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	)	

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FCC Office of the Secretary

To: The Commission

REPLY IN SUPPORT OF 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

Although Comcast concedes that this case is necessarily before the Commission because there is no final ruling on Tennis Channel's complaint, Comcast argues that the Commission can take only "ministerial" action in the wake of the D.C. Circuit's decision. This argument gets administrative law precisely backwards. Where, as here, an appellate court enunciates new evidentiary tests in the course of vacating an agency's decision, only the agency can — and, indeed, must — make the factual findings necessary to apply the new tests to the case at hand.

Comcast's arguments that the D.C. Circuit did not adopt new tests for Section 616 fail to come to grips with the court's actual reasoning. Nor does Comcast deny that there is considerable evidence in the record that is patently relevant to the new tests the panel articulated. It is now incumbent on the Commission to evaluate that record evidence and reach appropriate findings of fact. Under basic principles of administrative law, the Court of Appeals cannot, and did not presume to, displace the Commission's role as factfinder by applying new tests directly to record evidence. The court's mandate therefore must be read as having returned the case to the Commission to make the factual findings required by the court's holding regarding the legal standards.

Comcast tosses an array of other arguments against the wall but none sticks. Thus, it argues that Section 402(h) of the Communications Act does not require a remand in this case, but it relies on a decision that has since been abrogated by a more recent D.C. Circuit opinion explicitly holding that Section 402(h) applies to cases like this one. Comcast also argues that even if the court was required to remand the case, the court did not explicitly do so, and the Commission therefore cannot correct this "error." But the court's opinion can easily be read to comply with the remand requirement, and there is no reason for the Commission to assume that it is foreclosed from exercising its normal responsibility when an appellate court vacates an order. Indeed, as Comcast concedes, the case is necessarily remanded, by operation of law; the thrust of Comcast's argument is that the Commission lacks the authority to do what is required to apply the court's tests to the record before it. However, the D.C. Circuit has made clear, in a holding ignored by Comcast, that once a case is returned to the Commission, it must take whatever actions are necessary to resolve the issues the case presents.

Comcast also argues that the Commission should not take additional evidence because Tennis Channel already had an opportunity to develop evidence satisfying the court's tests. Tennis Channel believes that the existing record already contains ample evidence to support reaffirmation of the Commission's original decision, and therefore we agree with Comcast that new proceedings for additional evidence should not be necessary. But if the Commission disagrees and believes it requires further evidence directed at the court's tests, we believe it elementary (and amply supported by judicial authority) that the Commission should take that step — particularly since neither party nor the Commission ever urged or contemplated tests like those adopted by the court.

As the appropriate factfinder in this case, the Commission should now set a new briefing cycle directing the parties to file limited proposed findings of fact and conclusions of law, based on the current record, on the narrow issues left unresolved by the court's opinion. After its review, the Commission should affirm its initial decision that Comcast has violated Section 616.

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In its Opposition to The Tennis Channel, Inc.'s ("Tennis Channel's") Petition for Further Proceedings and Reaffirmation of Original Decision, Comcast Cable Communications, LLC ("Comcast") agrees that further Commission action is required to resolve this proceeding.[1] However, Comcast opposes Tennis Channel's petition on the fundamentally flawed premise that the Commission is limited to taking only "ministerial" action, an argument that upends longstanding administrative law principles and ignores the legal basis for the D.C. Circuit's actual decision. Not only *can* the Commission make the factual findings contemplated by the D.C. Circuit's new tests, it *must* do so. Accordingly, the Commission should grant Tennis Channel's petition for further proceedings — which would allow the parties to brief the

[1] *See* Comcast's Opposition to Tennis Channel's Petition for Further Proceedings and Reaffirmation of Original Decision, at 13 n.74, Mar. 18, 2014 [hereinafter "Comcast Opposition"] (acknowledging that the D.C. Circuit's ruling vacating the Commission's prior order leaves "no final Commission ruling on Tennis Channel's complaint").

Commission regarding the new tests articulated by the D.C. Circuit — and ultimately affirm its initial decision.

I. THE D.C. CIRCUIT PLAINLY ARTICULATED NEW EVIDENTIARY TESTS THAT THE COMMISSION AND PARTIES HAD NOT PREVIOUSLY CONSIDERED.

Although Comcast claims in its Opposition that the D.C. Circuit did not create new tests for discrimination under Section 616, it is telling that Comcast avoids engaging with the substance of the court's opinion. Instead, Comcast appears to rely on the incorrect technical argument that because the court did not *expressly state* that it had adopted new tests, it must not have done so.[2] But judicial review is not a game of Simon Says; a court may of course alter an evidentiary standard without explicitly pronouncing that it "hereby changes the law."[3] And the Commission is free to reach its own judgment on whether the tests have been changed.

Contrary to Comcast's repeated assertions, the court never said that it was not adopting new tests — only that it was not changing the ultimate legal standard. That unchanged, overarching standard is whether Comcast was motivated by discriminatory purpose or by reasonable business judgment in limiting Tennis Channel to the Sports Tier.[4] However, the court clearly identified new ways to test whether the reasonable business purpose standard is satisfied, and unsurprisingly — since the question had not been briefed before the Commission or the

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[2] *See id.* at 14–15.

[3] *Cf., e.g.*, *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (noting "the 'inevitable difficulties' that come with 'attempting to determine whether a particular decision has really announced a "new" rule at all'") (internal quotation marks omitted).

[4] *See Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) ("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."); *see also* Petition for Further Proceedings and Reaffirmation of Original Decision, at 7 & n.19, Mar. 11, 2014 [hereinafter "Petition"].

panel — it found no evidence within the framework of those new tests to support a finding of discrimination on the face of the Commission's Order.

A simple comparison of the Commission's decision and the D.C. Circuit's decision plainly reveals that the court articulated new evidentiary tests. The Commission found evidence that Comcast had discriminated against Tennis Channel through an analysis of the benefits Comcast obtained for its *programming* business — and its affiliated services, Golf Channel and Versus — by treating them differently than the similarly-situated Tennis Channel. The court generally accepted the Commission's findings on these questions, but concluded they were not enough; the court focused on additional questions such as whether the Commission had relied on evidence that Comcast could expect a "net benefit" to its *distribution* business from broad carriage of Tennis Channel (or at least evidence that broad carriage of Tennis Channel would have resulted in lesser incremental losses than broad carriage of the similarly situated Golf Channel and Versus).[5] No such tests — not even the term "net benefit" — appeared in the Commission's decision, and nothing in Comcast's Opposition suggests otherwise.[6] Indeed, neither the Commission nor the Media Bureau has ever suggested that such a showing is required or probative of discrimination in any of the adjudications or rulemakings that have taken place under Section 616.[7] Comcast attempts to assert otherwise, but it identifies no instance in which

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[5] The court also left open the ability of a complainant to establish discrimination by showing that "an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose," but stated that "[n]either Tennis nor the Commission has invoked th[is] concept." *Comcast*, 717 F.3d at 987; *see also* Petition, at 20–26.

[6] *See Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 27 FCC Rcd. 8508 (2012).

[7] *See Game Show Network, LLC v. Cablevision Sys. Corp.*, 27 FCC Rcd. 5113 (2012); *Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494 (2011); *Herring Broad., Inc. d/b/a Wealth TV v. Time Warner Cable, Inc.*, 26 FCC Rcd. 8971 (2011); *TCR Sports Broad.* (continued…)

the Commission has ever done so. Thus, as we have stated, it is unsurprising that neither Comcast nor Tennis Channel developed evidence with these questions in mind, framed the evidence in the record in these terms, or made arguments to the administrative law judge or the Commission that were rooted in these questions.

Contrary to Comcast's assertions, it is not an "assault" on the D.C. Circuit's decision to characterize these evidentiary tests as "new."[8] Indeed, it is the only way to understand what the court did, which was to agree with *all* of the concrete facts found by the Commission under the pre-existing test — but to conclude that those factual findings were not sufficient to establish that Comcast had discriminated against Tennis Channel. The court reached this conclusion because the Commission did not find that Comcast forewent a "net benefit" (or lesser incremental losses) to its distribution business by refusing to carry Tennis Channel.[9] In sum, it is inescapable that, while the panel assumed the validity of the ultimate legal standard for Section 616 as implemented by the Commission, as far as it went, the court's decision articulated new, additional evidentiary tests for whether that standard is satisfied — tests that were not heretofore applied by the Commission or known to the parties.

Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc., 25 FCC Rcd. 18099 (2010).

[8] Comcast Opposition, at 15.

[9] The court also noted that the Commission had not invoked the concept of pretext. *See supra* note 5.

II. THE COURT DID NOT CONTRAVENE BASIC ADMINISTRATIVE LAW PRINCIPLES BY INDEPENDENTLY SCOURING THE RECORD, MAKING ITS OWN FACTUAL FINDINGS, AND THEN CHOOSING NOT TO REMAND THE CASE.

Comcast's further argument that the D.C. Circuit has "finally and conclusively"[10] decided the question of whether Comcast discriminated against Tennis Channel is based on the erroneous premise that the court "*appl[ied]* the standard that it articulated to the record."[11] This argument is surprising because, as federal law makes overwhelmingly clear, a court reviewing an agency decision lacks the authority to make final factual findings by applying a new legal standard directly to record evidence.[12] Here, there is no reason to conclude that the court overstepped its limited role in reviewing the Commission's findings for "substantial evidence."[13]

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[10] Comcast Opposition, at 10.

[11] *Id.* at 15.

[12] *See, e.g.*, *Gonzalez v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam) (concluding that the Ninth Circuit violated the "ordinary 'remand' rule" by offering its own interpretation of the Immigration and Nationality Act — which the Ninth Circuit claimed was consistent with the interpretation of the Board of Immigration Appeals (BIA) — and applying that interpretation to the particular case before the BIA had considered the question; and further agreeing with the Solicitor General that "the Ninth Circuit's error is so obvious . . . that summary reversal [is] appropriate"); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (noting that it is improper for a court of appeals to make "factual findings on its own"); *Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012) (holding that "[w]here there are facts that remain to be found in the first instance, a remand is the proper course," and further noting that "[i]t is not enough that only a few factual findings remain or that the applicant may have a strong case on the merits" because resolving such factual issues "is precisely what needs to be done by the fact-finding agency in the first instance, not by a court of appeals"); *United States v. Comer*, 93 F.3d 1271, 1285 n.15 (6th Cir. 1996) ("Even if we were inclined to comb the record ourselves, we are without authority to make factual findings."); *United States v. Jackson*, 983 F.2d 757, 763 (7th Cir. 1993) ("[T]his court is not empowered to make factual findings based upon the record . . . ."). *See generally* Richard J. Pierce, Jr., *Administrative Law Treatise* § 18.1, at 1676 (5th ed. 2010); 33 Charles A. Wright & Charles H. Koch, Jr., *Federal Practice & Procedure: Judicial Review of Administrative Action* § 8372 (1st ed. 2013) ("'A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.' . . . In most administrative schemes, the agency has the power of decision over findings of fact.").

[13] *See Meadville Master Antenna, Inc.*, 36 F.C.C.2d 591, 592–93 (1972) ("[A] restrictive interpretation of [a reviewing] Court's mandate . . . would be inconsistent with the weight of (continued...)

In accordance with well-established administrative law principles, the court's decision plainly cannot be taken as self-executing, and it requires the Commission to now consider whether the record evidence supports a finding of discrimination in light of the new tests articulated by the D.C. Circuit's decision.

A. Factual Findings Pursuant to the Court's Tests Must Be Made by the Commission.

Although Comcast claims that the D.C. Circuit "appl[ied] the standard it articulated to the record," Comcast itself acknowledges that "[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.'"[14]

The D.C. Circuit's review was limited to looking at whether the reasons the agency provided for its conclusions were sufficient to support the agency's decision. As the D.C. Circuit has explained, "We can only look to the [agency]'s stated rationale. We cannot sustain its action on some other basis the [agency] did not mention."[15] That is precisely what happened in this case: The court looked at the evidence expressly cited and relied upon by the Commission and, finding that it was insufficient to satisfy the tests that the court adopted, the court did not sustain the Commission's decision. Under basic administrative law principles, in

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authority concerning the judicial review function and the broad discretion conferred upon the Commission to specify the procedures to be adopted in carrying out its statutory obligations."), *abrogated on other grounds*, *E. Carolinas Broad. Co. v. FCC*, 762 F.2d 95, 100 n.6 (D.C. Cir. 1985).

[14] *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* Comcast Opposition, at 18.

[15] *Jochims v. NLRB*, 480 F.3d 1161, 1169 (D.C. Cir. 2007) (quoting *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006)); *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").

such a case, the court is required to vacate the Commission's decision, regardless of all of the other evidence in the record.[16] There was therefore no reason for the court to undertake to review the entirety of the voluminous record in this case, as Comcast suggests it did. In any event, under such circumstances, it is clear that the Commission has the discretion — and, indeed, the obligation — on remand to evaluate the evidence in the record itself and make the necessary factual findings relating to the court's tests in order to conclude the case.[17]

Thus, Comcast turns administrative law on its head by arguing that the D.C. Circuit was "*require[d]* . . . to consider the whole record upon which an agency's factual findings are based."[18] The cases cited by Comcast stand only for the proposition that a reviewing court affirming an agency action "must consider not only the evidence supporting the [agency's] decision but also 'whatever in the record fairly detracts from its weight.'"[19] In this case, the D.C. Circuit did not affirm the Commission. It held that the facts found by the Commission were not enough to support the Commission's decision because the Commission had not considered certain tests the court concluded were important. If, as the D.C. Circuit concluded, the reasons the agency gave were insufficient to support the agency's decision, the court had no need or reason to look further.[20] Comcast's suggestion that the D.C. Circuit must have — or even *could* have — reviewed the record as a whole through the lens of its new tests is

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[16] *See, e.g.*, *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132–33 (D.C. Cir. 2007) ("[I]n administrative law, we do not sustain a 'right-result, wrong-reason' decision of an agency. We send the case back to the agency so that it may fix its reasoning or change its result.") (internal quotation marks omitted).

[17] *See, e.g.*, *Pasternack*, 596 F.3d 836.

[18] Comcast Opposition, at 17–18.

[19] Comcast Opposition, at 18 (citing *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 647 (D.C. Cir. 2013)).

[20] *See, e.g.*, *Allied Mech. Servs., Inc.*, 668 F.3d at 771; *Jochims*, 480 F.3d at 1169.

thus simply meritless. In light of the fact that the court did not and could not apply its new tests to the record evidence, that important responsibility falls to the Commission.

Significantly, Comcast itself makes no effort to present its view of the facts or the record — choosing instead to proceed only on what it apparently and erroneously believes are dispositive procedural questions. It therefore has not challenged what we believe is obvious — the evidence that Tennis Channel has adduced in its Petition is directly relevant to the court's new tests. Since there is, in fact, evidence in the record that the Commission could now rely upon to find discrimination under the new tests the court announced in its opinion, the Commission cannot enter a final order without considering it.[21]

B. The Communications Act and Relevant Precedent Compel the Conclusion that the Court Remanded the Case to the Commission.

For the reasons described above, it is abundantly clear that the court's decision requires further agency action simply as a result of its vacatur of the Commission's decision.[22] Contrary to Comcast's additional claims, however, Section 402(h)[23] and relevant precedent independently make clear that the D.C. Circuit's issuance of its mandate to the Commission must

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[21] One reason a court of appeals cannot make factual findings when reviewing an agency decision is that it simply is not as familiar with the facts as the agency is. *See generally* Bernard Schwartz, *Administrative Law* § 10.5, at 632–33 (3d ed. 1991) ("It has been said, indeed, that the law-fact distinction is essential for preservation of the separation of powers. In determining facts, an agency is operating within its area of expertise. Hence, on questions of fact, the primary responsibility of decision is with the administrative expert.").

[22] Although we believe Section 402(h) applies in this case, even if it did not, the Commission would nevertheless be required to make factual findings by applying the court's new tests to the record evidence. *See, e.g.*, *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) ("Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards. . . . [I]f [the agency] relied on incorrect legal grounds, it would be error for this court to enforce without first remanding for agency examination of the evidence and proper fact-finding.") (internal quotation marks omitted).

[23] 47 U.S.C. § 402(h).

be treated as a remand contemplating further substantive proceedings. Specifically, Section 402(h) provides that "[i]n 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."[24] The D.C. Circuit's final mandate therefore must be treated as a remand consistent with the statutory directive in Section 402(h).

Comcast correctly notes that there is a distinction between the procedures applicable to Comcast's petition for review, which was filed pursuant to Section 402(a), and appeals filed pursuant to Section 402(b), which provides a separate avenue to appeal certain agency actions. But its argument that Section 402(h) is applicable only to appeals filed pursuant to Section 402(b) is based primarily on the Commission's subsequently abrogated position in *Meadville Master Antenna, Inc.*, 36 F.C.C. 2d 591, 594 (1972). In fact, the D.C. Circuit itself has held that the Commission must treat Section 402(h) as applicable to Section 402(a) cases as well. In *Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95 (D.C. Cir. 1985) — which Comcast itself cites but ignores for this key point — the court reversed a Commission determination that Section 402(h) was inapplicable to Section 402(a) cases, noting that "no such distinction appears on the face of section 402(h)."[25] In light of the D.C. Circuit's determination that Section 402(h) does not distinguish between Section 402(a) and (b) disputes, the D.C. Circuit's mandate in this proceeding plainly should be treated as the mandatory remand contemplated by Section 402(h).

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[24] *Id.* (emphasis added).

[25] *E. Carolinas Broad. Co.*, 762 F.2d at 100 n.6. Further, nothing in the other procedures applicable to Section 402(a) cases (provided for in 28 U.S.C. §§ 2341 *et seq.*) governs the matters that are addressed in Section 402(h), and Section 402(h) itself is not by its terms limited to Section 402(b) proceedings.

Comcast then argues that if the court should have but did not remand the case pursuant to Section 402(h), the Commission is not free to correct that "error."[26] However, the court's decision plainly can be read as consistent with Section 402(h): The court articulated new evidentiary tests and simply vacated the Commission's decision because it had not pointed to evidence that satisfied those tests, which as Comcast concedes, returns this case to the Commission.[27] Accordingly, the Commission should interpret the court's mandate as consistent with its statutory obligations.[28] Section 402(h)'s remand requirement therefore further reinforces the conclusion that the ball is back in the Commission's court.

Comcast is mistaken in its argument that Section 402(h) forecloses the Commission from any form of substantive reevaluation of the case. Section 402(h) directs the Commission, upon remand from the appellate court, to "forthwith give effect" to the reviewing court's decision "upon the basis of the proceedings already had and the record upon which said appeal was heard and determined," "unless otherwise ordered by the court."[29] Long-standing precedent makes clear that unless the reviewing court expressly prohibits the Commission from engaging in factfinding or reopening the record, the Commission has broad discretion to initiate appropriate proceedings to resolve questions on remand — including even the authority to

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[26] *See* Comcast Opposition, at 25.

[27] *See id.* at 13 n.74.

[28] *See Cnty. of L.A. v. Shalala*, 192 F.3d 1005, 1011–12 (D.C. Cir. 1999) ("Whether it is a court of appeals or a district court, '[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.' . . . Accordingly, because that was all that the district court had the power to do, we construe its January 20, 1998 order as a remand to the Secretary, and ignore, for jurisdictional purposes, its later order on specific relief.").

[29] 47 U.S.C. § 402(h).

reopen the record in appropriate circumstances.[30] Indeed, in the one case in which the Commission took the position that Section 402(h) precludes it from having the discretion to consider supplemental evidence on remand, the D.C. Circuit reversed and held that the Commission acted unreasonably in relying on Section 402(h) as a constraint to considering new evidence on remand.[31] Since that case, the Commission has maintained the practice of "retain[ing] discretion to order post-remand proceedings," and it has stated that the D.C. Circuit's decision in *Eastern Carolinas* suggests that "the Commission would not be able to enforce any interpretation of Section 402(h) as constituting a flat bar on post-remand proceedings."[32]

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[30] *See, e.g.*, *Mid-Florida Television Corp.*, Memorandum Opinion and Order, 49 F.C.C.2d 846 (1974) (seeking comments and replies from the parties on "the scope of the remand" and "the extent to which the Commission could and should exercise its discretion to reopen the record" with respect to any matters); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd. 2545, 2557–78 (1999) (re-examining compensation methodology following remand from D.C. Circuit concluding that Commission failed to "adequately justify" its conclusions on the basis of the record); *see also Toll Free Service Access Codes*, Order and Request for Comment, 26 FCC Rcd. 327, 329 (2011) (reconsidering and, ultimately, refreshing the record on remand from D.C. Circuit, which concluded that Commission's decision was not "adequately explained").

[31] *See E. Carolinas Broad. Co.*, 762 F.2d 95. The Commission had held previously that Section 402(h) means only that the Commission lacks discretion "to either specify new issues in the further proceedings or to delete issues which have already been heard and determined." *Spartan Radiocasting Co. (WSPA-TV)*, Memorandum Opinion and Order, 22 F.C.C. 619, 622 (1957). In *Eastern Carolinas*, the court noted that the Commission has interpreted Section 402(h) as a constraint solely to its "discretion to add new parties or entirely new issues on remand." 762 F.2d at 100 n.7.

[32] *Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service Off the Island of Puerto Rico*, Memorandum Opinion and Order, 8 FCC Rcd. 63, 72 n.90 (1992); *see also, e.g.*, *KIRO, Inc. v. FCC*, 545 F.2d 204 (D.C. Cir. 1976) (noting that Commission solicited further comments and evidence from the parties to ensure that the record was "current and complete"); *WSTE-TV, Inc.*, Memorandum Opinion and Order, 75 F.C.C.2d 52, 53 n.1 (1979) ("We shall grant all three unopposed requests to accept additional pleadings. Good cause exists for acceptance of the pleadings inasmuch as they focus on the Commission's most recent views concerning . . . a subject central to this proceeding upon remand.").

C. Comcast's Various Arguments That the Court's Decision Is Not a Remand Are Meritless.

None of the other arguments that Comcast raises in its Opposition forecloses the Commission from considering whether the record evidence establishes a violation of Section 616 under the new tests articulated by the court.

First, Comcast makes much of language in Tennis Channel's Petition for Rehearing En Banc, in which it argued, among other things, that the D.C. Circuit should have expressly remanded the case to the Commission for further proceedings to apply the new tests articulated by the D.C. Circuit.[33] Such specific instructions from the court might have obviated the latest round of briefing by Comcast and Tennis Channel and allowed the Commission to proceed directly to requesting briefing regarding whether the record evidence satisfies the court's newly articulated tests for Section 616 discrimination. But the D.C. Circuit's discretionary and opinionless denial of rehearing en banc does not constitute law of the case, has no precedential value, and is not any indication of the D.C. Circuit's views regarding the merits of the issues raised in the en banc petition. As the Eleventh Circuit has observed, "[A] summary denial of rehearing en banc is insufficient to confer any implication or inference regarding the court's opinion relative to the merits of a case. . . . We also believe that attaching precedential weight to a denial of rehearing en banc would be unmanageable."[34]

Second, Comcast argues that because the D.C. Circuit did not reach alternative dispositive grounds (such as Comcast's argument to that court that "the FCC's Order violates the

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[33] *See* Intervenor The Tennis Channel, Inc.'s Petition for Rehearing or Rehearing En Banc, at 11, *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) (No. 12-1337) ("The panel not only erred in requiring evidence of a foregone 'net benefit' to Comcast, but it also erred in not remanding the case *for further proceedings to determine whether such evidence exists*.") (emphasis added).

[34] *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991).

First Amendment"[35]), the court must have intended its decision to be "conclusive and end[] the case."[36] Otherwise, Comcast claims, remanding to the Commission "would have been utterly irrational and wasteful."[37] Courts, however, are not obligated to consider all potentially dispositive issues when deciding an appeal, and Comcast cites no authority to the contrary. In fact, courts often decide to remand cases in order to *avoid* reaching a dispositive issue, particularly where the panel may not agree on how to resolve other issues or where constitutional questions hang in the balance.[38] The only issue actually decided by the D.C. Circuit is that the evidence relied upon by the Commission in its Order did not satisfy the tests articulated by the court under the substantial evidence standard.[39] Accordingly, by vacating the Commission's decision, the case returns to the Commission for factfinding in light of the D.C. Circuit's tests.

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 provides ample evidence for the Commission to find, consistent with the D.C. Circuit's opinion, that Comcast discriminated against it in violation of Section 616. However, if the Commission disagrees and on this record

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[35] Final-Form Opening Brief for Petitioner, at 43, *Comcast Cable Commc'ns, LLC*, 717 F.3d 982.

[36] Comcast Opposition, at 20.

[37] *Id.*

[38] *See Mayor of City of Phila. v. Educ. Equal. League*, 415 U.S. 605, 629 (1974); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *see also, e.g.*, *Sierra Club v. EPA*, 699 F.3d 530, 534 (D.C. Cir. 2012) (remanding a case to the EPA for fulfillment of the Administrative Procedure Act's notice-and-comment requirements, and expressly noting that "we do not reach Sierra Club's arguments on the substance of the Determination or express the slightest opinion as to their merit").

[39] Comcast Opposition, at 19 ("[T]he unanimous panel opinion did not pass on these [other] issues.").

is unable to make findings that would resolve the outstanding factual issues identified by the D.C. Circuit, it should — indeed, must — allow the parties to produce additional evidence that sheds light on the new tests raised by the court's opinion.[40]

Even Comcast appears to acknowledge that the Commission has the discretion to reopen the proceeding,[41] though it argues that the Commission should not so exercise its discretion because "Tennis Channel ha[s] already had an ample prior opportunity to adduce any evidence and make any arguments."[42] However, as described in Part I, *supra*, that is plainly not the case. Not even Comcast had urged an evidentiary test like the one enunciated by the court in evaluating evidence of discrimination. It therefore would be appropriate to permit the parties to develop evidence in a manner tailored to meet the tests adopted by the court if the Commission concludes that the existing record is not sufficient for it to evaluate that question.

* * *

For the foregoing reasons, the Commission should grant Tennis Channel's Petition for Further Proceedings and Reaffirmation of Original Decision.

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[40] *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).

[41] *See* Comcast Opposition, at 26 ("The case is closed — and no further proceedings are called for — *unless and until the Commission reopens it*.") (emphasis added).

[42] Comcast's suggestion that the relief sought by the Tennis Channel would "force prevailing litigants to defend the results of decided cases ad infinitum, casting a cloud over every Commission ruling," seems inapposite in this proceeding, where every single time the Commission or the ALJ has looked at the case, it has found that Comcast violated the law.

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 28, 2014

CERTIFICATE OF SERVICE

I, Dustin Cho, hereby certify that on this 28th day of March, 2014, I caused a true and correct copy of the foregoing Reply in Support of 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

Counsel to the Enforcement Bureau

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

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/Dustin Cho