record Evidence Of Discrimination Forecloses Further Proceedings To Revisit That Issue.

Tennis Channel asks the Commission to “initiate further proceedings” to address the question “whether the record evidence” demonstrates that “Comcast discriminated against

⁵⁰ *Id.* at 428 (quoting *Chi. & S. Air Lines*, 333 U.S. at 113).

⁵¹ *Brachtel v. Apfel*, 132 F.3d 417, 419-20 (8th Cir. 1997); *see* Pet. 2.

⁵² *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 739-40 (D.C. Cir. 2000) (Edwards, C.J.) (remanding to agency “with instructions to justify” remedy it had imposed “as required by the law of this circuit or, in the absence of such justification, to vacate that portion of the remedy”).

⁵³ *See, e.g., Nat’l Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345, 354-55 (D.C. Cir. 1978) (granting petition for review in part based on agency’s failure to follow court’s prior mandate and agency’s “evasion of an order of th[e] court,” which “threaten[ed]” “destruction ... to the settled principles governing the relationship of agency and reviewing court”).

⁵⁴ Pet. 13.

Tennis Channel in violation of Section 616.”⁵⁵ The D.C. Circuit, however, has finally and conclusively decided that question. As the court explained, “even under the Commission’s interpretation of § 616 (the correctness of which [the court] assume[d] for purposes of [its] decision), the Commission has failed to identify adequate evidence of unlawful discrimination.”⁵⁶ There was “no dispute” that Section 616—as previously construed by the Commission, and as the Commission’s counsel “conceded ... at oral argument”—“prohibits only discrimination *based on* affiliation.”⁵⁷ “Thus, if the MVPD treats vendors differently based on a reasonable business purpose,” and not a network’s affiliation status, “there is no violation.”⁵⁸

That undisputed principle was dispositive here—irrespective of other disputes about the statute’s scope—because, even assuming that Tennis Channel established a *prima facie* case of discrimination, the record contained “nothing to refute Comcast’s contention that its rejection of [Tennis Channel’s] proposal was simply a straight up financial analysis.”⁵⁹ The record amply demonstrated the immense costs to Comcast of accepting Tennis Channel’s proposal of broader carriage.⁶⁰ But Tennis Channel had “offered no evidence that its rejected proposal would have afforded Comcast *any* benefit,” much less a benefit great enough to offset the increased cost.⁶¹ The court identified several “obvious” types of evidence that Tennis Channel *could* have tendered to demonstrate a benefit to Comcast, such as “expert evidence” showing that if the

⁵⁵ *Id.* at 1.

⁵⁶ 717 F.3d at 984.

⁵⁷ *Id.* at 985 (citing *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 25 FCC Rcd. 18,099, ¶ 22 (2010), *aff’d*, 679 F.3d 269 (4th Cir. 2012)).

⁵⁸ *Id.*

⁵⁹ *Id.* at 984 (internal quotation marks omitted).

⁶⁰ *See id.* at 985.

⁶¹ *Id.* at 984; *see id.* at 984-87.

proposal were adopted, enough subscribers “would switch to Comcast” to enable Comcast to “recoup the proposed increment in cost.”⁶² But after reviewing the record, the court determined that “[t]here is no such evidence.”⁶³ “[T]he record,” in short, “simply lacks material evidence that the [Tennis Channel] proposal offered Comcast any commercial benefit,” which foreclosed a conclusion that “Comcast discriminated against [Tennis Channel] on the basis of affiliation.”⁶⁴ The D.C. Circuit thus squarely addressed the question “whether the record evidence” establishes affiliation-based discrimination under Section 616, and held that it does not.

Tennis Channel asks the Commission to disregard this ruling, and to reassess the evidence for itself and decide the discrimination issue *de novo*.⁶⁵ That is beyond the agency’s power.⁶⁶ Only the D.C. Circuit itself and the Supreme Court have the power to alter or overturn the court’s ruling. Both, however, refused to do so. The *en banc* D.C. Circuit rejected Tennis Channel’s request for rehearing, without any judge calling for a vote.⁶⁷ And the Supreme Court denied certiorari, without requesting a response from the Commission or Comcast.⁶⁸ The D.C. Circuit panel’s ruling is therefore final and now beyond challenge, and all parties to the proceeding, including the Commission, are duty-bound to obey it.

⁶² *Id.* at 986.

⁶³ *Id.*

⁶⁴ *Id.* at 987.

⁶⁵ Pet. 1-2.

⁶⁶ See *Chi. & S. Air Lines*, 333 U.S. at 113; *Town of Deerfield*, 992 F.2d at 428; *Vincent Indus.*, 209 F.3d at 739.

⁶⁷ See Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013); En Banc Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013).

⁶⁸ See Order, No. 13-676 (U.S. Feb. 24, 2014).

B. The D.C. Circuit Did Not Explicitly Or Implicitly Remand The Case To The Commission To Reassess Whether The Record Establishes Discrimination.

Tennis Channel attempts to evade the clear import of the D.C. Circuit's decision by contending that the court did *not* actually decide whether the record supports a finding of discrimination, but left that issue to be resolved by the Commission. Nothing in the court's decision remotely supports that assertion. Indeed, the panel's opinion, Tennis Channel's admission, and the court's rejection of Tennis Channel's rehearing request squarely refute it.

When the D.C. Circuit intends to remand a case to the Commission for further proceedings, it says so expressly.⁶⁹ Its opinion here, however, says nothing about remanding to address any issue.⁷⁰ Instead, it simply "[g]ranted" Comcast's petition for review, which had asked the court to "hold unlawful, vacate, enjoin, and set aside the [Commission's] Order."⁷¹ The court's formal mandate likewise is silent regarding remand, in stark contrast to cases in which the court expressly remands for further proceedings.⁷² The panel plainly was aware of the possibility of remanding for the Commission to consider a particular issue further; indeed, one of

⁶⁹ See, e.g., *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014) ("We remand the case to the Commission for further proceedings consistent with this opinion."); *BellSouth Telecomm's, Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) ("we vacate and remand for further proceedings consistent with this opinion"); *SBC Commc'ns, Inc. v. FCC*, 407 F.3d 1223, 1232 (D.C. Cir. 2005) ("[w]e vacate the order and remand for further proceedings"); *Commc'ns Satellite Corp. v. FCC*, 836 F.2d 623, 636 (D.C. Cir. 1988) ("[w]e therefore vacate the Commission's order ... and remand for further proceedings"); *Orange Park Fla. T.V., Inc. v. FCC*, 811 F.2d 664, 675 (D.C. Cir. 1987) ("[w]e therefore vacate [a] portion of the Commission's decision ... and remand to the agency"); *All Am. Cables & Radio, Inc. v. FCC*, 736 F.2d 752, 761 (D.C. Cir. 1984) (Commission's orders "are vacated, and the cases are remanded to the Federal Communications Commission for further proceedings").

⁷⁰ See 717 F.3d at 983-87.

⁷¹ *Id.* at 987; Pet. for Review 2, No. 12-1337 (D.C. Cir. Aug. 1, 2012).

⁷² Compare Mandate, No. 12-1337 (D.C. Cir. Sept. 13, 2013) ("it is ordered and adjudged that the petition for review is granted, in accordance with the opinion of the court" (capitalization omitted)), with Mandate, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Mar. 11, 2014) ("it is ordered and adjudged that the ... rules be vacated *and the cases be remanded for further proceedings*, in accordance with the opinion of the court" (emphasis added; capitalization omitted)).

the concurring judges identified a hypothetical scenario in which remand *would* be required for that purpose.⁷³ But the panel elected *not* to send this case back to the Commission for additional proceedings, reflecting its conclusion that no such proceedings were necessary.⁷⁴

Tennis Channel is thus left to argue that, despite granting Comcast's petition for review based on the lack of evidence of discrimination—and without so much as hinting that further proceedings were warranted, while in fact rejecting Tennis Channel's request to amend the mandate to include a remand—the D.C. Circuit did *not* decide the discrimination question, but instead remanded the case *sub silentio* to the Commission to decide that issue for itself.⁷⁵ That claim is flatly contradicted by the D.C. Circuit's analysis of the discrimination issue, and by the court's reservation of judgment on independent grounds that would foreclose Tennis Channel's claims. Any doubt is erased by Tennis Channel's later *admission* in the court of appeals that the panel did *not* remand for further proceedings to address the evidence of discrimination, and by the D.C. Circuit's *rejection* of Tennis Channel's request that the court revise its ruling to do so. Tennis Channel's arguments, at bottom, are simply attacks on the court's rulings. Tennis Channel is free to disagree with those rulings, but the Commission must faithfully follow them.

⁷³ 717 F.3d at 991-92 n.2 (Kavanaugh, J., concurring) (explaining that Section 616 applies “only when a video programming distributor possesses market power in the relevant market,” but that, “even if we thought Section 616 reasonably could be applied to video programming distributors without market power,” the court “would have to remand” the case “[b]ecause the FCC’s Order never actually interpreted the phrase ‘unreasonably restrain’”).

⁷⁴ Tennis Channel's claim that the court's ruling vacating the Commission's prior order left “no final Commission ruling on Tennis Channel's complaint” standing (Pet. 11) is true as far as it goes. But to the extent a final Commission ruling on the complaint is necessary, all that is required—and all the Commission *can* do in light of the D.C. Circuit's mandate—is to issue a ministerial order implementing the court's decision by terminating the proceeding for the reasons stated by the D.C. Circuit, which as Tennis Channel concedes are now “law of the case.” *Id.* at 2.

⁷⁵ *Id.* at 11.

1. Tennis Channel's Claims That The D.C. Circuit Adopted "New Tests" For Section 616 And Left Their Application To The Commission On Remand Are Direct Attacks On The Court's Holdings.

Tennis Channel's argument that the D.C. Circuit left the Commission free to determine on remand whether Comcast discriminated against Tennis Channel based on its affiliation rests explicitly on two premises: (1) the D.C. Circuit created "new tests" for discrimination under Section 616;⁷⁶ and (2) the court itself did not apply the legal standard it articulated to the facts of this case, and did not even review the entire record.⁷⁷ Both premises are squarely refuted by the panel's opinion.

a. As to the first premise, Tennis Channel *concedes* that the court itself did not purport to adopt any new legal standard for discrimination under Section 616: "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."⁷⁸ The court emphasized that it was applying "the *Commission's* interpretation of § 616"—drawn from existing Commission precedent and confirmed by the Commission's counsel at oral argument—"the correctness of which [the court] assume[d] for purposes of [its] decision."⁷⁹ And when Tennis Channel urged the *en banc* D.C. Circuit to grant rehearing on the basis that the panel had failed to apply the Commission's test, not a single judge thought that claim substantial enough to warrant a *poll*.⁸⁰

⁷⁶ *Id.* at ii, 2, 3, 7, 10, 11, 12, 13, 19.

⁷⁷ *Id.* at 12 ("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.")

⁷⁸ Pet. ii (emphasis added); *see also id.* at 7 ("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.")

⁷⁹ 717 F.3d at 984 (emphasis added); *see id.* at 985.

⁸⁰ En Banc Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013).

Tennis Channel nevertheless asserts that, despite the court's pronouncements that it was applying the Commission's existing legal standard, the court in substance applied a new one.⁸¹ It contends, in short, that the panel's understanding of the Commission's existing standard was wrong. That is a frontal assault on the D.C. Circuit's ruling. Tennis Channel, no doubt, is free to disagree with the court's interpretation of the Commission's precedent. But at the end of the day, it is the *court's* understanding that counts. The Commission is not free to second-guess the D.C. Circuit's determination and proceed on the assumption that the panel did not correctly understand the legal standard that it applied.

b. Tennis Channel's second premise—that the D.C. Circuit did not *apply* the standard that it articulated to the record here—is likewise a direct attack on the court's decision. The court was required by statute to consider the “the record of the pleadings, [the] evidence adduced” at the hearing before the Administrative Law Judge, “and proceedings before the agency.”⁸² And having done so, the court expressly held not only that Tennis Channel had “offered no evidence that its rejected proposal would have afforded Comcast *any* benefit,” but also that the record evidence was “that no such benefits exist.”⁸³ Indeed, the court described the Commission's and Tennis Channel's contrary arguments, which Tennis Channel seeks to repackage here, as “mere handwaving.”⁸⁴

⁸¹ Pet. ii (“the D.C. Circuit's decision plainly added new tests for Section 616 cases”); *id.* at 7 (although the panel “intended to apply” the Commission's existing standard and “held that there was not sufficient evidence of discrimination to uphold the Commission's Order ... 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”).

⁸² 28 U.S.C. § 2347(a).

⁸³ 717 F.3d at 984, 986.

⁸⁴ *Id.* at 986.

The court identified several types of evidence that Tennis Channel *could* have presented to prove that critical point in its case.⁸⁵ But it made clear that “the record lack[s] affirmative evidence along these lines.”⁸⁶ Tennis Channel “offer[ed]” no “analysis on either a qualitative or a quantitative basis” that showed a benefit offsetting the costs to Comcast.⁸⁷ While certain kinds of “expert evidence” might have sufficed, “[t]here is no such evidence” here.⁸⁸ The court carefully examined the evidence that Tennis Channel *did* present, but it explained that that evidence did not actually demonstrate that Comcast would have derived any net benefit from Comcast’s proposal; standing alone, in fact, Tennis Channel’s evidence was “mere handwaving” and ultimately irrelevant.⁸⁹ Likewise, the D.C. Circuit explained that the evidence that Tennis Channel tendered as proof that “Comcast’s cost-benefit analysis” was “pretextual cover”—purportedly showing that that analysis was “insufficiently rigorous”—did not in fact prove the asserted conclusion.⁹⁰ Contrary to Tennis Channel’s claim, the D.C. Circuit thus plainly *did* apply the Commission’s discrimination standard to the record here, and concluded that Tennis Channel’s claim was built on sand.

Tennis Channel responds that despite the D.C. Circuit’s holding that “the record simply lacks” evidence of discrimination under the Commission’s standard,⁹¹ the court did not mean

⁸⁵ *Id.* at 985-86.

⁸⁶ *Id.* at 986.

⁸⁷ *Id.* at 985.

⁸⁸ *Id.* at 986.

⁸⁹ *Id.*

⁹⁰ *Id.* at 987 (concluding that Tennis Channel’s “actual claim is that the cost-benefit analysis was too hastily performed to justify Comcast’s rejection of [Tennis Channel’s] proposal,” but “[i]n light of the evidence surveyed above, and the lack of evidence from which one might infer any net benefit, Comcast’s haste is *irrelevant*” (emphasis added)).

⁹¹ *Id.*

what it said. The panel, Tennis Channel claims, “did not (and, indeed, could not) independently assess whether the entire voluminous record ... supported a finding of discrimination” under that standard.⁹² This, too, is simply an attack on the court’s ruling, which made clear that the panel *had* examined the record.⁹³ It is an accusation, in fact, that the court shirked its statutory duty to examine not merely the parties’ briefs on appeal, but also the “evidence adduced” and the “proceedings before the agency.”⁹⁴ Tennis Channel’s bald conjecture that a federal court of appeals flouted that obligation and cut corners in reaching its decision deserves no credence.⁹⁵

Tennis Channel attempts to dress up its speculation as a legal argument, contending that in conducting “substantial evidence” review, the court could not “make its own findings on the basis of the record evidence,” and that the court therefore “did not look beyond the portions of the record on which Commission had relied.”⁹⁶ But its claim badly distorts the well-settled substantial-evidence standard. Far from forbidding a reviewing court from examining the entire record for itself, “substantial evidence review *requires* a court to consider the whole record upon

⁹² Pet. 12.

⁹³ See 717 F.3d at 984-87.

⁹⁴ 28 U.S.C. § 2347(a).

⁹⁵ Tellingly absent from Tennis Channel’s petition is *any* reference to the alleged benefits to Comcast of broader carriage that Tennis Channel relied on in prior proceedings before the agency—namely, in the Commission’s summary, “the advertising availabilities from which Comcast *might* benefit and ... the *possibility* of additional upgrades and subscribers if Tennis Channel were distributed more widely.” *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, Mem. Op. and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78, at ¶ 77 (July 24, 2012) (emphasis added). That the D.C. Circuit found that these unsubstantiated assertions did not constitute evidence, let alone substantial evidence, does not mean that the court did not take them into account. To the contrary, it most certainly did *not* escape the court’s notice that the best evidence Tennis Channel could offer after a full and fair opportunity to make its case was “mights” and “possibilities.”

⁹⁶ Pet. 12 & n.34.

which an agency's factual findings are based."⁹⁷ The court's task is to determine "whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion."⁹⁸ The court's "analysis," therefore, "must consider not only the evidence supporting the [agency's] decision but also 'whatever in the record fairly detracts from its weight.'"⁹⁹ In doing so, to be sure, "[t]he court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence."¹⁰⁰ But the court *is* empowered—indeed, obligated—to examine the entire record to determine if the agency's findings are backed up by adequate evidence, or indeed by any "evidence at all."¹⁰¹

That is all that the D.C. Circuit did here. It did not rely on any "alternative findings" that substantial evidence might have supported. Instead, the court simply examined the record but concluded that there is "no evidence" supporting the Commission's finding that Comcast discriminated against Tennis Channel based on affiliation.¹⁰² And absent *any* evidence to support the agency's determination, there "obviously" was not "substantial evidence."¹⁰³

2. The D.C. Circuit's Reservation Of Judgment On Several Independent Grounds That Foreclose Tennis Channel's Claim Confirms That The Court Did Not Leave The Discrimination Issue Open On Remand.

Tennis Channel's argument that the D.C. Circuit remanded the discrimination issue to the Commission not only distorts what the court *did* decide, but also ignores what it did *not*. The

⁹⁷ *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608, 614 (D.C. Cir. 2011) (emphasis added).

⁹⁸ *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (internal quotation marks omitted).

⁹⁹ *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 647 (D.C. Cir. 2013) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

¹⁰⁰ *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

¹⁰¹ See *Guardian Moving & Storage Co. v. ICC*, 952 F.2d 1428, 1433 (D.C. Cir. 1992) (vacating agency action because "there is no evidence in the record before this court" to support it).

¹⁰² 717 F.3d at 984, 987.

¹⁰³ *Id.* at 987 (citing *Guardian Moving*, 952 F.2d at 1433).

panel expressly reserved judgment on multiple additional grounds raised by Comcast that would independently foreclose Tennis Channel's claim. But the court would not and could not have done so if it believed that its analysis of the evidence of discrimination were not dispositive.

As the court explained, Comcast challenged the Commission's order on an array of different grounds. In addition to arguing that Tennis Channel failed to prove discrimination "even under the Commission's interpretation of § 616," Comcast also contended (inter alia) that Tennis Channel's complaint was time-barred, and that both Section 616 and the First Amendment, properly construed, foreclose imposing liability on Comcast for exercising its editorial discretion in the absence of market power.¹⁰⁴ Any of those arguments, if sustained, would preclude Tennis Channel from prevailing on its complaint here. The two concurring opinions confirm that each of those arguments has merit. Judge Edwards agreed with Comcast that Tennis Channel's complaint was time-barred—indeed, it was filed years too late—and that the Commission could not lawfully skew the statute of limitations to allow the case to go forward.¹⁰⁵ And, as Judge Kavanaugh explained, both Section 616 and the First Amendment barred liability unless Comcast had "market power" in the relevant nationwide market, which the record plainly showed Comcast "does not have."¹⁰⁶

Despite the recognition in the two concurring opinions that Comcast's additional arguments are meritorious, the unanimous panel opinion did not pass on these issues. Instead, it expressly reserved judgment on them, explaining that the court "need not" decide those grounds because "Comcast prevail[ed]" on its separate argument "that the Commission could not lawfully find discrimination because [Tennis Channel] offered no evidence that its rejected proposal

¹⁰⁴ See *id.* at 984; Comcast Final Br. 18-62, No. 12-1337 (D.C. Cir. Dec. 3, 2012).

¹⁰⁵ 717 F.3d at 995 (Edwards, J., concurring); see *id.* at 994-1007.

¹⁰⁶ *Id.* at 988 (Kavanaugh, J., concurring); see *id.* at 987-94.

would have afforded Comcast *any* benefit.”¹⁰⁷ The panel “conclude[d]” that Comcast’s argument “is correct,” which left the Commission with no basis to deem Comcast’s actions discriminatory.¹⁰⁸

That the court saw no need to address these independently dispositive issues is powerful proof that the panel believed that its analysis of the discrimination issue was conclusive and ended the case. But for that fact-based holding, the court *would* have had to address Comcast’s additional arguments that the entire proceeding was commenced years too late and that Tennis Channel could not possibly prevail given Comcast’s lack of market power in the relevant market. Comcast petitioned for review on those grounds as well, and any one of them, if upheld by the court, would have doomed Tennis Channel’s claim—and made any remand futile and inappropriate.¹⁰⁹ It thus would have been utterly irrational and wasteful for the court to send the case back to the Commission to reconsider the discrimination issue, as Tennis Channel claims the court did, *without considering and conclusively resolving* Comcast’s other arguments. Tennis Channel does not explain—because it cannot—how its “remand” theory could be consistent with the D.C. Circuit’s opinion in this additional, and dispositive, respect.

3. Tennis Channel’s Admission That The Court Did Not Remand The Case For Further Proceedings And The Court’s Rejection Of Tennis Channel’s Request That It Do So Forecloses Such Proceedings Now.

If the D.C. Circuit’s analysis in the panel’s opinion left any doubt that the court did not remand the case to the Commission for further proceedings, that doubt is erased by Tennis

¹⁰⁷ *Id.* at 984 (majority opinion).

¹⁰⁸ *Id.*

¹⁰⁹ See *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992); see also, e.g., *Nat’l Mining Ass’n v. U.S. Dep’t of Interior*, 251 F.3d 1007, 1014 (D.C. Cir. 2001) (remand would be “pointless” when “the language of the statute commands a particular outcome”); *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (“if the record evidence *compels* the result that we have reached, then no alternative determination is possible”).

Channel's subsequent *admission* that the panel did not remand for that purpose, and by the D.C. Circuit's *rejection* of Tennis Channel's request that the court revise its ruling to provide for just such a remand. After the panel issued its opinion, Tennis Channel asked the D.C. Circuit to grant either panel or *en banc* rehearing, and in doing so it expressly conceded that the panel had not remanded the case to the Commission for further proceedings regarding discrimination. In addition to challenging the legal test the court applied, Tennis Channel asserted that the panel "erred in *not remanding the case for further proceedings* to determine whether" "evidence of a forgone 'net benefit' to Comcast ... exists."¹¹⁰ Tennis Channel urged the panel or the *en banc* court to correct that alleged error, arguing that "the case should be remanded" to the Commission "for consideration, in light of the panel's decision, of whether Comcast violated Section 616" under the standard articulated by the panel.¹¹¹ Tennis Channel, in fact, went even further, contending that, "even if the existing record did not contain evidence of a forgone 'net benefit,'" the case *still* "should be remanded" to enable Tennis Channel to drum up *new* evidence.¹¹² This, of course, is exactly the course of proceedings that Tennis Channel is now urging on the Commission.

As Comcast explained in its response, Tennis Channel's request for a remand was improper, unnecessary, and futile. The court did not apply a new standard, but applied the Commission's existing test; Tennis Channel had already had an ample prior opportunity to adduce any evidence and make any arguments it could to satisfy that standard; and remanding to relitigate the discrimination issue would be pointless because the *other* grounds that Comcast had

¹¹⁰ Pet. for Reh'g 11, No. 12-1337 (D.C. Cir. July 12, 2013); *see also id.* at 15 ("The panel at least should have remanded the case for further consideration in light of its decision.").

¹¹¹ *Id.* at 11 (capitalization omitted).

¹¹² *Id.* at 15.

raised, which the concurrences found compelling, barred liability in any event.¹¹³ The D.C. Circuit summarily denied Tennis Channel's request, with no judge even calling for a vote.¹¹⁴

Both Tennis Channel's rehearing petition and the D.C. Circuit's rejection of its remand request foreclose its request here that the Commission conduct further proceedings to revisit the discrimination issue. Tennis Channel's concession that the D.C. Circuit panel did *not* remand the case belies its strained analysis of the court's opinion. Having urged the court of appeals to *alter* its ruling so that the case could be sent back to the Commission, Tennis Channel cannot credibly argue now that the court implicitly remanded the case without saying so. And the court's unequivocal denial of Tennis Channel's request for exactly the same relief it seeks now—"further proceedings to determine whether ... evidence" of discrimination that the court held lacking "exists" in the record, and if necessary the opportunity to present *new* evidence¹¹⁵—makes clear beyond all possible doubt that the court did not intend to allow the proceedings Tennis Channel now proposes.

C. Tennis Channel's Claim That The Court Was Required To Remand The Case Is Incorrect And Ultimately Irrelevant.

Tennis Channel inexplicably does not even *mention* its admission in D.C. Circuit that the panel did not remand the case, its request that the court change course and do so, or the court's rejection of that request. Instead, Tennis Channel contends, for the first time, that the D.C. Circuit was *required* to remand the case to the Commission to conduct further proceedings to

¹¹³ Resp. to Pet. for Reh'g 11-15, No. 12-1337 (D.C. Cir. Aug. 7, 2013).

¹¹⁴ Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013); En Banc Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013).

¹¹⁵ Pet. for Reh'g 11, 15, No. 12-1337 (D.C. Cir. July 12, 2013).

reconsider the discrimination issue.¹¹⁶ That argument is at war with Commission precedent, and in any event irrelevant.

Tennis Channel claims that the D.C. Circuit was compelled to remand the case to the Commission by 47 U.S.C. § 402(h).¹¹⁷ Commission precedent establishes, however, that this provision does not apply to this case. Section 402 describes two different methods of seeking judicial review of Commission rulings: For the specific categories of “decisions and orders” enumerated in Section 402(b), a party must take an “appeal” to the D.C. Circuit. The procedures set forth in Section 402(c)-(j) pertain to such “appeals.” Thus, as the Commission explained years ago, “Section 402(h) relates only to *appeals* ... from decisions and orders of the Commission in certain specified types of cases under Section 402(b).”¹¹⁸ Review of any *other* Commission order, however, must be sought by a petition for review under Section 402(a) “as provided by and in the manner prescribed in chapter 158 of title 28,” *i.e.*, 28 U.S.C. §§ 2341-2351.¹¹⁹

Because the Commission’s prior order regarding Tennis Channel’s claim is not among the actions listed in Section 402(b), Comcast sought review under Section 402(a), and the proceeding was governed by 28 U.S.C. §§ 2341-2351, *not* by the procedures for “appeals” set forth in Section 402, including Section 402(h). And nothing in the relevant provisions of Title 28 requires a court to remand after ruling on a petition for review. The statute empowers the court to “enjoin, set aside, suspend (in whole or in part), or to determine the validity of” agency

¹¹⁶ Pet. 11.

¹¹⁷ *Id.* at 11 n.32.

¹¹⁸ *Meadville Master Antenna, Inc.*, 36 F.C.C.2d 591, 594 (1972) (emphasis added).

¹¹⁹ See 47 U.S.C. § 402(a) (“Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.”).

orders.¹²⁰ Where, as here, the agency has already held a hearing, the court decides the case based on the existing record.¹²¹ The court will remand for further factual development *only* “[i]f a party ... applies to the court ... for leave to adduce additional evidence and shows to the satisfaction of the court” both that “the additional evidence is material” and that “there were reasonable grounds for failure to adduce the evidence before the agency.”¹²² The governing statute here, in short, did not require the D.C. Circuit to remand the case for further proceedings.

Even if Section 402(h) were applicable here, however, that would make no difference.

Section 402(h) provides, in full, that:

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, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.¹²³

The provision thus only underscores the Commission’s obligation to obey the court’s ruling, not to commence further proceedings for the purpose of *defying* the court’s decision by reinstating an order the court has overturned. Section 402(h), in short, does not provide the Commission license to disregard the court’s ruling, but provides even more reason faithfully to apply it. It would be perverse to interpret a statute requiring the agency to “carry out” and “give effect” to a court ruling as license to *disregard* it.

¹²⁰ 28 U.S.C. § 2342.

¹²¹ *Id.* § 2347(a).

¹²² *Id.* § 2347(c). If no hearing has been held, the court either may decide the case based on the pleadings and affidavits if there is “no genuine issue of material fact,” remand the case to the agency to hold a hearing (if a hearing is legally required), or else transfer the case to a district court for a hearing. *Id.* § 2347(b).

¹²³ 47 U.S.C. § 402(h).

In any event, *whatever* Section 402(h) requires with respect to remands, it is directed to the *court*, not to the *Commission*. It provides that “the *court* ... *shall* remand the case,”¹²⁴ not that the Commission shall *presume* that the court remanded a case when it did not. Even on Tennis Chanel’s view, therefore, Section 402(h) is at most a reason why the D.C. Circuit *should* have sent the case back, not why the court’s mandate can be construed, contrary to its terms, as having done so. And if a remand were required, only the D.C. Circuit itself (or the Supreme Court) could correct that “error.” Tennis Channel, however, never argued in the court of appeals that Section 402(h) mandated a remand. And the D.C. Circuit rejected Tennis Channel’s request to remand on the grounds that Tennis Channel *did* assert—a ruling the Supreme Court declined to disturb. The Commission, in all events, cannot correct what it perceives as errors in the court’s judgment. It must obey that ruling as written.

II. Even If The Commission Could Disregard The Court’s Holdings, Tennis Channel’s Request To Reopen The Proceedings And Present New Evidence Is Meritless.

The Commission thus is powerless to second-guess the D.C. Circuit’s substantive holding that Tennis Channel failed to prove affiliation-based discrimination and that its claim is, therefore, meritless. But even if the Commission were free to reach a different conclusion, there is no basis to reopen the proceedings for further consideration of that issue. The Commission’s precedent and basic principles of fairness preclude Tennis Channel from reopening the case to relitigate an element of its claim with the benefit of hindsight. And the controlling statute bars it from adducing new *evidence* of discrimination that it had ample opportunity to present before.

A. The Commission’s Precedent Forecloses Reopening The Proceedings.

Tennis Channel asks the Commission to reopen a case that is over to revisit an issue that the parties already litigated. Even if the Commission could appropriately disagree with the D.C.

¹²⁴ *Id.* (emphasis added).

Circuit's analysis and holdings, there can be no question that the court's ruling brought this case to an end. The case is closed—and no further proceedings are called for—unless and until the Commission reopens it. Tennis Channel's petition confirms this, urging the Commission to “initiate further proceedings” to reconsider whether the existing record (or even new evidence) contains anything substantiating its discrimination claim.¹²⁵

Tennis Channel, however, does not come close to demonstrating that reopening the proceeding is appropriate. “It is well settled that [the Commission] do[es] not re-open proceedings that are final unless there has been fraud on [the Commission's] processes or the challenged result is unconscionable.”¹²⁶ The petition points to nothing of the sort. It alleges no fraud on the agency's processes. And it cannot credibly claim that the result already reached is “unconscionable.”¹²⁷ Indeed, the core of Tennis Channel's grievance is that in 2010 Comcast chose to do what *every other major MVPD did*: carry Tennis Channel less broadly than Golf and Versus.¹²⁸ Treating a network in accord with the market's judgment is hardly shock-the-conscience material. Absent fraud or unconscionability, there is no basis to reopen the case.

Allowing Tennis Channel, moreover, to “try, try again” by repackaging its arguments and rearranging the record evidence would be manifestly unfair and set a dangerous precedent for future cases. Tennis Channel devotes more than a dozen pages attempting to demonstrate that the existing record establishes discrimination. Its contentions are incorrect, because they merely repackage, and not very inventively, precisely what the D.C. Circuit already rejected. But assuming *arguendo* that the arguments that Tennis Channel now advances were new, its

¹²⁵ Pet. 1 (emphasis added).

¹²⁶ *Birach Broad. Corp.*, 16 FCC Rcd. 5015, 5018 (2001).

¹²⁷ *Id.*

¹²⁸ See Comcast Exhs. 1102, 1103.

argument only illustrates that Tennis Channel could have made these very arguments all along. Whatever its reasons for not presenting these arguments earlier, Tennis Channel's failure hardly entitles it to a re-do. No rational legal system allows a litigant to keep arguing its case over and over again until the tribunal with ultimate authority is finally convinced (or simply exhausted) and grants the requested relief.¹²⁹

Granting Tennis Channel's request for further proceedings here, however, would send just the opposite message. It would invite other parties who lose before the agency or in court to keep trying, submitting an endless stream of new filings, until the party can finally convince the Commission and the courts that its claims have merit after all. Indeed, if the Commission held here that Tennis Channel may start over and reargue its case—now that the claim's most glaring factual deficiencies have been highlighted by a federal court—other litigants inevitably would invoke the Commission's ruling as authority to demand reopening of other settled cases to offer new variations of arguments that failed the first time.

The Commission should not encourage such abuse of its processes, and should not invite dissatisfied litigants to waste the agency's already-taxed time and resources relitigating closed cases. And it should not force prevailing litigants to defend the results of decided cases *ad infinitum*, casting a cloud over every Commission ruling.

B. Tennis Channel Is Not Entitled To Re-Try Its Case With New Evidence.

While Tennis Channel devotes most of its argument to asserting that the existing record establishes discrimination, the penultimate paragraph of its petition reveals what it is really after: the chance not only to reargue the case based on the insufficient evidence it has already tendered,

¹²⁹ Cf. *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989) (Commission properly "refused to allow petitioners to secure, by virtue of the fortuity of [court's] remand, a second opportunity" to present arguments not previously presented).

but a chance to present “*additional* evidence.”¹³⁰ It claims that, even “if the Commission *disagrees*” that the existing record demonstrates discrimination, and concludes (like the D.C. Circuit) that Tennis Channel failed to prove its case, the Commission *still* should let Tennis Channel keep trying until it musters enough evidence to prove its allegations.¹³¹ That request is plainly improper.

Indeed, the provision of Title 28 that governs Comcast’s petition for review of the Commission’s prior ruling precludes the procedure Tennis Channel proposes. As noted above, Section 2347(c) of Title 28 establishes a procedure by which a reviewing court can permit the taking of new evidence.¹³² But under that procedure, a party can present new evidence to the agency on remand *only* if the party “shows to the satisfaction of the court” both that “the additional evidence is material” *and* that “there were reasonable grounds for failure to adduce the evidence before the agency.”¹³³ The existence of that detailed procedure, requiring court approval for the taking of new evidence on remand to the agency, proves that Tennis Channel’s request to introduce new evidence now is meritless. If litigants were always free, as Tennis Channel assumes, to present new evidence to the Commission after remand from a court, then Section 2347(c)’s procedure—and the specific standard it requires parties wishing to present new evidence to satisfy—would be utterly pointless.

Moreover, while Tennis Channel is wrong that Section 402(h) of Title 47 applies here, even if it *were* applicable that provision likewise would foreclose taking new evidence. Section 402(h) provides that, “unless otherwise ordered by the court,” the Commission must “forthwith

¹³⁰ Pet. 27 (emphasis added).

¹³¹ *Id.* at 26 (emphasis added).

¹³² *Supra* at 24; 28 U.S.C. § 2347(c).

¹³³ 28 U.S.C. § 2347(c).

give effect” to the court’s judgment “upon the basis of the proceedings already had *and the record upon which said appeal was heard and determined.*”¹³⁴ As explained above, nothing in the D.C. Circuit’s decision even suggests that new evidence is appropriate here, much less “order[s]” the Commission to reopen the record to accept further evidence.

The only judicial authority Tennis Channel cites for its claim that new evidence “must” be taken, *Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95 (D.C. Cir. 1985), lends it no support.¹³⁵ That case involved a court ruling that expressly had remanded the matter to the Commission for additional explanation—not remotely what occurred here—and merely concluded that the Commission acted unreasonably on remand by abruptly departing from its prior practice, in cases to which Section 402(h) was applicable, of permitting new evidence.¹³⁶ The court made clear that “[i]n the future ... the Commission is completely free to apply any reasonable interpretation of this provision.”¹³⁷ And even the court’s analysis of the Commission’s departure from its prior practice was dictum, as the court went on to hold that the Commission’s refusal to consider additional evidence on remand was “harmless.”¹³⁸

The D.C. Circuit’s decision and the Supreme Court’s denial of certiorari means that Tennis Channel’s program-carriage case is finally over. Federal statutes, the Commission’s precedent, and common sense all preclude sending the case back to the beginning and starting over at square one.

¹³⁴ 47 U.S.C. § 402(h).

¹³⁵ Pet. 27 & n.77.

¹³⁶ See 762 F.2d at 98-101.

¹³⁷ *Id.* at 101.

¹³⁸ *Id.* at 98, 104.

CONCLUSION

For these reasons, Tennis Channel's petition should be denied, and the Commission should take any further ministerial action that it may deem necessary to terminate the proceeding.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

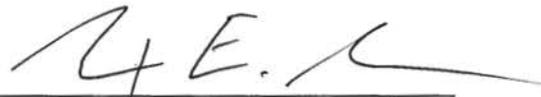
I, Robert E. Johnson, do hereby certify that on this 18th day of March, 2014, I caused the foregoing Opposition to Petition for Further Proceedings and Reaffirmation of Original Decision to be served upon the following individuals by hand-delivery and electronic mail.

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