

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Game Show Network, LLC,	)	MB Docket No. 12-122
Complainant,	)	File No. CSR-8529-P
)	
v.)	
)	
Cablevision Systems Corp.,)	
Defendant)	

PARTIES’ JOINT STATUS REPORT

Pursuant to the order of the Chief Administrative Law Judge dated March 12, 2014, as amended, Cablevision Systems Corp. (“Cablevision”), Game Show Network, LLC (“GSN”), and the Enforcement Bureau (“Enforcement Bureau”) (collectively, the “parties”) submit the following joint status report in the above-captioned action.

A. Background

On June 7, 2013, GSN and Cablevision jointly moved for a continuance of the hearing in this matter, on the grounds that a continuance would allow the parties an opportunity to consider the potential impact of the D.C. Circuit’s May 28, 2013 panel decision in *Comcast Cable Communications v. FCC*, No. 12-1337 (D.C. Cir. filed August 1, 2012) (the “*Comcast Cable* action”) on the above-captioned proceeding. On December 3, 2013, Tennis Channel filed with the United States Supreme Court a petition for writ of certiorari in the *Comcast Cable* action, and the present matter was further continued while the *Comcast Cable* action remained subject to further review. The Supreme Court denied the petition for writ of certiorari on February 24, 2014. On March 11, 2014 Tennis Channel filed with the Commission a Petition for

Further Proceedings seeking a ruling on whether the *Comcast Cable* record satisfies the standard set out by the D.C. Circuit. For the convenience of the Presiding Judge, the pleadings filed in that matter are attached for the record.

Following the Supreme Court's denial of the petition for certiorari in the *Comcast Cable* action, the Presiding Judge ordered the parties to submit a Joint Status Report, "describing discovery needs and proposed dates for deposing witnesses, exchanging evidence, and commencing trial." On March 12, 2014, the Presiding Judge granted the parties until April 7, 2014 to submit a further status report. On April 8, the Presiding Judge granted the parties' request to extend the deadline for submission of a status report to April 10, 2014.

B. Status Report of the Parties

1. GSN

GSN hereby responds to the Presiding Judge's request that the parties submit a report "describing discovery needs and proposed dates for deposing witnesses, exchanging evidence, and commencing trial," in light of the *Comcast Cable* action.¹ GSN's counsel have conferred with counsel for Cablevision and, based on that discussion, we include in this Joint Status Report a mutually agreeable proposed schedule intended to allow the parties appropriate time to develop a complete record that accounts from the *Comcast Cable* action, while consistent with the need for expeditious review of the case.

Limited further discovery in this proceeding is appropriate in light of the *Comcast Cable* action. There, a panel of the D.C. Circuit vacated the Commission's decision on the grounds that it was not supported by "substantial evidence." GSN respectfully requests limited

¹ *Game Show Network, LLC v. Cablevision Systems Corp.*, Order, MB Docket No. 12-122, File No. CSR-8529-P, FCC 12M-28, at 1 (Chief ALJ March 12, 2104).

further discovery to account fully for the potential impact of the D.C. Circuit's panel decision, including, but not limited to, the panel's adoption of a new test for determining whether a vertically integrated MVPD has a legitimate business purpose to treat unaffiliated program services differently from affiliated services. Its test had never previously been articulated or applied by the Commission or the Presiding Judge. In addition, it is appropriate for the parties to conduct tailored discovery to freshen the record evidence, which was developed more than a year ago. GSN's request for narrowly focused discovery is consistent with the Presiding Judge's recent guidance that "additional discovery would likely be necessary to address the issues elevated by [the *Comcast Cable*] decision." Mar. 12, 2014 Order at 1-2.

Cablevision disagrees that the D.C. Circuit changed the standard in any way and therefore disagrees on the scope and form of further discovery. It proposes limitations on GSN's further discovery without having seen our further discovery requests. Cablevision's objection is therefore premature. Instead, GSN should be permitted to pursue limited, narrowly-tailored discovery on the issues raised by the D.C. Circuit's *Comcast Cable* decision, and Cablevision may object to GSN's further discovery requests in the normal course. In the event of such objections, the parties will endeavor to resolve any disagreements, as they have successfully throughout these proceedings. If the parties are unable to resolve any disagreements, they could elevate any outstanding discovery disputes to the Presiding Judge.

For the reasons set forth below, GSN requests limited further discovery:

The Comcast Cable action created a new evidentiary test that justifies further discovery. In vacating the Commission's Order, the *Comcast Cable* panel held that the evidence on which the Commission and the Presiding Judge relied did not suffice to establish that Comcast discriminated against Tennis Channel. The *Comcast Cable* panel identified three forms

of proof that *could* have supported a finding that Comcast did not have a legitimate business purpose for treating Tennis Channel differently from its competing affiliated services. Following is an overview of those newly-established tests, and a statement of proposed discovery in light of each test.

First, the Commission could find that the cable operator’s distribution business could have obtained a “net benefit” from carrying the independent programmer more broadly, but that it sacrificed this benefit. Under the panel’s reasoning, such evidence would establish that the cable operator’s real motive was to reap illegitimate advantages for its affiliated and competing programming services.² Such an analysis of benefits could be qualitative and need not be quantitative, the court noted, and it suggested that evidence of subscriber “churn”—that is, evidence that the operator was losing subscribers solely because of its refusal to give the programming service broader carriage — might have been one place to start, but was absent in the record before it.³ Endorsing a non-exclusive list of qualitative factors raised in the testimony of a cable executive, the court indicated that the benefits of carrying a network could also be

² *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 987 (D.C. Cir. 2013). The court suggested that the cable operator’s refusal to incur the greater license fees associated with carrying the independent programmer more broadly was not itself discriminatory unless the operator had reason to expect that the benefits of such broad carriage to its distribution business would outweigh that cost. *Id.* at 985 (“Tennis showed no corresponding benefits that would accrue to Comcast by its accepting the change. . . . Of course the record is very strong on the proposed increment in licensing fees, in itself a clear negative. The question is whether the other factors, and perhaps ones unmentioned by Comcast, establish reason to expect a net benefit. But neither Tennis nor the Commission offers such an analysis on either a qualitative or a quantitative basis.”).

³ *Id.*

assessed by “the nature of the programming content involved; the intensity and size of the fan base for that content; . . . [and] the network’s carriage on other MVPDs.”⁴

GSN respectfully requests that the Presiding Judge permit limited additional discovery related to the benefits that Cablevision was foregoing by repositioning GSN to a narrowly penetrated tier. We expect this would include further factual and expert evidence relating to subscriber churn and other qualitative and quantitative costs and benefits associated with Cablevision’s carriage of GSN on a narrowly penetrated sports tier as compared to a more broadly penetrated digital tier. For example and for illustrative purposes only, GSN anticipates further discovery focused on the following:

- Evidence of whether Cablevision’s distribution business would have a “net benefit,” perceived or otherwise, to carriage of GSN, including factual evidence of the direct and indirect costs to carriage of GSN and the value Cablevision perceived in carrying GSN.
- Expert testimony related to whether Cablevision would have a “net benefit,” perceived or otherwise, to carriage of GSN.
- Documents concerning subscriber churn or subscriber disconnects by video service subscribers, and additional documents reflecting the rebates and/or subsidies Cablevision has provided to subscribers who threatened to disconnect from Cablevision’s video services.
- Documents and evidence demonstrating the benefits to Cablevision of carriage of GSN.
- Documents and evidence concerning Cablevision’s analysis of consumer goodwill.

Second, the *Comcast Cable* panel observed that the Commission could conclude that a cable operator’s carriage decision was discriminatory if it found that “incremental losses from carrying [an independent programming service] in a broad tier would be the same as or less

⁴ *Id.*

than the incremental losses [the cable operator] was incurring from carrying [its affiliated networks] in such tiers.”⁵ In other words, even if carrying an unaffiliated programming service on a broadly distributed tier does not provide a “net benefit” for a cable operator, the D.C. Circuit understood that failing to carry it on that tier would be discriminatory if the operator were willing to carry its own affiliated networks on that tier at an even *greater* net loss or *lesser* profit to the operator’s distribution business.⁶ This alternative finding also permits both qualitative and quantitative evidence regarding the relative benefits of carrying each network broadly. The *Comcast Cable* court noted that the Commission could find either an affirmative net benefit or lesser incremental losses by means of a “comparative” analysis of the relative costs and benefits of broad distribution of these networks.⁷

GSN respectfully requests that the Presiding Judge permit limited additional discovery related to the relative costs and benefits associated with broad carriage of WE tv and Wedding Central. We expect this would include further factual and expert evidence relating to subscriber churn and other qualitative and quantitative costs and benefits associated with Cablevision’s carriage of WE tv and Wedding Central on a broadly penetrated digital tier. For example and for illustrative purposes only, GSN anticipates further discovery focused on the following:

⁵ *Id.* at 986.

⁶ Of course, a cable operator may pay the license fees for its affiliated programming services from one side of its business to another, but the test contemplated by the court requires consideration of the relative value proposition to the operator’s distribution business alone.

⁷ *Id.* at 987. What the Commission found — that the three networks are “similarly situated” when “compared along a series of important axes,” Order ¶ 51 — was not the same as the finding required by the D.C. Circuit, because the Commission’s more general findings of similarities were not specifically aimed at assessing the relative costs and benefits for Comcast’s distribution business with respect to broad carriage of each network. *See Comcast*, 717 F.3d at 987.

- Evidence of whether continued broad carriage of GSN would have resulted in smaller losses or greater profits to Cablevision’s distribution business than broad carriage of WE tv or Wedding Central, including factual evidence of the direct and indirect costs to carriage of the networks and evidence of the value Cablevision perceived and obtained in carrying each of the networks.
- Expert testimony related to whether Cablevision would have perceived that continued broad carriage of GSN would result in smaller incremental losses or greater profits to its distribution business than broad carriage of WE tv or Wedding Central. This would include appropriate evidence of promotional support and other similar advantages that Cablevision provided WE tv or Wedding Central that are necessary to fully understand the context for WE tv and Wedding Central’s performance on Cablevision systems.

Third, the court held that the Commission could rely on a finding that Comcast’s “otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose.”⁸ GSN respectfully requests the opportunity to conduct further discovery, including deposition discovery, on the questions of who was responsible for key carriage decisions related to the repositioning of GSN and why those decisions were made. The witnesses deposed previously in this proceeding claimed to have no recollection of who made certain key decisions and why those decisions were made, and, in light of the importance that the D.C. Circuit attached to whether a carriage decision is pretext for discrimination, GSN respectfully requests further discovery tailored to address this question. Once facts concerning Cablevision’s repositioning of GSN are revealed, additional discovery relevant to the pretext inquiry may be appropriate.

⁸ *Id.* In the *Comcast Cable* action, the court found that the Commission had not “invoked th[is] concept,” *id.*, although the May 21, 2014 Petition filed by Tennis Channel argues that there is evidence in the record that is sufficient for the Commission, on remand, to make express findings of fact that Comcast’s carriage decisions were pretext for discriminatory conduct.

Cablevision's arguments that GSN has "thoroughly exhausted" the issues raised in the Comcast Cable action are incorrect. Nothing in governing law at the time of the Presiding Judge's decision focused attention on the other evidentiary issues that the D.C. Circuit effectively found dispositive in the *Comcast Cable* action. The D.C. Circuit's decision clearly imposed new evidentiary tests not contemplated at the time the parties conducted discovery in this matter, a proposition that the Presiding Judge is perhaps uniquely qualified to evaluate. While GSN does not seek to reopen the record "wholesale," limited further discovery is therefore appropriate. Moreover, GSN respectfully suggests that it would be premature to impose arbitrary limitations on further discovery at this juncture (i.e., in the absence of concrete discovery requests), such as those Cablevision outlines in this submission.

Finally, the record should be updated to ensure that it is based on current data and evidence. It has now been a full year since the parties completed the initial discovery process, and the record is therefore stale in certain respects. In addition to ensuring that the Presiding Judge has the benefit of expert reports that are appropriately addressed to the D.C. Circuit's decision in the *Comcast Cable* action, such expert reports should be based on the most recent data relevant to this proceeding. As the Presiding Judge has stated, "expert opinions should be based on *current data*."⁹ Further, additional evidence may have developed over the past year on key issues for which further discovery is appropriate. For example, there may be additional information about the competitive impact of Cablevision's repositioning of GSN. GSN therefore respectfully requests that the Presiding Judge permit the parties to conduct limited additional discovery (including both factual and expert) to freshen the record.

⁹ *Game Show Network, LLC v. Cablevision Systems Corp.*, Order, MB Docket No. 12-122, File No. CSR-8529-P, FCC 12M-28, at 1 (Chief ALJ March 12, 2104) (emphasis added).

For the foregoing reasons, GSN respectfully requests that the Presiding Judge allow tailored discovery focused on the additional evidentiary tests introduced by the D.C. Circuit's decision in the *Comcast Cable* action and on freshening the now-stale evidentiary record to the extent appropriate.

The parties clearly disagree about the appropriate scope and nature of discovery, although the schedule they jointly propose is adequate to accommodate either view. GSN respectfully requests that the Presiding Judge order that the parties endeavor to resolve any discovery disputes that arise in connection with GSN's concrete discovery requests on their own, and only in the absence of such resolution should the parties escalate such disputes to the Presiding Judge.

Estimated Dates for Deposing Witnesses, Exchanging Evidence and Commencing Trial

GSN, Cablevision, and the Enforcement Bureau have conferred and agreed to the procedural dates below. As noted, the parties have not reached agreement over whether interrogatories should be served.

May 1, 2014	Supplemental document requests served; interrogatories served.
May 16, 2014	Responses and objections to document requests and interrogatories served.
May 26, 2014	Supplemental document production begins; parties may serve fact deposition notices.
June 20, 2014	Supplemental document production ends.
July 16, 2014	Complainant's supplemental expert reports filed.

August 15, 2014	Defendant's supplemental expert reports filed; parties may serve expert deposition notices.
September 26, 2014	Deadline for completing all supplemental fact and expert depositions; discovery ends.
October 22, 2014	Supplemental trial briefs exchanged by 12:00 noon.
October 22, 2014	Supplemental hearing exhibits and written direct testimony exchanged by 12:00 noon.
November 11, 2014	Document Admissions Session commencing at 10:00 a.m.
November 12, 2014	Hearing commences at 9:30 a.m.

2. Cablevision

Cablevision has a fundamentally different view as to what, if anything, remains to be done before trial.

The D.C. Circuit's recent decision in *Comcast Cable Communications, Inc. v. FCC* (the "Comcast Cable" opinion),¹⁰ reaffirmed that where an MVPD's challenged carriage decision is supported by a legitimate business rationale, no Section 616 violation exists. Faced with this precedent, GSN seeks to transform the Presiding Judge's offer of a brief supplemental discovery period into a complete "do-over" of the record for trial. GSN's proposal goes far beyond supplemental discovery and is not justified by anything said by the D.C. Circuit in the *Comcast Cable* decision. The appellate court did not create the purportedly "new tests" GSN claims necessitate its expansive discovery requests; the court merely assessed the well-developed trial record before it under the existing Commission standards for Section 616.

As was true in *Comcast Cable*, the parties in this case engaged in extensive and far-ranging fact and expert discovery to get the case ready for trial. GSN (through the same counsel) had every opportunity to develop the factual and expert record necessary to attack Cablevision's business justification for its re-tiering of GSN. There is simply no reason to start over now. As the Presiding Judge is aware, Cablevision's fundamental view is that no additional discovery is required and the case is trial ready, as it has been since June 25, 2013 when the matter was stayed to permit the appellate process in *Comcast Cable* to run its course. The Presiding Judge has made clear, however, that he will allow some supplementation of the discovery record. Cablevision's position is that other than modest updating of information to account for the

¹⁰ *Comcast Cable Communications v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).

passage of time, there is nothing to discover—every topic GSN identifies in this status report has already been covered at length in the extensive fact and expert discovery to date. Accordingly, Cablevision respectfully requests that the Presiding Judge reject GSN’s broad discovery plan and instead adopt the targeted supplemental discovery proposal Cablevision sets out below.

A. Comcast Cable Did Not Create New Evidentiary Tests for Section 616 Claims.

Contrary to GSN’s contentions, the *Comcast Cable* opinion did not create new evidentiary tests for Section 616 claims that would justify additional discovery here. Nor did the appellate court find such evidentiary issues “dispositive,” as GSN asserts. Rather, in *Comcast Cable*, the D.C. Circuit carefully assessed the evidence surrounding Comcast’s legitimate business rationale for refusing to broaden the carriage of Tennis Channel—which the record established was based on a “straight-up financial analysis.” In assessing this evidence, the D.C. Circuit specifically noted that it was following the “Commission’s [existing] interpretation of § 616,” which the D.C. Circuit assumed was correct for purposes of its analysis.¹¹ GSN now contends that “[n]othing in the governing law at the time of the Presiding Judge’s decision focused attention” on these evidentiary issues. But in subsequent proceedings in *Comcast Cable*, the Tennis Channel—represented by the same counsel as GSN—has conceded that “[t]he D.C. Circuit made clear its view that it was following—not changing—the standards for Section 616 enforcement” in its decision.¹²

Under this settled interpretation of Section 616, the D.C. Circuit reaffirmed that “if the MVPD treats vendors differently based on a reasonable business purpose . . . there is no

¹¹ *Id.* at 984.

¹² Tennis Channel Pet. for Further Proceedings and Reaffirmation of Original Decision, *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, at ii (Mar. 11, 2014) (emphasis added).

violation.”¹³ Thus, unless a complainant can rebut an MVPD’s legitimate business rationale by showing that the MVPD was forgoing a net commercial benefit through its carriage decision, the Section 616 claim must fail.¹⁴ In *Comcast Cable*, as the appellate court explained, “the record simply lacks material evidence that the Tennis [Channel’s expanded carriage] proposal offered . . . any commercial benefit.”¹⁵

The analysis could hardly come as a surprise to GSN, which focused its discovery in this case on the same type of inquiry: whether Cablevision had a legitimate business rationale for re-tiering GSN and whether the evidence established that such a business rationale was pretextual. Indeed, the broad sweep of GSN’s prior discovery efforts reflects that GSN was fully cognizant of the operative legal and evidentiary standards under Section 616.

B. Every Subject on Which GSN Seeks Supplemental Discovery is Fully Developed in the Existing Record.

Seizing on dicta in the *Comcast Cable* opinion, GSN attempts to characterize the decision as fashioning a number of new evidentiary tests not found in governing law that GSN now needs substantial new discovery to address. Although Cablevision disagrees with that predicate, even if the Presiding Judge places weight on the various tangential statements found in the *Comcast Cable* opinion, the fact remains that GSN now seeks discovery on subjects that the parties have already thoroughly exhausted in document production and depositions.

Profitability of Carriage Decisions: GSN’s first two purportedly new *Comcast Cable* tests focus on the profitability of an MVPD’s carriage decisions. Here, however, the existing

¹³ *Id.* at 985.

¹⁴ *Id.* at 984, 987.

¹⁵ *Id.* at 987.

record includes extensive evidence addressing whether Cablevision chose to forgo a net benefit or incur incremental losses by moving GSN to a less-penetrated tier (and confirming that Cablevision's decision was the sort of "straight-up financial analysis" contemplated by *Comcast Cable*). And while GSN suggests that it also needs to examine whether Cablevision ever considered the benefits of re-tiering its affiliates WE tv or Wedding Central to a less penetrated tier of service, that is irrelevant under the *Comcast Cable* analysis.¹⁶ Even if they were relevant, though, GSN has examined these subjects at length in fact and expert depositions. For example, Thomas Montemagno, Cablevision's Executive Vice President of Programming, and former Cablevision President John Bickham, both testified about Cablevision's profitability analysis of continued carriage of GSN and Cablevision's subsequent decision to move GSN to a less-penetrated tier.¹⁷ Mr. Montemagno and Jonathan Orszag, one of Cablevision's expert witnesses, also addressed the costs and benefits of continued carriage of GSN and WE tv/Wedding Central in their depositions and Mr. Orszag's expert report.¹⁸ Among other things, Mr. Orszag's expert report includes a subscriber "churn" analysis which was then critiqued by GSN's expert, Hal Singer, and scrutinized during the Orszag deposition. Moreover, GSN's existing document requests already cover the specific categories of information GSN identifies as relevant to

¹⁶ GSN's request for discovery concerning potential repositioning of WE tv and Wedding Central reflects a fundamental misapprehension of *Comcast Cable*. As the D.C. Circuit explained, the relevant issue in a Section 616 dispute is *not* whether an MVPD should reposition an affiliated network, but whether failure to carry the complaining network in the same fashion as the affiliated network is discriminatory. *See Comcast Cable*, 717 F.3d at 986–87.

¹⁷ *See, e.g.*, Montemagno Tr. 174:22–181:6, 199:23–204:13; Bickham Tr. 38:8–45:10.

¹⁸ *See, e.g.*, Montemagno Tr. 36:18–45:9, 99:14–123:19; Orszag Tr. 256:10–267:5, 269:3–271:4.

carriage profitability analyses.¹⁹ In short, the profitability of the carriage of the networks at issue in this case was at the heart of Cablevision’s decision to re-tier GSN, and has been explored in detail in discovery. To the extent that GSN now wishes that it had prepared the case differently for trial, that provides no basis for putting Cablevision to the burden of re-opening wholesale the record of a case that has been trial ready for more than nine (9) months.

Evidence of Pretextual Motives: GSN’s theory that Cablevision’s legitimate business rationale for re-tiering GSN was pretextual is hardly new. To the contrary—as GSN concedes when it complains that the numerous depositions it has already taken yielded no evidence supporting this theory—this subject has been explored in nearly *every* deposition of Cablevision fact witnesses. GSN’s contention that Cablevision’s witnesses could not recall decision-making surrounding the GSN re-tiering is also demonstrably false. For example, Mr. Montemagno testified at length and in detail about the GSN re-tiering.²⁰ GSN’s suggestion that it should now take depositions of other witnesses to probe the same issues should be rejected; it has already taken the depositions of the executives who played the critical role in the determination to re-tier GSN. The record on this point is fully developed, and, while it lends no support to GSN’s pretextual motive theory, there is nothing to supplement.

¹⁹ GSN served 32 document requests, many of which directly target the subjects GSN now claims require supplemental discovery in light of *Comcast Cable*. For example, GSN has already received “[a]ll documents concerning or reflecting any analysis [by Cablevision] of GSN, including, without limitation, its audience and value . . .” (GSN’s First Set of Document Requests, No. 7), and “[a]ll documents comparing GSN with any Affiliated Network or any Unaffiliated Women’s Network . . .” (GSN’s First of Document Requests, No. 8.) In the unlikely event that these document requests did not capture relevant documents, GSN included several expansive, catch-all document requests, including one seeking “[a]ll [Cablevision] documents concerning GSN.” (GSN’s First Set of Document Requests, No. 1.)

²⁰ *See, e.g.*, Montemagno Tr. 174:22–181:6 (explaining that Cablevision, under cost pressure, decided to re-tier GSN to save annual programming fees).

C. Narrowly-Limited Supplemental Discovery is Appropriate to Update Material Already in the Record.

In light of the Presiding Judge's prior orders making clear that he will allow some supplemental discovery, Cablevision proposes that any such discovery be governed by the following guidelines:

- Any supplemental document discovery should be limited to specific and identifiable documents (such as board minutes, ratings data, and program lineups), created or relating to the period between the cutoff of document production on October 19, 2012 and December 31, 2013. Neither party should be required to collect additional emails or conduct generalized searches for documents "concerning" various topics.
- No interrogatories or requests for admissions should be permitted.
- Additional fact depositions, if any, should be limited to three (3) per side and to new issues related to the *Comcast Cable* opinion or relevant events post-dating the prior submission of written direct testimony.
- GSN should be permitted to submit a supplemental expert report from only Mr. Singer, which shall not exceed twenty-five (25) pages (including appendices). Cablevision will be permitted to submit a supplemental expert report of equal length by Mr. Orszag that responds to the new Singer report.
- Each party may conduct one additional expert deposition of Mr. Singer and Mr. Orszag, limited to the topics addressed in the new supplemental reports.

Although GSN wants an unfettered ability to initiate all of the wide-ranging new discovery that it sees fit, and proposes that Cablevision can object thereafter, Cablevision respectfully submits that the above reasonable guidelines both are more consistent with the concept of supplemental discovery and permit the Presiding Judge to manage this process more efficiently from the outset. For example, Cablevision believes that the deposition guidelines will minimize witness inconvenience and the prejudice arising from potential counsel's efforts to re-plow old ground in order to secure "better" deposition testimony. Given the obvious differences in views between the parties, this proactive approach will also reduce the number of expensive and time-consuming discovery disputes between the parties and enable the Presiding Judge to move the case to trial in the fall in an orderly manner.

Finally, Cablevision agrees with GSN on the proposed case schedule set out above.

Cablevision stands ready to discuss its proposal with the Presiding Judge at a conference after April 14, 2014 if that would be useful.

3. Enforcement Bureau

The Bureau has reviewed GSN's discovery proposal and Cablevision's response. The Bureau submits that GSN and Cablevision are in a better position to assess whether additional discovery is necessary and to what extent. The Bureau takes no position on the parties' discovery proposals.

* * *

The parties would be pleased to supply any additional information that would be helpful to the Presiding Judge in connection with such scheduling.

Respectfully submitted,

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I, Elizabeth Canter, hereby certify that on April 10, 2014, copies of the foregoing were served by electronic mail upon:

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ATTACHMENTS

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

In the Matter of)
)
The Tennis Channel, Inc.,) MB Docket No. 10-204
Complainant,)
) File No. CSR-8258-P
v.)
)
Comcast Cable Communications, LLC,)
Defendant)

To: The Commission

**PETITION FOR FURTHER PROCEEDINGS AND
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March 11, 2014

SUMMARY

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

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

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

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

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

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

In the Matter of)	
)	
The Tennis Channel, Inc.,	)	MB Docket No. 10-204
Complainant,)	
	)	File No. CSR-8258-P
v.)	
)	
Comcast Cable Communications, LLC,)	
Defendant)	

To: The Commission

**PETITION FOR FURTHER PROCEEDINGS AND
REAFFIRMATION OF ORIGINAL DECISION**

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

Tennis Channel requests that the Commission initiate further proceedings in this docket focused on the limited question of whether the record evidence satisfies any one of the three findings that the D.C. Circuit has now stated may establish that Comcast discriminated against Tennis Channel in violation of Section 616.² We believe that the Commission will

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

⁷ *Id.* ¶¶ 51, 56.

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

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

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

⁸ *Id.* ¶¶ 52–55.

⁹ *Id.* ¶ 65.

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

¹¹ *Id.* ¶ 68 (“While Golf Channel and Versus reach ██████████ of Comcast’s subscribers, Tennis Channel reaches only ██████████.”).

¹² *Id.* ¶ 45.

¹³ *Id.* ¶ 46.

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

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

¹⁴ *Id.* ¶ 69.

¹⁵ *Id.* ¶ 77.

¹⁶ *Id.* ¶ 112.

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

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

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

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

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

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

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

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

²⁰ *Id.*

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

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 986.

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

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

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

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

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

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁹ Order ¶ 52.

⁴⁰ *Id.* ¶¶ 53, 55.

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

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

⁴¹ Tennis Channel Ex. 108.

⁴² Order ¶ 55.

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

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

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

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

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

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

⁴⁸ See Tennis Channel Exs. 21, 61.

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

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

⁴⁹ Order ¶ 71.

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

⁵¹ *Comcast*, 717 F.3d at 986.

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

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

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

⁵³ Indeed, there is evidence that limiting distribution of Versus *does not* drive subscriber churn: After DirecTV, LLC (“DirecTV”) decided to drop Versus from its line-up during its renewal negotiation with Versus in 2009, Comcast executives acknowledged that subscribers were unlikely to switch service providers — or even make a telephone call to DirecTV to complain — following the loss of Versus. Tennis Channel Ex. 80, at COMTTC 00015420 [REDACTED]; Bond Tr. at 2261:3–2262:5. DirecTV ultimately restored Versus after Comcast executives made a quid pro quo agreement to carry DirecTV’s regional sports networks in exchange for carriage of Versus. See Tennis Channel Ex. 89 (internal discussion of proposal regarding [REDACTED]; Bond Tr. at 2232:32:11–2233:17.

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

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

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

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

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

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

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

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

⁵⁶ *Comcast*, 717 F.3d at 987.

⁵⁷ Order ¶ 79.

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

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

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

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

⁶⁰ Order ¶ 80.

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

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

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

⁶⁴ Initial Decision ¶ 58 (“Mr. Jeff Shell, head of Comcast’s programming division, characterized OLN, the network subsequently renamed Versus, as ‘a crappy channel that was dead in the (continued...)”)

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

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

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

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

⁶⁵ See Tennis Channel Exs. 21, 61.

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

⁶⁷ Initial Decision ¶ 59.

⁶⁸ Singer Written Direct ¶ 20.

⁶⁹ *Id.* ¶ 20 & Table 1.

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PROTECTIVE ORDER IN FCC MB DOCKET NO. 10-204**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

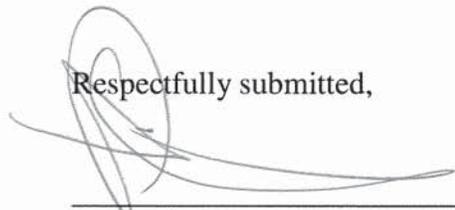
⁷⁶ Donnelly Tr. at 2550:3–21.

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

CONCLUSION

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

Respectfully submitted,



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

CERTIFICATE OF SERVICE

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

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

In the Matter of)	
)	
The Tennis Channel, Inc.,)	
Complainant	)	MB Docket No. 10-204
v.	)	File No. CSR-8258-P
Comcast Cable Communications, LLC,)	
Defendant)	

**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,¹⁰⁶ 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.

Dated: March 18, 2014

Respectfully submitted,



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

In the Matter of)	
)	
The Tennis Channel, Inc.,	)	MB Docket No. 10-204
Complainant,)	
	)	File No. CSR-8258-P
v.)	
)	
Comcast Cable Communications, LLC,)	
Defendant)	
 To: The Commission		

**REPLY IN SUPPORT OF
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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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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
The Tennis Channel, Inc.,	)	MB Docket No. 10-204
Complainant,)	
	)	File No. CSR-8258-P
v.)	
)	
Comcast Cable Communications, LLC,)	
Defendant)	

To: The Commission

**REPLY IN SUPPORT OF
PETITION FOR FURTHER PROCEEDINGS AND
REAFFIRMATION OF ORIGINAL DECISION**

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

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

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

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[ie]d 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

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

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

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).

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

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

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

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

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.

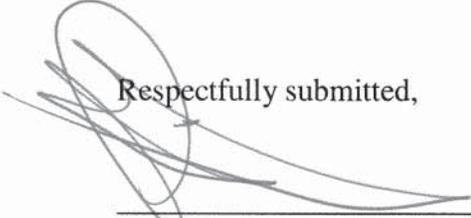
* * *

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

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,

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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:

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