

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMCAST CABLE COMMUNICATIONS, LLC,)	
)	
Petitioner,)	
)	
v.)	No. 12-1337
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	

**OPPOSITION OF FEDERAL COMMUNICATIONS
COMMISSION TO PETITIONER'S EMERGENCY
MOTION FOR STAY OF AGENCY ORDER**

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INTRODUCTION

The Federal Communications Commission opposes Comcast's motion to stay the FCC's order requiring Comcast to remedy its violation of Section 616 of the Communications Act, 47 U.S.C. § 536, by carrying Tennis Channel at the same level of distribution as two Comcast-affiliated sports networks, Golf Channel and Versus.

Animated by concerns that vertically integrated cable operators have the incentive and ability to favor their affiliated programmers, Congress enacted Section 616 to promote competition and diversity among programming networks in the pay-TV market. Section 616 prohibits any multichannel video programming distributor ("MVPD") from "discriminating ... on the basis of affiliation or nonaffiliation of [video programming] vendors in the selection, terms, or conditions for carriage of video programming" if the effect of such discrimination "is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." 47 U.S.C. § 536(a)(3). The statute directs the FCC to "provide for appropriate penalties and remedies" for such discrimination, "including carriage." *Id.* § 536(a)(5).

This case involves a Section 616 discrimination complaint that Tennis Channel, a sports programming network, filed with the FCC in January 2010 against Comcast, the nation's largest cable operator. After conducting a 6-day hearing (featuring live testimony) and reviewing a voluminous evidentiary record, an FCC Administrative Law Judge ("ALJ") concluded

that Comcast had discriminated on the basis of affiliation by giving broader carriage to its affiliated sports networks (Golf Channel and Versus) than it gave to Tennis Channel. To remedy this violation of Section 616, the ALJ ordered Comcast, among other things, to provide Tennis Channel with the same level of distribution as Golf Channel and Versus.

In the *Order* on review, the FCC affirmed the ALJ's finding that Comcast violated Section 616, and upheld the monetary forfeiture and "equal carriage" remedies ordered by the ALJ. Comcast has moved to stay the *Order* pending judicial review, contending that it improperly allows Tennis Channel to "rewrite" its existing contract with Comcast. Mot. at 4. To the contrary, the *Order* simply requires Comcast to exercise its contractual rights in compliance with federal law.

Comcast is not likely to succeed on the merits of its challenge to the *Order*. The FCC's reading of its own regulation specifying the limitations period for Section 616 complaints was reasonable and neither "plainly erroneous" nor "inconsistent with the regulation." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011). Similarly, the agency's determination that Comcast violated Section 616 is consistent with the statutory text and supported by substantial evidence. The carriage remedy also comports with the First Amendment: It "advances important governmental interests unrelated to the suppression of free speech" – fair competition and diversity of information sources in the pay-TV market – and

“does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

Nor has Comcast shown that it will suffer irreparable harm without a stay. To minimize any burden on Comcast, the FCC’s Office of General Counsel has stayed the portion of the *Order* requiring the cable operator to launch Tennis Channel on any cable systems that do not already carry the network and allegedly have limited available channel space. For the remaining cable systems at issue in this case, Comcast already has *chosen* to carry Tennis Channel; the FCC’s *Order* does not compel Comcast to carry any speech that it is opposed to carrying for any expressive purpose. In all events, Comcast has not come close to demonstrating the “certain” and “great” injury required by this Court to justify the extraordinary remedy of a stay. Comcast’s alleged injuries consist of administrative burdens (such as updating databases and programming guides) that are routine for any cable operator – particularly one as large and sophisticated as Comcast. Indeed, Comcast represented to the Commission over six months ago that it was “engaging in good-faith planning for compliance with and implementation of” the ALJ’s decision. Given that representation, Comcast should not now be heard to complain that it suffers extraordinary and irreparable harm in being required to do what it has long stated it has been planning to do.

Lastly, the public interest and the substantial harm that Tennis Channel would suffer if the FCC’s remedy were suspended weigh decidedly against issuance of a stay. The stay motion should be denied.

BACKGROUND

1. Comcast, the nation's largest MVPD, owns a controlling interest in Golf Channel and Versus, two cable sports networks. Add. 492-93.¹ Tennis Channel is a national sports network that focuses on tennis-related programming. Add. 491. It is "unaffiliated with Comcast." Add. 493-94.

Since Comcast began carrying Tennis Channel in 2005, the network has been placed on a premium Sports Tier on the vast majority of Comcast's systems. To access this tier, subscribers must pay an additional monthly charge above what they pay for basic digital cable service. As a result, Tennis Channel is available to only [REDACTED] percent of Comcast's subscribers. By contrast, Golf Channel and Versus – Comcast's affiliates – are offered on channel tiers that are available to all digital subscribers at no additional cost. Those tiers reach many more of Comcast's customers than the channel tier on which Comcast carries Tennis Channel. Add. 493.

In 2009, citing recent viewership growth and programming improvements, Tennis Channel asked Comcast to increase its distribution by repositioning it to a tier with broader distribution than the Sports Tier. At that time (as now), Comcast carried Golf Channel and Versus on its broadly distributed Expanded Basic and Digital Starter tiers. After Comcast rejected Tennis Channel's proposal in June 2009, Tennis Channel filed a complaint with the FCC on January 5, 2010, asserting that Comcast had discriminated against it because the network was unaffiliated with Comcast. Add. 493-94.

¹ "Add." refers to the addendum to Comcast's stay motion.

2. The FCC's Media Bureau determined that Tennis Channel's complaint was timely filed and designated it for hearing before an ALJ. Add. 494-95. After conducting a hearing that featured live testimony and thousands of exhibits, the ALJ issued a decision granting the complaint. Add. 421. First, the ALJ found that Tennis Channel was "similarly situated" to Golf Channel and Versus – *i.e.*, the three networks compete for the same audience, target the same advertisers, and have similar ratings and programming. Add. 431-46. Thus, it was reasonable to compare Comcast's treatment of the three networks for purposes of assessing whether Comcast had discriminated against Tennis Channel – and in favor of Golf Channel and Versus – on the basis of Tennis Channel's unaffiliated status.

The ALJ next determined that Comcast violated Section 616 by engaging in affiliation-based discrimination against Tennis Channel, while affording preferential treatment to Golf Channel and Versus. Finding undisputed evidence that Comcast gave Golf Channel and Versus more favorable channel placement and much broader carriage than Tennis Channel (Add. 446-47), the ALJ concluded that "the weight of reliable record evidence demonstrates" that this differential treatment was "based upon affiliation." Add. 447. In particular, the ALJ cited an acknowledgment by Comcast's former Chief Operating Officer that affiliated networks "get treated like siblings as opposed to like strangers" and receive a "different level of scrutiny" from that given to unaffiliated networks. Add. 447; *see also id.* (citing similar testimony from Comcast's

senior executive responsible for carriage decisions). The ALJ also pointed to undisputed evidence that “[e]very one of [Comcast’s] affiliated networks is carried on more widely distributed tiers” than the Sports Tier, and that Comcast “carries only unaffiliated sports networks exclusively on the narrowly penetrated Sports Tier.” Add. 448.

In addition, the ALJ determined that Comcast’s “unequal treatment of Tennis Channel *vis-à-vis* its sports affiliates has adversely affected the ability of Tennis Channel to compete fairly in the video programming marketplace.” Add. 459. The ALJ found that Comcast’s decision to carry Tennis Channel on the Sports Tier “greatly diminishes the number of Tennis Channel subscribers which in turn reduces the amount of its earnings derived from license fees,” “hinders the network’s ability to compete for valuable programming rights,” “makes it more difficult for the network to sell advertising,” and reduces its advertising revenues. Add. 459-62.

To remedy Comcast’s violation of Section 616, the ALJ ordered Comcast “to carry Tennis Channel at the same level of distribution that it carries Golf Channel and Versus” (subject to an exception regarding analog services) and “to provide Tennis Channel with equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement.” Add. 472.

3. After conducting an independent review of the extensive evidentiary record, the Commission upheld the ALJ’s finding that Comcast violated Section 616, and (with one exception) affirmed the ALJ’s remedy. Add. 488. Two Commissioners dissented. Add. 532-36.

The Commission first affirmed the Media Bureau's determination that Tennis Channel filed its complaint within the one-year limitations period established by the FCC's rules. Add. 499-502. The Commission also agreed with the ALJ that the record demonstrated that Comcast had deliberately discriminated against Tennis Channel on the basis of its lack of affiliation with the cable operator (Add. 505-20), and that this discriminatory conduct unreasonably restrained the network's ability to compete fairly (Add. 520-23). The Commission next affirmed the ALJ's "equal carriage" remedy, rejecting Comcast's arguments that the remedy violated the First Amendment. Add. 523-31. The Commission, however, vacated the ALJ's "channel placement" remedy, finding the record insufficient to "establish that Tennis Channel's ability to compete fairly was unreasonably restrained" by its specific channel placement. Add. 524.

4. After it petitioned the FCC for an administrative stay of the *Order*, Comcast filed a motion for a judicial stay on August 8, 2012. One day later, the FCC's Office of General Counsel granted a limited stay of the *Order* pending review by this Court.² The administrative stay suspends Comcast's duty to comply with the *Order* only for the Comcast systems that do not currently carry Tennis Channel and allegedly have little to no available channel capacity. *Stay Order* ¶ 44.

² *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, DA 12-1311 (OGC Aug. 9, 2012) ("*Stay Order*"). A copy of the *Stay Order* is attached, along with a separate statement by Commissioner Pai.

ARGUMENT

THE STAY REQUEST SHOULD BE DENIED

The injunctive relief sought by Comcast is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). To obtain a stay, Comcast must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed by a stay; and (4) a stay will serve the public interest. *Id.* at 20; *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Comcast has failed to satisfy this stringent standard.

A. Comcast Has Failed To Show That It Is Likely To Prevail On The Merits.

Comcast contends that the FCC misconstrued its own limitations rule, misapplied Section 616, and violated the First Amendment. None of these contentions has merit.

1. Comcast asserts that the Commission misread its rule prescribing the limitations period for program carriage complaints. Mot. at 8-10. It is well settled, however, that the Court defers to the FCC’s reading of its own rules “unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.” *Rural Cellular Ass’n v. FCC*, 2012 WL 2866314, *9 (D.C. Cir.

July 13, 2012) (quoting *Talk Am.*, 131 S. Ct. at 2261). Under this highly deferential standard, Comcast does not come close to establishing that it will likely succeed in showing that the Commission misapplied its own rule.

FCC Rule 76.1302(f)(3) provides that a Section 616 program carriage complaint is timely if it is filed within one year after the party “has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the [program carriage] rules.” 47 C.F.R.

§ 76.1302(f)(3) (2010).³ It is undisputed that Tennis Channel filed its complaint within one year of notifying Comcast of its intent to do so.

“Tennis Channel notified Comcast of its intent to file a complaint in December 2009 and filed its complaint in January 2010.” Add. 500.

Moreover, Tennis Channel’s complaint did not allege that the 2005 contract itself was unlawful, but rather that Comcast’s subsequent refusal in June 2009 to relocate Tennis Channel to a more widely distributed tier violated Section 616. For this reason, Comcast is wrong in contending (Mot. at 8) that Tennis Channel’s complaint was untimely under 47 C.F.R.

§ 76.1302(f)(1) because that provision by its terms only applies when a contract is alleged to violate the rules. Add. 501. The filing of Tennis Channel’s complaint “occurred well within one year of the conduct that allegedly violated Section 616.” Add. 500. Therefore, it was timely.

³ We refer to the rules in effect when Tennis Channel filed its complaint in January 2010. The relevant rule, which was amended in October 2011, is now found at Section 76.1302(h).

Comcast nevertheless contends that the FCC's reading of subsection (f)(3) is "implausible" because it "renders subsections (f)(1) and (f)(2) superfluous" and "allows *any* long-dead claim to be resuscitated." Mot. at 9. That is incorrect. The agency reads subsection (f)(3) "consistent with the doctrine of laches to impliedly require notification of an intent to file a complaint within a reasonable time" after "discovery of the allegedly unlawful conduct." Add. 500. Here, "the allegedly unlawful conduct ... occurred within one year of the filing of the complaint," *id.*, and Comcast cannot plausibly claim that it is unreasonable to permit programmers to file a complaint within one year of the discriminatory conduct. Under Comcast's counter-textual reading of the Commission's rule, a programming network would be barred from complaining about any carriage-related discrimination occurring more than one year after the execution of its contract so long as the cable operator did not violate the terms of that contract.⁴

2. Comcast's challenge to the FCC's application of Section 616 is likewise unavailing. Comcast asserts that Congress intended for the "unreasonable restraint" element of the statute to be limited by the "essential facilities" doctrine and other antitrust principles. Mot. at 10. But nothing in the statute's text indicates any such intent (Add. 504); and "Comcast's

⁴ Comcast bases its reading on limiting language that was *deleted* from the rule 18 years ago. It argues that Section 76.1302(f)(3) "applies only where an MVPD denies or refuses to acknowledge a request to negotiate for carriage." Mot. at 9. While the original version of subsection (f)(3) "was expressly limited to those circumstances" (*id.* at 9 n.10), "the Commission removed the limiting language in 1994." Add. 501.

narrow interpretation of Section 616” is “inconsistent with the [statute’s] legislative history.” Add. 522; *see* H.R. Rep. No. 102-628, at 111 (1992) (Section 616 “provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws”).

Adopting a “straightforward and textual reading” of Section 616 (Add. 522), the Commission construed the undefined and ambiguous phrase “unreasonably restrain” to mean that “the discrimination must be unreasonable and have a restraining effect on the programmer’s ability to compete fairly in the MVPD distribution marketplace.” Add. 504. “[T]his court owes substantial deference” to the FCC’s interpretation of ambiguous provisions of the Communications Act, like the term “unreasonable.” *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994).

Contrary to Comcast’s contention (Mot. at 11), the FCC’s reading of Section 616 does not nullify the unreasonable-restraint requirement. The agency did not find an unreasonable restraint merely “because Tennis Channel could secure *more* viewers and advertising revenue via broader carriage” (*id.*), but because the harms caused by Comcast’s discrimination were “of such a magnitude that they clearly restrain Tennis Channel’s ability to compete fairly with similarly situated networks.” Add. 521. For example, depriving Tennis Channel of broader carriage on Comcast’s cable systems made it more “difficult for the network to acquire programming rights” and has “discouraged advertisers from placing advertisements on the network,” thereby reducing Tennis Channel’s advertising revenues. Add.

520. Moreover, given Comcast's position as the market leader, its limited distribution of Tennis Channel has severely impaired the network's efforts to obtain broader carriage with other MVPDs.⁵ These substantial harms are not present "in every case," as Comcast claims. Mot. at 11.

Comcast also attacks the FCC's finding that it discriminated on the basis of affiliation. Mot. at 11-13. In doing so, Comcast effectively invites the Court to conduct its own evaluation of the evidence in this case. The Court's "role, however, is not to reweigh the evidence de novo," but simply "to determine if the Commission's finding is supported by substantial evidence on the record as a whole." *Thompson Med. Co. v. FTC*, 791 F.2d 189, 196 (D.C. Cir. 1986). Applying this "very deferential" standard of review, the Court must uphold the FCC's findings "if a reasonable mind might accept [the] evidentiary record as adequate to support the agency's conclusions." *Siegel v. SEC*, 592 F.3d 147, 155 (D.C. Cir. 2010) (internal quotation marks omitted); see also *TCR Sports Broad. Holding v. FCC*, 679

⁵ See Add. 515-16 (describing the "ripple effect" of Comcast's decision on other MVPDs, including evidence that other "MVPDs would often 'inquire about Tennis Channel's level of carriage on Comcast' and would often follow Comcast's lead"). Although Comcast now disputes this "ripple effect" (Mot. at 13), the record showed that it was concerned about that effect with regard to its own affiliated networks. See Add. 516 (Comcast executives were [REDACTED]). Indeed, even in its present filing, Comcast implicitly recognizes that its carriage decisions strongly influence other MVPDs, by arguing that it should not be required to "be the 'first mover' and *make* Tennis Channel attractive to other MVPDs" (Mot. at 13).

F.3d 269, 276-77 (4th Cir. 2012) (applying the “substantial evidence” test in upholding the FCC’s denial of a Section 616 discrimination complaint).

In this case, substantial evidence supports the FCC’s finding that Comcast discriminated on the basis of affiliation. For example, the record contained an acknowledgment by Comcast’s Chief Operating Officer that Comcast’s “affiliated networks are ‘treated like siblings as opposed to like strangers,’ and that affiliates ‘get a different level of scrutiny’ than unaffiliated networks.” Add. 505. Comcast’s carriage practices confirmed this preference for affiliates. The record showed that “[e]very one” of Comcast’s affiliated sports networks “is carried on more widely distributed tiers” than the Sports Tier, and that Comcast “carries only unaffiliated sports networks exclusively on the narrowly penetrated Sports Tier.” Add. 448.

Comcast asserts that it rejected Tennis Channel’s proposal on the basis of a good faith cost-benefit analysis. But the Comcast executive who performed the analysis “admitted in her testimony that she gave no thought to preparing an analysis of ‘what Comcast might have gained by moving The Tennis Channel to a more widely-distributed tier.’” Add. 518. This testimony supported the Commission’s determination that “Comcast made no attempt to analyze benefits at all.” *Id.*⁶

⁶ Comcast claims that it relied on “field reports showing a lack of subscriber interest in Tennis Channel.” Mot. at 12. But the Commission reasonably discounted the credibility of those reports from Comcast’s regional executives because they were “incomplete,” and because “Comcast had earlier overridden regional executives’ decisions to carry Tennis Channel

Comcast next points to “the similar decisions” of other MVPDs as evidence that it did not engage in affiliation-based discrimination. Mot. at 12. The Commission reasonably found that evidence unpersuasive. It noted that the record, “examined in its entirety, shows that Comcast treats Golf Channel and Versus more favorably and Tennis Channel less favorably” than other MVPDs treat them. Add. 514.⁷

3. Comcast’s First Amendment claims also lack merit. Contrary to Comcast’s assertion (Mot. at 14), the *Order* did not “infer[] discrimination” from a “content-based” finding that Tennis Channel is “similarly situated” to Golf Channel and Versus. The Commission examined whether the networks were “similarly situated” because the assessment of “evidence of disparate treatment of similarly situated parties ... is a hallmark of discrimination law”

more broadly,” thereby sending the unmistakable signal that Comcast “did not favor broad carriage of Tennis Channel.” Add. 519.

⁷ “The record demonstrates that Comcast carries Tennis Channel at [REDACTED] of the average penetration rate at which it is carried by other MVPDs, including telephone companies and satellite MVPDs.” Add. 514. The FCC also found evidence that “Golf Channel and Versus are carried on Comcast at [REDACTED] respectively, than they are by other MVPDs.” Add. 515. The dissenting Commissioners’ claim that “Comcast’s treatment of Tennis Channel was within the industry mainstream” – an assertion on which Comcast heavily relies (Mot. at 7, 12) – was based on a market analysis that excluded DIRECTV and DISH Network. Add. 532-33. That analysis did not accurately reflect the industry mainstream because it ignored “Comcast’s principal competitors” – the nation’s “second and third largest MVPDs.” Add. 516. In any event, the Commission explained that, even if it excluded consideration of how other MVPDs treated Tennis Channel, independent – and substantial – evidence supported its conclusion that Comcast had discriminated against Tennis Channel on the basis of affiliation. Add. 517.

generally, and is no less relevant where the parties receiving disparate treatment are video programmers. Add. 525-26. Moreover, the examination of whether Tennis Channel and Comcast's affiliates were similarly situated was just the first step in the agency's analysis. After concluding that the networks were similarly situated, the FCC examined multiple sources of evidence showing that Comcast's differential treatment of Tennis Channel was motivated by improper considerations of affiliation. Add. 514-20. Thus, there is no basis for Comcast's claim that the agency "[i]gnor[ed] Comcast's actual motivation." Mot. at 14.

Nor was the agency's analysis impermissibly content-based or subject to strict scrutiny. "[T]here is absolutely no evidence, nor even any serious suggestion, that the Commission issued its [*Order*] to [favor or] disfavor certain messages or ideas." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (internal quotation marks omitted). As the Commission explained, "[t]he *particular* content of the programming at issue was irrelevant; the same comparative analysis would apply regardless of the specific type of programming involved." Add. 528.

"Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The goal of the FCC's *Order* – "promoting diversity and competition in the video programming market" (Add. 528) – "is independent of content and viewpoint." *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998).

Therefore, intermediate scrutiny applies. *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996) (applying intermediate scrutiny to FCC's program access rules, which "regulat[e] cable programmers and operators on the basis of the 'economics of ownership,' a characteristic unrelated to the content of speech").

The *Order* easily satisfies that standard. The carriage remedy in this case is designed to "promote competition and diversity in the video programming market" (Add. 529) – two "important governmental objectives unrelated to the suppression of speech." *Time Warner*, 93 F.3d at 969 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662-64 (1994)). Comcast argues that these important interests have "become less substantial" because cable operators no longer hold a "bottleneck" monopoly in the MVPD market. Mot. at 15. This Court, however, rejected the same argument just last year in *Cablevision*, 649 F.3d at 711-12. In light of evidence that "cable operators still have a dominant share of MVPD subscribers" and "still own significant programming," the Court held that the FCC's decision to extend its program access rules to terrestrially delivered programming "serves an important governmental interest" by promoting "fair competition in the video marketplace" even if "vertically integrated cable companies" no longer "retain a stranglehold on competition nationally." *Id.* at 712 (internal quotation marks omitted).

In addition, the *Order* does "not burden substantially more speech than necessary" to achieve the government's objective. *Time Warner*, 93

F.3d at 969. It simply requires “that Tennis Channel not be carried in a discriminatory manner.” Add. 530. This “equal carriage” remedy is narrowly tailored to prevent the sort of discrimination that unreasonably restrains Tennis Channel’s ability to compete fairly.⁸

B. Comcast Has Not Shown That It Will Be Irreparably Harmed Absent A Stay.

“‘The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.’” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citation omitted). To obtain a stay, Comcast must demonstrate that the irreparable harm it alleges is “both certain and great,” “actual and not theoretical.” *Id.* Comcast has not come close to meeting this requirement.

Comcast claims that if it does not obtain a stay, its free speech rights will be violated. Mot. at 16. The mere assertion of a First Amendment violation, however, does not suffice to establish irreparable harm; “the moving party must demonstrate some likelihood of a chilling effect on [its] rights.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006). Comcast has failed to do so. As Comcast acknowledges, it “*does* carry Tennis Channel.” Mot. at 11. Because Comcast has chosen to

⁸ Comcast asserts that the *Order* is “not narrowly tailored” because it “requires Comcast to ‘pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated.’” Mot. at 16 (quoting Add. 525). But the *Order* does not require broader carriage, just equal carriage. If Comcast opts to carry Golf Channel and Versus on the Sports Tier, Tennis Channel would be entitled to no additional compensation.

do so, “the *Order* does not compel Comcast to carry any speech that it is opposed to carrying for any communicative or expressive purpose.” *Stay Order* ¶ 38. Moreover, Comcast is unlikely to prevail on its First Amendment claim. *See* Part A.3 above. Denial of a stay thus will not cause it any irreparable First Amendment injury.

Comcast represented to the Commission over six months ago that it was “engaging in good-faith planning for compliance with and implementation of” the ALJ’s decision should it be upheld on administrative review. *Stay Order* ¶ 39 (citation omitted). Nonetheless, it now complains that it will face various administrative burdens associated with providing Tennis Channel broader carriage, including updating its programming guides and rate cards. Pet. 17-19. These are hardly extraordinary burdens for a cable operator (much less the largest cable operator in the Nation); they are part of the day-to-day activities of its business. The record showed that “Comcast frequently changes its channel lineups and orders nationwide tiering changes at-will,” *Stay Order* n.118, and that implementation of the remedy in this case would require “nothing more than the type of business decision Comcast makes routinely with many channels.” *Id.* ¶ 39. A stay cannot be justified unless Comcast establishes irreparable injury that is “both certain *and great*.” *Wisconsin Gas*, 758 F.2d at 674 (emphasis added). Comcast has failed to show that the administrative burdens of complying with the *Order* – burdens that are common in its line of business and that it claimed to be preparing to assume months ago – would be so “great” as to

warrant the extraordinary relief it seeks. Moreover, the partial stay of the *Order* granted by the FCC’s Office of General Counsel (*Stay Order* ¶ 44) removes any “irreparable burdens” on Comcast’s digital systems that do not currently carry Tennis Channel and allegedly have little to no spare bandwidth. Mot. at 18.⁹

Finally, Comcast claims that there is a “significant risk” that it “*may* be compelled to pay a higher ... fee to Tennis Channel while judicial review is pending.” Mot. at 19 (emphasis added). This assertion of a “risk” is speculative on its face and thus cannot justify a stay. *See Wisconsin Gas*, 758 F.2d at 674 (alleged irreparable injury must be “actual and not theoretical”). Comcast will not have to pay additional fees to Tennis Channel if it opts to comply with the *Order* by moving Golf Channel and Versus to the Sports Tier. In any event, Comcast has not shown that it would be barred from recovering any additional fees it pays to Tennis Channel in the unlikely event that the Court ultimately vacates the *Order*.¹⁰

⁹ Comcast’s current request for a stay is not advanced by the Commission’s observation in an earlier order staying the ALJ’s decision pending plenary review by the Commission that there may be “potential disruption to consumers and ... third-party programmers.” Mot. at 6 (citation omitted). Those concerns stemmed from the ALJ’s channel-placement remedy – which the Commission *vacated* in the *Order* on review here – and Comcast’s complaint about being required to move or drop existing channels to accommodate equal carriage for Tennis Channel – a burden that is eliminated by the partial stay of the *Order*. *See Stay Order* ¶ 44.

¹⁰ *See United Gas Improvement Co. v. Callery Props.*, 382 U.S. 223, 229 (1965) (“[a]n agency, like a court, can undo what is wrongfully done by virtue of its order”).

C. A Stay Would Harm Tennis Channel And The Public Interest.

Finally, a stay would plainly harm Tennis Channel. The FCC determined, on a full record, that Comcast violated federal law by discriminating against Tennis Channel, and that this discrimination unreasonably restrained Tennis Channel's ability to compete fairly. Tennis Channel has been, and continues to be, harmed by Comcast's refusal to provide Tennis Channel with the broader carriage it provides Golf Channel and Versus. A stay would leave Tennis Channel without a remedy for Comcast's unlawful discrimination while this case is pending.

A stay would also harm the public interest. Congress enacted Section 616 to promote competition and diversity in programming by preventing MVPDs from favoring their own networks over unaffiliated networks. The statute provides for "expedited review" of carriage discrimination complaints. 47 U.S.C. § 536(a)(4). A stay would thwart Congress's pro-competitive goals by denying prompt implementation of Section 616's remedies to a programmer that is the victim of unlawful discrimination.

CONCLUSION

The motion for a stay should be denied.

Respectfully submitted,

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August 16, 2012

Federal Communications Commission

DA 12-1311

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

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

ORDER

Adopted: August 09, 2012**Released: August 09, 2012**

By the General Counsel:

I. INTRODUCTION

1. On July 30, 2012, Comcast Cable Communications, LLC (“Comcast”) filed a petition requesting a stay of the Commission’s *Memorandum Opinion and Order* in MM Docket No. 10-204. *In the Matter of Tennis Channel, Inc.*, FCC 12-78 (July 24, 2012) (“*Order*”). The *Order*, which affirmed in part and vacated in part an Initial Decision of Chief Administrative Law Judge Richard L. Sippel,¹ found that Comcast had discriminated with regard to carriage against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation in violation of Section 616 of the Communications Act, 47 U.S.C. § 536, and Section 76.1301(c) of the Commission’s rules, 47 C.F.R. § 76.1301(c). As relevant here, the *Order* also (a) affirmed the remedy imposed by the ALJ requiring Comcast to provide Tennis Channel with equal carriage to Golf Channel and Versus, subject to an exemption for certain analog cable systems operated by Comcast; and (b) vacated the ALJ’s issuance of a remedy requiring Comcast “to provide Tennis Channel with equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement.”² Comcast seeks a stay of the implementation of the *Order* pending the completion of judicial review.³ Tennis Channel filed an opposition to Comcast’s stay petition on August 2, 2012. For the reasons stated below, with one exception, the Office of General Counsel (hereinafter, “OGC” or “we”) denies the petition for stay pursuant to authority delegated to it by the Commission.

II. BACKGROUND

2. On January 5, 2010, Tennis Channel filed a complaint with the Commission asserting that Comcast, the nation’s largest distributor of multichannel video programming, discriminated against Tennis Channel on the basis of its non-affiliation with Comcast, by affording preferential treatment to

¹ *In the Matter of Tennis Channel, Inc.*, 26 FCC Rcd 17160 (ALJ 2011)(“*Initial Decision*”).

² *Id.* at 17211 ¶ 120. Although the ALJ did not specifically define what his channel placement remedy required, we understand it to require Comcast to accord Tennis Channel a channel placement that is very close to that accorded to Comcast’s affiliated networks (Golf Channel and Versus).

³ Comcast filed a petition for judicial review on August 1, 2012. *Comcast Cable Commc’ns, LLC v. FCC*, D.C. Cir., No. 12-1337.

Comcast's own affiliated (and competing) networks – Golf Channel and Versus.⁴ Since Comcast began carrying Tennis Channel in 2005, the network has been placed on a premium Sports Tier on the vast majority of the nearly 700 cable systems operated by Comcast.⁵ To access this tier, subscribers must pay an additional monthly charge above what they pay for basic digital cable service. Under its carriage agreement with Tennis Channel, Comcast may determine the tiers on which it will carry Tennis Channel. Golf Channel and Versus, Comcast-affiliated networks that Tennis Channel viewed as similarly situated, generally are offered on channel tiers that are available to all digital subscribers at no additional cost and reach significantly more of Comcast's customers than the channel tier on which Comcast's systems carry the Tennis Channel. In 2009, Tennis Channel, pointing to recent viewership growth and programming improvements, asked Comcast to increase its distribution by repositioning it to a tier that had broader penetration than the Sports Tier. Comcast rejected Tennis Channel's proposal.

3. On October 5, 2010, the Media Bureau released an order designating Tennis Channel's complaint for a hearing before an administrative law judge.⁶ The Media Bureau rejected Comcast's arguments that Tennis Channel's complaint was barred by an FCC rule specifying the applicable statute of limitations for program carriage disputes. The Media Bureau also concluded that Tennis Channel had established a *prima facie* case of program carriage discrimination pursuant to Section 616(a)(3) of the Communications Act and Section 76.1301(c) of the Commission's rules.⁷ The ALJ was directed by the Media Bureau to "develop a full and complete record in the instant hearing proceeding and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision on each of the outstanding factual and legal issues" and to do so on an expedited basis.⁸

4. The ALJ issued his Initial Decision on December 16, 2011. The ALJ concluded that Tennis Channel, Golf Channel, and Versus are similarly situated networks.⁹ The ALJ found it undisputed that Comcast gave Golf Channel and Versus far more favorable channel placement and broader carriage than Tennis Channel, noting that a senior Comcast executive had acknowledged that affiliated networks "get treated like siblings as opposed to like strangers" and receive a "different level of scrutiny" than unaffiliated providers.¹⁰ The ALJ further noted that "[e]very one of [Comcast's] affiliated networks is carried on more widely distributed tiers than the Sports tiers," while it carries "only unaffiliated sports networks exclusively on the narrowly penetrated Sports Tier."¹¹ The ALJ rejected Comcast's arguments that its differential treatment of the three networks could be explained by factors other than impermissible discrimination on the basis of Tennis Channel's unaffiliated status.

5. The ALJ concluded that Comcast benefits economically by favoring affiliated networks over unaffiliated networks and that Comcast's unequal treatment of Tennis Channel adversely affected

⁴ The Tennis Channel, Inc., Program Carriage Complaint File No. CSR-8258-P, at 2 ¶ 3, filed by Tennis Channel (Jan. 5, 2010) ("*Complaint*").

⁵ According to one industry source, Comcast currently operates 676 cable systems. See Warren Communications News, Inc., *Television & Cable Factbook 2012*, Vol. 80, Cable Vol. 2, at D-1488.

⁶ *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 25 FCC Rcd 14149 (MB 2010) ("*HDO*").

⁷ *Id.* ¶ 9.

⁸ *Id.* ¶ 23.

⁹ *Initial Decision*, 26 FCC Rcd at 17170 ¶ 24.

¹⁰ *Id.* ¶¶ 53-55.

¹¹ *Id.* ¶ 57

Tennis Channel's ability to compete fairly in the video programming marketplace.¹² Relegating Tennis Channel to the Sports Tier "greatly diminishes the number of Tennis Channel subscribers which in turn reduces the amount of its earnings derived from license fees,"¹³ "hinders the network's ability to compete for valuable programming rights,"¹⁴ "makes it more difficult for the network to sell advertising,"¹⁵ and diminishes its advertising revenues.¹⁶

6. After taking into account the relevant statutory and regulatory factors, the ALJ ordered Comcast to pay a forfeiture of \$375,000, the maximum fine permitted under the statute.¹⁷ He also ordered Comcast to afford Tennis Channel the same treatment in the terms and conditions of video program distribution that it provides to its similarly situated affiliates, Golf Channel and Versus.¹⁸ The ALJ required Comcast to carry Tennis Channel at the same level of distribution as Golf Channel and Versus, although it retained "full discretion in determining the level of penetration it chooses to carry the three channels."¹⁹ The ALJ also required Comcast "to provide Tennis Channel with equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement."²⁰

7. Following our issuance of a brief, interim stay of the Initial Decision on May 2, 2012 to afford the Commission an opportunity to review the matter,²¹ the Commission on May 14, 2012 stayed the *Initial Decision* on its own motion.²² The Commission concluded that a stay was warranted because certain aspects of the remedy ordered by the ALJ were unclear. In particular, the Commission noted that the Initial Decision "imposes a tier placement remedy without providing guidance on questions of compensation, a matter on which the parties disagree."²³ The Commission also observed that the "channel placement remedy" imposed by the Initial Decision "is not defined."²⁴ The Commission determined that a stay would "preserve the status quo while the Commission has an adequate opportunity to examine the record and the ALJ's disposition of each issue closely, and it will avoid potential disruption to consumers and any affected third-party programmers in the event that the Commission subsequently reverses or modifies the ALJ's remedy."²⁵ The Commission found that a stay pending its

¹² *Id.* ¶ 81.

¹³ *Id.* ¶ 82.

¹⁴ *Id.* ¶ 86.

¹⁵ *Id.* ¶ 89.

¹⁶ *Id.* ¶ 91.

¹⁷ *Id.* ¶ 118.

¹⁸ *Id.* ¶ 119.

¹⁹ *Id.* ¶ 119.

²⁰ *Id.* ¶ 120.

²¹ *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd 4931 (OGC 2012).

²² *In the Matter of The Tennis Channel, Inc.*, 27 FCC Rcd 5613 (2012) ("Stay Order"). Tennis Channel had filed a motion to compel compliance with the *Initial Decision*, which the Commission denied. *Id.* at 5616 ¶ 6. In addition, Comcast had filed a conditional motion for stay of the *Initial Decision*, which the Commission did not rule on but dismissed as moot. *Id.*

²³ *Id.* ¶ 5.

²⁴ *Id.* ¶ 5.

²⁵ *Id.* ¶ 5.

review of the Initial Decision “will not unduly delay the grant of any relief to which The Tennis Channel may be entitled.”²⁶ The Commission pointed out in this regard Comcast’s representation that it was “engaging in good-faith planning for compliance with and implementation of the Initial Decision, should it become effective.”²⁷

8. In the *Order* released July 24, 2012, the Commission found that the record evidence supported the ALJ’s conclusion that Comcast discriminated with regard to carriage against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation in violation of Section 616 of the Act and Section 76.1301(c) of the Commission’s rules. The Commission also found that the ALJ’s carriage remedy was appropriate and consistent with Section 616, the Commission’s rules, and the Media Bureau’s Hearing Designation Order. However, the Commission rejected the ALJ’s channel placement remedy as unsupported by the record. The Commission also concluded that the ALJ’s equal-carriage remedy was consistent with the First Amendment.

9. Initially the Commission rejected Comcast’s argument that Tennis Channel’s complaint should have been dismissed by the Media Bureau as barred by the applicable one-year limitations period in the Commission’s rules.²⁸ Comcast argued that Tennis Channel had filed its complaint more than one year after entering into the March 2005 carriage agreement with Comcast. However, the Commission found, consistent with the Media Bureau’s determination in the *HDO*,²⁹ that the conduct at issue in Tennis Channel’s complaint was Comcast’s June 2009 refusal to relocate Tennis Channel to a more widely distributed tier.³⁰ Tennis Channel notified Comcast of its intent to file a complaint in December 2009 and filed its complaint in January 2010. Both the notification of its intent to file a complaint and the actual filing, the Commission found, occurred within one year of the conduct that allegedly violated Section 616.³¹

10. Turning to the merits, the Commission held that the Initial Decision’s conclusion that Comcast’s actions with respect to Tennis Channel violated the Act and the Commission rules was “correct” and “supported by the record.”³² Specifically, the Commission found that “the ALJ correctly concluded that Comcast both discriminated against Tennis Channel on the basis of nonaffiliation and discriminated in favor of Golf Channel and Versus on the basis of affiliation.”³³ As the Commission pointed out, either of these forms of discrimination would be sufficient to entail a violation of the statute and rules so long as the effect of the discrimination was to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly.³⁴

11. The Commission grounded that conclusion in the record evidence developed in this proceeding. It found that the record contained “significant circumstantial evidence that Comcast engaged in a general practice of favoring affiliates over nonaffiliates” and that, “when read in conjunction with the determination that Tennis Channel, Golf Channel, and Versus were similarly situated but treated

²⁶ *Id.*

²⁷ *Id.* n. 22 (quoting Comcast’s Opposition to Tennis Channel’s Petition to Compel at 5 n.11).

²⁸ *Order* ¶ 28; see 47 C.F.R. § 76.1302(f) (2011).

²⁹ *HDO*, 25 FCC Rcd at 14154-14159.

³⁰ *Order* ¶ 29.

³¹ *Id.* ¶ 30.

³² *Id.* ¶¶ 39, 44.

³³ *Id.* ¶ 44.

³⁴ *Id.*, citing 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

differently without a nondiscriminatory reason,” supported a finding that “Comcast discriminated on the basis of affiliation.”³⁵ The Commission thoroughly considered Comcast’s arguments that its differential treatment of Tennis Channel was based on legitimate and nondiscriminatory reasons, and found them unpersuasive.³⁶

12. The Commission further held that “Comcast’s discriminatory treatment of Tennis Channel unreasonably restrained Tennis Channel’s ability to compete in the marketplace” and that in the absence of such discriminatory treatment Tennis Channel would have significantly more subscribers.³⁷ Comcast’s placement of Tennis Channel affected its ability to compete in a variety of direct and indirect ways, the Commission concluded. For example, Tennis Channel “collects less in licensing fees than it would if it reached more MVPD subscribers, cutting into the network’s largest source of revenue.”³⁸ The Commission also pointed out that the “limitation on Tennis Channel’s audience size and the reduction in Tennis Channel’s income make it difficult for the network to acquire programming rights,” and that “Comcast’s limited distribution of Tennis Channel has also discouraged advertisers from placing advertisements on the network and consequently reduced advertising revenues.”³⁹ The Commission concluded that these “harms are of such a magnitude that they clearly restrain Tennis Channel’s ability to compete fairly with similarly situated networks.”⁴⁰

13. Tennis Channel was also unreasonably restrained in its ability to compete, the Commission found, by Comcast’s discrimination on the basis of affiliation in favor of Golf Channel and Versus.⁴¹ “The advantages that Comcast provides to its affiliated networks, both directly and through its carriage decisions, support our finding that Comcast’s discrimination against Tennis Channel was unreasonable and restrained Tennis Channel’s ability to compete in the marketplace.”⁴²

14. The Commission rejected Comcast’s contention that the harms to Tennis Channel are “‘highly generalized and speculative’” and the sort that will “‘be present in *every* case in which a network seeks broader distribution by an MVPD.”⁴³ To the contrary, the Commission explained, “[t]he harms inflicted upon Tennis Channel were not simply the consequence of its inability to obtain broader carriage, but as the entirety of the evidence in the record demonstrates, were a consequence of Comcast’s discrimination in favor of its own similarly situated affiliates with which Tennis Channel competes for advertisers, audience, and, in the case of Versus, programming.”⁴⁴ In view of Comcast’s position as the nation’s largest MVPD, the harm to Tennis Channel amounted to a loss of access to a significant number of subscribers.⁴⁵

³⁵ *Id.* ¶ 45.

³⁶ *See id.* ¶¶ 68-82.

³⁷ *Order* ¶ 83.

³⁸ *Id.* ¶ 84.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 85.

⁴² *Id.*

⁴³ *Id.* ¶ 86.

⁴⁴ *Id.*

⁴⁵ *Id.*

15. The Commission also found no basis for Comcast's argument that, even if it did not carry Tennis Channel at all, Comcast customers amount to less than 24 percent of the MVPD market, leaving the rest of the market open to Tennis Channel. The Commission noted its finding in a prior proceeding that "Comcast's extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming."⁴⁶ Here, the Commission observed that an "MVPD that discriminates against a video programming vendor by limiting the vendor's access to nearly a fourth of the entire market and to a significant percentage of subscribers in major regional markets, while giving similarly situated affiliated competitor networks broad access is clearly restraining the vendor's ability to compete."⁴⁷

16. On one issue, however, the Commission agreed with Comcast. It concluded that "the record does not sufficiently establish that Tennis Channel's ability to compete fairly was unreasonably restrained by its channel placement."⁴⁸ Consequently, the Commission vacated the channel placement remedy ordered by the ALJ, but otherwise affirmed the remedies imposed by the ALJ.⁴⁹

III. DISCUSSION

17. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*⁵⁰ Under this standard, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.⁵¹ The relative importance of the four criteria will vary depending on the circumstances of the case,⁵² but a showing of irreparable injury is generally a critical element in justifying a request for stay of an agency order.⁵³

18. In this case, we conclude that Comcast has satisfied none of the four factors in the stay calculus. Accordingly, with one exception discussed below, we find that a stay is not warranted and deny the petition.

A. Comcast Is Unlikely to Prevail on the Merits.

19. Comcast has failed to show that it would likely prevail on the merits of its judicial challenge to the Commission's *Order*. Comcast raises constitutional, statutory, administrative law, and

⁴⁶ *Id.* ¶ 87, quoting *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, 26 FCC Rcd 4238, 4284-85 ¶ 116 (2011).

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 91.

⁴⁹ *Id.* ¶ 110.

⁵⁰ *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

⁵¹ *Virginia Petroleum*, 259 F.2d at 925; *Holiday Tours*, 559 F.2d at 843; see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *In the Matter of Standardized & Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, DA 12-1122 ¶ 6 (MB July 12, 2012).

⁵² See, e.g., *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

⁵³ See *Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction."); see also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only the second factor) ("*Wisconsin Gas*").

evidentiary claims. We find none of Comcast's arguments persuasive, especially in view of the standard of judicial review applicable to this case as discussed below.

1. The Statute of Limitations Rule

20. Comcast's contention that Tennis Channel's complaint was untimely under the applicable statute of limitations rule has been rejected twice, first by the Media Bureau in the *HDO* and then by the Commission in the *Order*. We find nothing new or more persuasive in the argument that it repeats once more in its stay petition.⁵⁴

21. Pursuant to the Commission's rules, a programmer has a one-year period in which to file a program carriage complaint that commences upon the occurrence of one of three specified events, the third one of which requires notification that the programmer "intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section."⁵⁵ The Commission rejected Comcast's argument that Tennis Channel's complaint was late because it was filed more than a year after Tennis Channel entered into the March 2005 carriage agreement with Comcast. The Commission reasoned that the conduct challenged in Tennis Channel's complaint was Comcast's refusal in June 2009 to relocate Tennis Channel to a more widely distributed tier. Thus, the operative date was June 2009, and Tennis Channel's December 2009 notification to Comcast of its intent to file a complaint (as well as its January 2010 filing of the complaint itself) occurred well within one year of the conduct that violated the statute.⁵⁶

22. Comcast repeats its claim that the "complaint assails decisions made over seven years ago" and that the rule's first "trigger" relating to that 2005 contract applies to bar Tennis Channel's 2010 complaint.⁵⁷ However, as the Commission found, "the first trigger only applies when a contract is alleged to violate the rules. Tennis Channel makes no such allegation about the March 2005 contract."⁵⁸ The gravamen of Tennis Channel's complaint is not that the parties' carriage agreement is itself unlawful; rather, it is that Comcast's subsequent action violates the program carriage statute and the Commission's implementing rules. As the Commission explained, "Tennis Channel's complaint does not allege that the 2005 contract was improperly discriminatory, but instead focuses on Comcast's 2009 conduct."⁵⁹

⁵⁴ Pet. at 5-8.

⁵⁵ 47 C.F.R. § 76.1302(f) (2011):

Any complaint filed pursuant to [Section 76.1302] must be filed within one year of the date on which one of the following events occurs:

- (1) The [MVPD] enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or
- (2) The [MVPD] offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or
- (3) A party has notified a [MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

Id.

⁵⁶ *Order* ¶ 29. The Media Bureau reached the same conclusion in the Hearing Designation Order. *HDO* ¶ 11.

⁵⁷ Pet. at 5, citing 47 C.F.R. § 76.1302(f)(1) (2011).

⁵⁸ *Order* ¶ 31.

⁵⁹ *Id.* ¶ 32.

23. The Commission also considered and reasonably rejected Comcast's contention that its reading of its regulation was "implausible" and "renders subsections (f)(1) and (f)(2) superfluous" because it purportedly "would allow *any* long-dead claim to be resuscitated simply by asking to reopen settled negotiations."⁶⁰ As the Commission explained, "[t]his argument fails to take into account the fact that under the March 2005 contract, Comcast had discretion as to Tennis Channel's carriage. Comcast has an obligation to exercise that discretion consistent with Section 616. . . . In other words, Tennis Channel was not trying to demand a unilateral change in the existing terms of its contract with Comcast; it was asking that the existing contract be performed – that Comcast exercise its contractual discretion – consistent with its obligations under Section 616."⁶¹

24. The Commission explained that Tennis Channel's complaint was filed within the statute of limitations "[b]ecause the allegedly unlawful conduct at issue here occurred within one year of the filing of the complaint."⁶² In response to Comcast's claim that the Commission's reading of its statute of limitations rule results in an "unlimited" limitations period, the Commission made clear that it read the rule, "consistent with the doctrine of laches," to "require notification of an intent to file a complaint within a reasonable time period of discovery of the allegedly unlawful conduct."⁶³ Comcast complains that this amounts to "graft[ing] a new, unwritten, and undefined 'laches' doctrine onto the regulation."⁶⁴ However, the Commission emphasized that its decision here was not dependent on a laches limitation. Rather, Tennis Channel acted promptly after its June 2009 request, and it is simply wrong for Comcast to allege that a "long-dead claim can be resuscitated simply by asking to reopen settled negotiations."⁶⁵ Indeed, it was the specific facts relevant to Tennis Channel's 2009 request for equal carriage – and Comcast's refusal of that request – that formed the basis for the network's discrimination complaint. In all events, the Commission did not rely on any laches theory here, and thus, even if there were basis for Comcast's complaint, it is irrelevant in this case.

25. Comcast's claim is particularly unlikely to prevail on judicial review, as it rests on the premise that the Commission has misread its own rules. An agency's interpretation of its own regulations is controlling unless it is "plainly erroneous or inconsistent with the regulation[s]."⁶⁶ The Commission fully explained in the *Order* the reasoning supporting its interpretation of the statute of limitations rule at issue in this case as well as the basis for rejecting Comcast's contrary interpretation. Because that interpretation was, at a minimum, reasonable, Comcast's is unlikely to prevail on this issue on review.

2. The Commission's Application of Section 616

26. Comcast argues that the *Order* "misapplies and misinterprets Section 616."⁶⁷ With this claim, as with its statute of limitations claim, Comcast faces a high hurdle. The Commission's interpretation of a statutory provision that Congress has assigned it to enforce is entitled to substantial

⁶⁰ Pet. at 6

⁶¹ *Order* ¶ 33.

⁶² *Id.* n.105.

⁶³ *Id.*

⁶⁴ Pet. at 6.

⁶⁵ Pet. at 11.

⁶⁶ *Talk Am. Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks omitted); *see also AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006) (the FCC's "interpretation of its own orders and rules is entitled to substantial deference").

⁶⁷ Pet. at 8.

judicial deference.⁶⁸ In the specific context of FCC orders involving program carriage complaints, one court has recently held that “[r]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid.”⁶⁹ Beyond that, most of Comcast’s argument is really an attempt to have a court reweigh the evidence presented to the Commission.⁷⁰ Review of those kinds of determinations is subject to the “arbitrary and capricious” and “substantial evidence” standards of the Administrative Procedure Act.⁷¹ Such review is “narrow,”⁷² and the determination of whether the agency’s decision is supported by substantial evidence requires “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁷³ Especially in light of these deferential standards of review, Comcast’s argument that the *Order* violated Section 616 fails to demonstrate that it is likely to prevail on review.

27. For example, Comcast claims that Congress intended in enacting Section 616 to “narrow[] the application of antitrust principles by the Commission in the video-programming market” and grant the Commission only limited authority “to remedy particularly severe forms of competitive harm.”⁷⁴ The Commission fully considered and properly rejected this argument in the *Order* as inconsistent with both the text and legislative history of the provision: “Section 616 would serve no function if it existed simply as a redundant analogue to antitrust law. Nothing in the text of Section 616 indicates an intent to mimic existing antitrust law or the ‘essential facilities’ doctrine. The legislative history, moreover, expressly repudiates such a design.”⁷⁵

28. Comcast further contends that there was not substantial evidence to support the Commission’s findings.⁷⁶ That position does not hold up when viewed against the extensive record cited in both the *Order* and the *Initial Decision*. For example, the Commission found Tennis Channel is similarly situated with Comcast’s affiliated channels, pointing out that they target the same viewers, compete for the same advertisers, and have almost identical ratings.⁷⁷ The Commission found that every sports network in which Comcast has an ownership interest is carried on a tier that is more broadly distributed than the tier on which Tennis Channel is carried, and “[e]very single nationally distributed network carried exclusively on the Sports Tier [including Tennis Channel] is unaffiliated with Comcast.”⁷⁸ The record included testimony from Comcast’s former Chief Operating Officer that Comcast’s affiliated networks are “treated like siblings as opposed to like strangers,” and that affiliates “get a different level of scrutiny” than unaffiliated networks.⁷⁹ On the basis of this record evidence, the Commission found that Comcast had treated Tennis Channel differently from Golf Channel and Versus

⁶⁸ See, e.g., *Kay v. FCC*, 393 F.3d 1339, 1343 (D.C. Cir. 2005) (“we accord a substantial measure of deference to the Commission’s interpretation” of telecommunications statutes).

⁶⁹ *TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269, 274 (4th Cir. 2012).

⁷⁰ See, e.g., Pet. at 8-12.

⁷¹ 5 U.S.C. § 702.

⁷² *In re Core Communications, Inc.*, 455 F.3d 267, 277 (D.C. Cir. 2006).

⁷³ *Environmental Def. Fund v. EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978)(internal quotes omitted).

⁷⁴ Pet. at 9-10.

⁷⁵ *Order* ¶ 41.

⁷⁶ Pet. at 10-12.

⁷⁷ *Order* ¶¶ 52-55; see also *Initial Decision* ¶¶ 25-26, 37, 41, 43, 45-48.

⁷⁸ *Order* ¶ 47; see also *Initial Decision* ¶ 57.

⁷⁹ *Order* ¶ 46; see also *Initial Decision* ¶ 55.

on the basis of affiliation, rejecting specifically and in detail Comcast's claimed reasons for the differential treatment.⁸⁰

29. Comcast argues that its "treatment of Tennis Channel was within the industry mainstream," citing the opinion of two dissenting Commissioners.⁸¹ Actually, Comcast's claim is that in determining the "industry mainstream," the Commission should have viewed the industry more narrowly and should not have considered Tennis Channel's carriage by two satellite video providers, DirecTV and DISH Network, which have equity interest in Tennis Channel. The Commission addressed this argument, explaining that it is "reasonable in assessing whether Comcast discriminated on the basis of affiliation to consider the treatment of the three networks at issue by the MVPD market in general, including Comcast's principal competitors, DirecTV and DISH—which are, after Comcast, the second and third largest MVPDs in the Nation. We disagree with the contention that we should have excluded those MVPDs from our comparison of penetration rates simply because they had an equity interest in Tennis Channel."⁸² The Commission determined that it was "appropriate to view the market as a whole, and include in the comparison MVPDs that Comcast sees as its chief competitors."⁸³ The Commission added, however, that even if it adopted Comcast's approach or entirely excluded the consideration of how other MVPDs treated Tennis Channel it would reach the same conclusion that Comcast discriminated against Tennis Channel on the basis of affiliation based on the other substantial evidence in the record.⁸⁴ Thus, even if Comcast's argument were correct, it would be unlikely to prevail on the merits because substantial evidence supports the Commission's alternative holding.

30. In addition, the Commission discussed the record basis for its conclusion that Comcast's discriminatory treatment unreasonably restrained Tennis Channel's ability to compete in the marketplace by impairing its ability to acquire programming, sell advertising and collect advertising revenue, and conversely provides its affiliates Golf Channel and Versus a significant competitive advantage.⁸⁵ Based on the extensive record developed in this proceeding and the Commission's careful analysis, there is no basis to conclude that Comcast has a likelihood of succeeding on the merits of its argument that there is not substantial evidence to support the Commission's decision here.

31. Finally, Comcast claims that the Commission applied an incorrect standard in adjudicating Tennis Channel's complaint by "reading the unreasonable-restraint requirement out of the statute altogether."⁸⁶ Comcast contends that the standard adopted by the Commission "will be present in every case in which a network seeks broader carriage through a claim of affiliation-based discrimination, rendering the unreasonable-restraint requirement of Section 616 a nullity."⁸⁷ As the Commission fully explained in the *Order*, there is no basis for Comcast's "narrow interpretation" of Section 616: "The harms inflicted upon Tennis Channel were not simply the consequence of its inability to obtain broader carriage, but as the entirety of the evidence in the record demonstrates, were a consequence of Comcast's discrimination in favor of its own similarly situated affiliates with which Tennis Channel competes for advertisers, audience, and, in the case of Versus, programming. Because Comcast is the nation's largest

⁸⁰ *Order* ¶¶ 68-82.

⁸¹ Pet. at 11.

⁸² *Order* ¶ 74; *see also* ¶ 71 and n. 218.

⁸³ *Id.* ¶ 71.

⁸⁴ *Id.* ¶ 75.

⁸⁵ *Order* ¶¶ 83-87.

⁸⁶ Pet. at 8.

⁸⁷ *Id.* 9.

MVPD, that harm amounted to a loss of access to [REDACTED] subscribers.”⁸⁸ The Commission also found, based on the record evidence, that “Comcast’s limited distribution of Tennis Channel” made it “difficult for the network to acquire programming rights” and “discouraged advertisers from placing advertisements on the network,” thereby reducing Tennis Channel’s advertising revenues.⁸⁹

3. The First Amendment

32. As it has argued throughout this proceeding, Comcast once again asserts that the remedy adopted in the *Order* to address its statutory violations is a “nakedly content-based” restriction on its speech that violates the First Amendment.⁹⁰ The Commission and courts have repeatedly considered, and rejected, similar arguments advanced by cable operators.⁹¹ In the *Order* the Commission found that while the equivalent carriage remedy did “implicate[] Comcast’s First Amendment rights,” well-settled law confirms that intermediate scrutiny under the First Amendment is the appropriate standard.⁹² A content-neutral regulation will withstand intermediate scrutiny if it: (1) “advances important governmental interests unrelated to the suppression of free speech”; and (2) “does not burden substantially more speech than necessary to further those interests.”⁹³ The Commission’s action in this proceeding easily satisfies that standard.

33. Comcast does not directly challenge the government interest at stake. As the Commission pointed out, the courts have consistently held that the government interest reflected in Congress’ adoption of provisions such as those in Section 616 was “the promotion of fair competition in the video marketplace,” a goal that “both furthers an important government interest and is unrelated to the suppression of free expression.”⁹⁴ However, Comcast asserts that cable operators no longer have “bottleneck or gatekeeper[] control,” and that these interests therefore are no longer served by program carriage regulation.⁹⁵ In a recent proceeding, the Commission directly addressed that issue and specifically rejected the same argument advanced by Comcast here, concluding that “substantial government interests in promoting diversity and competition remain.”⁹⁶ The Commission added, “because MVPDs have an

⁸⁸ *Order* ¶ 86.

⁸⁹ *Id.* ¶ 84.

⁹⁰ Pet. at 13.

⁹¹ See, e.g., *In the Matter of Review of the Commission’s Program Access Rules*, 25 FCC Rcd 746, 775 (2010), *aff’d in relevant part*, *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 710, 717-18 (D.C. Cir. 2011); *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 977-78 (D.C. Cir. 1996).

⁹² *Order* ¶ 98. In the *Order* the Commission agreed with Comcast that its First Amendment rights are implicated by the carriage remedy, rejecting the ALJ’s conclusion that the carriage remedy did not implicate Comcast’s First Amendment rights at all because it was free not to carry Tennis Channel if it also decided not to carry Golf Channel or Versus. *Id.* ¶ 97. The Commission also rejected Tennis Channel’s argument that Comcast had articulated no speech interest implicated here because Comcast already carries Tennis Channel on its systems. *Id.* n.310. The Commission found that the equivalent carriage remedy “impacts Comcast’s selection of networks on its cable systems.” *Id.*

⁹³ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)); see also *Time Warner*, 93 F.3d at 978.

⁹⁴ *Order* ¶ 98, quoting *Time Warner*, 93 F.3d at 978.

⁹⁵ Pet. at 14.

⁹⁶ *In the Matter of Revision of the Commissions Program Carriage Rules Leased Commercial Access; Dev. of Competition & Diversity in Video Programming Distribution and Carriage*, 26 FCC Rcd 11494, 11517-18 ¶ 33 (2011) (“*Program Carriage Order*”), petitions for review pending, *Time Warner Cable Inc. v. FCC*, Nos. 11-4138 & 11-1512 (2d Cir. filed Oct. 11, 2011); see also *Order* ¶ 99. The D. C. Circuit has recently rejected similar

(continued....)

incentive to shield their affiliated programming vendors from competition with unaffiliated programming vendors for viewers, advertisers, and programming rights, the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programming vendors.”⁹⁷ The Commission also observed in that order that “the number of cable-affiliated networks recently increased significantly after the merger of Comcast and NBC Universal, thereby highlighting the continued need for an effective program carriage complaint regime.”⁹⁸

34. There is no merit to Comcast’s contention that the carriage remedy is content-based because the Commission considered whether Tennis Channel is “similarly situated” with Comcast’s affiliates, Golf Channel and Versus. As the Commission explained, the “‘principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.’”⁹⁹ That was not the case here, the Commission explained, where the agency had “considered the content of the three networks solely for purposes of conducting a comparative analysis to determine whether Comcast discriminated ‘on the basis of affiliation or nonaffiliation’ by affording preferential treatment to affiliated networks that are similarly situated to Tennis Channel.”¹⁰⁰ The Commission emphasized that the “*particular* content of the programming at issue was irrelevant; the same comparative analysis would apply regardless of the specific type of programming involved.”¹⁰¹ Comcast’s claims that the Commission’s comparative analysis of these three channels constituted content-based regulation are mistaken. Nothing in the Commission’s “approach, or the statutory provision and Commission rule that undergirded it, favors or disfavors any particular speech ‘because of [agreement or] disagreement with the message it conveys.’”¹⁰²

35. Moreover, as Tennis Channel points out in its opposition, “the ‘similarly situated’ requirement actually protects Comcast by heightening the complainant’s burden for establishing discrimination.”¹⁰³ Indeed, in this proceeding Comcast introduced expert testimony “to argue that Tennis Channel, Golf Channel, and Versus are not similar in content terms. Now that Comcast has failed on this point . . . Comcast cannot complain that the Commission’s consideration of its own expert’s testimony violates the First Amendment.”¹⁰⁴

(...continued from previous page)

arguments, concluding that cable operators continue to exercise control in certain geographic areas. *See Cablevision*, 649 F.3d at 712. In its 2011 Order, the Commission also rejected reliance on *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009), finding that the court’s language in that case regarding the extent of cable operators’ market control involved a different rule, and the rationale was inapplicable to the program carriage area. *Program Carriage Order* ¶ 33; *see* Pet. n.54, citing *Comcast Corp. v. FCC*.

⁹⁷ *Order* ¶ 99.

⁹⁸ *Program Carriage Order* ¶ 33, citing *Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc.*, 26 FCC Rcd 4238, 4238, ¶ 1 and 4284-85, ¶ 116 (2011).

⁹⁹ *Order* ¶ 100, quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“*Turner I*”) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Order* ¶ 100, quoting *Turner I*, 512 U.S. at 642 (quoting *Ward*, 491 U.S. at 791). *See also Ward*, 491 U.S. at 791 (“The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”)

¹⁰³ *Tennis Channel Opp.* at 11.

¹⁰⁴ *Id.*

36. The Commission fully explained that the remedy in this case satisfies intermediate scrutiny and does not burden substantially more speech than necessary.¹⁰⁵ Comcast complains that the Commission ignored a “less burdensome remedy than the one it imposes – requiring Comcast to move Tennis Channel only to the Digital Preferred Tier,” a program tier that provides broader carriage than the Sports Tier but narrower carriage than the Digital Basic Tier on which Golf Channel and Versus are carried.¹⁰⁶ The Commission explained that it based its conclusion regarding Comcast’s discrimination on the cable operator’s decision to relegate Tennis Channel to the Sports Tier. The Commission expressed no opinion on the hypothetical whether the unreasonable-restraint prong of Section 616 would have been satisfied if Comcast had placed Tennis Channel on the Digital Preferred Tier since those were not the facts before it.¹⁰⁷ “All we say here is that if Comcast had carried Tennis Channel more broadly, the question whether Tennis Channel was unreasonably restrained in its ability to compete would be a different one and might yield a different answer. We think it appropriate and prudent to focus our conclusions on the facts at hand, rather than speculating on the proper analysis of facts not presented in this case.”¹⁰⁸ To the extent that Comcast argues in its petition that the Commission had an obligation to adopt a theoretically less speech-restrictive remedy, the Supreme Court has made clear that intermediate scrutiny does not require the least restrictive means to advance the government’s interest.¹⁰⁹

B. Comcast Would Not Suffer Irreparable Harm In The Absence Of A Stay.

37. Comcast contends that it would be irreparably harmed if a stay is not granted, focusing on two alleged injuries. First, it asserts that the *Order* violates its First Amendment rights and that “[t]hat alone justifies a stay.”¹¹⁰ Second, Comcast asserts that, absent a stay, the *Order* will “impose immediate, substantial burdens on Comcast that cannot be undone if the Order is overturned on judicial review.”¹¹¹ These claims do not suffice to demonstrate irreparable harm.

38. The mere assertion of a First Amendment violation, without more, does not demonstrate irreparable injury.¹¹² As the Commission found in the *Order*, and as discussed above, Comcast has failed to show that its free speech rights under the First Amendment were infringed by the requirement that Comcast provide Tennis Channel with carriage equivalent to the level of carriage that Comcast affords to its own affiliates (Golf Channel and Versus). Indeed, we note that, for the overwhelming majority of cable systems at issue in this case, Comcast has voluntarily chosen to carry Tennis Channel; the *Order* does not compel Comcast to carry any speech that it is opposed to carrying for any communicative or expressive purpose. Further, the *Order* explained in detail that the Commission’s program carriage rules are content-neutral (and were applied in a content-neutral manner), and that their application easily

¹⁰⁵ See *Order* ¶ 104 (“the remedy requires no more than that Tennis Channel not be carried in a discriminatory manner, and does not burden substantially more speech than necessary to achieve that end”).

¹⁰⁶ Pet. at 15.

¹⁰⁷ *Order* n. 290.

¹⁰⁸ *Id.*

¹⁰⁹ See *Turner I*, 512 U.S. at 662 (To survive intermediate scrutiny “a regulation need not be the least speech-restrictive means of advancing the Government’s interests.”)

512 U.S. at 662.

¹¹⁰ Pet. at 18.

¹¹¹ *Id.*

¹¹² *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (“[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury Rather the plaintiffs must show ‘a chilling effect on free expression.’”).

satisfies intermediate scrutiny.¹¹³ As the Commission explained, the remedy imposed likewise furthers the government's substantial interest in promoting fair competition and diversity, and does so in a manner that does not burden substantially more speech than necessary.¹¹⁴ Comcast thus has failed to show that its First Amendment rights will be injured in the absence of a stay or that it is likely to succeed on the merits of any appeal on those grounds.

39. Apart from Comcast's claims regarding injuries it may suffer to the extent it is required to launch Tennis Channel on cable systems with little or no available bandwidth that do not currently carry that network (which we separately address below), Comcast's asserted economic injuries stemming from the *Order's* equal-carriage requirement fall far short of demonstrating the sort of "irreparable" harm that would justify a stay of the *Order*. Comcast claims that it will face what are essentially a variety of administrative burdens associated with providing Tennis Channel broader carriage.¹¹⁵ These include updating websites, databases, and programming guides, and producing new channel lineup cards and local rate cards.¹¹⁶ Comcast asserts that it would be required "to allocate substantial resources, including the time and efforts of over one hundred national and regional employees."¹¹⁷ However, as Tennis Channel explains in its opposition, "[i]mplementation of this relief requires nothing more than the type of business decision Comcast makes routinely with many channels."¹¹⁸ Comcast is the country's largest MVPD (bigger than any other cable operator or satellite provider), with over 22 million video subscribers and 85,000 employees associated with its cable communications business.¹¹⁹ With that context in mind, Comcast's complaint about the administrative burdens of providing Tennis Channel broader carriage in compliance with the *Order* do not come close to demonstrating irreparable injury under prevailing precedents, which do not recognize mere economic loss, even if irretrievable, as constituting irreparable injury unless there is also a showing that the loss is sufficiently grave to threaten the destruction of the business.¹²⁰ Moreover, Comcast represented in January 2012 that it was "engaging in good-faith planning for compliance with and implementation of the Initial Decision, should it become effective."¹²¹ That planning should have limited the burden that Comcast now faces. Notwithstanding that Comcast will face some administrative burdens in complying with the *Order*, it has failed to demonstrate that those burdens are so great in the context of Comcast's substantial resources as to warrant a finding of irreparable injury.

40. We find no merit in Comcast's complaint that these asserted administrative burdens are exacerbated because it "is required to begin suffering these burdens *immediately* to satisfy the *Order's* direction to provide broader carriage to Tennis Channel within 45 days."¹²² Comcast has been on notice since the *Initial Decision* in this proceeding – issued more than seven months ago – that it could be

¹¹³ *Order* ¶¶ 97-106.

¹¹⁴ *Id.* ¶.104.

¹¹⁵ Comcast asserts that its only "practical" choice for compliance with the *Order* is to provide Tennis Channel with broader carriage equivalent to Golf Channel and Versus. Pet. at 18.

¹¹⁶ *Id.* at 19.

¹¹⁷ *Id.* at 19.

¹¹⁸ Tennis Channel Opp. at 13. Tennis Channel pointed to record evidence establishing "that Comcast frequently changes its channel lineups and orders nationwide tiering changes at-will." *Id.* at 15.

¹¹⁹ Comcast 2011 Annual Report Form 10-K at 2, 28.

¹²⁰ See *Wisconsin Gas Co.*, 758 F.2d at 674; *Gulf Oil Corp. v. Dep't of Energy*, 514 F.Supp. 1019, 1026 (D.D.C.1981).

¹²¹ Comcast Opp. to Tennis Channel Pet. to Compel Compliance at 5 n.11 (Jan. 25, 2012).

¹²² Pet. at 19.

required to take this action. Indeed, as noted, Comcast represented in January 2012 that it was “engaging in good-faith planning for compliance with and implementation of the Initial Decision, should it become effective.”¹²³ In its May 2012 *Stay Order*, the Commission took note of Comcast’s undertaking and underscored: “We expect that Comcast will *continue* its efforts in this regard notwithstanding our stay.”¹²⁴ Having assured the Commission months ago that it was engaged in “good-faith planning” to comply with the requirement that the *Order* has imposed, Comcast cannot plausibly claim surprise that the agency expects it to do what it has said it was already planning to do.

41. Comcast’s claim that it will suffer harm from the “inevitable viewer confusion” that would result from its compliance with the *Order* is particularly unpersuasive.¹²⁵ The consequence of Comcast’s complying with the *Order* is that many more of its cable customers will receive Tennis Channel. Rather than confusion, we expect that the likely reaction would be pleasant surprise. As the Commission’s Enforcement Bureau observed in response to Comcast’s prior stay petition in this proceeding, “there is no merit to Comcast’s claim that frustration and confusion among its viewers supports a stay of the [carriage remedy]. Whether there would be any such confusion or frustration at all is speculative, given that cable companies modify their channel lineups with relative frequency.”¹²⁶ In any event, Comcast does not attempt to quantify the alleged “viewer confusion,” and we find no basis in Comcast’s petition to support its claim that addressing such confusion as may arise will impose a substantial burden.

42. Broadly asserting that “consumer confusion” could lead to “loss of goodwill,”¹²⁷ Comcast speculates that subscribers “who begin receiving Tennis Channel under the *Order* could be displeased – and, at a minimum, confused – if access to Tennis Channel were suddenly rescinded” in the event that Comcast prevails in court.¹²⁸ This claim is insubstantial. Those subscribers who already receive Tennis Channel on Comcast’s Sports Tier will experience no material change; regardless of what happens in the litigation, they will continue to receive that network. As for those customers who subscribe to Comcast’s Digital Starter Tier or Expanded Basic Tier (but not the Sports Tier), they will receive Tennis Channel while the litigation is pending, and will continue to receive the network if the Commission’s order is affirmed on appeal. In the unlikely event that the Commission’s order is overturned on judicial review, those subscribers would be returned to the same position they were in before the Commission’s order. Under either scenario, Comcast will not suffer irreparable harm.

43. Finally, Comcast contends that the “significant risk” that it “*may be* compelled to pay a higher . . . fee to Tennis Channel” “magnifie[s]” the harms it is facing.¹²⁹ A stay petitioner must demonstrate that the injury is “both certain and great,” “actual and not theoretical.”¹³⁰ Comcast’s complaint about increased license fees it may be required to pay Tennis Channel under the parties’ existing contract fails this test. The Commission addressed the license fee issue in the *Order*: “The ALJ did not prescribe specific license fees, and we decline to do so here. . . . [T]o the extent that Comcast

¹²³ Comsat Opp. to Tennis Channel Pet. to Compel Compliance at 5 n.11 (Jan. 25, 2012).

¹²⁴ *Stay Order*, 27 FCC Rcd at 5616 n.22 (emphasis added).

¹²⁵ Pet. at 19-20.

¹²⁶ Enforcement Bureau Comments on Comcast Conditional Pet. for Stay at 3 ¶ 6 (Feb. 6, 2012).

¹²⁷ Pet. at 20.

¹²⁸ Pet. at 21.

¹²⁹ Pet. at 21 (emphasis added). We note that Comcast could comply with the carriage remedy without paying any additional fees to Tennis Channel. See *Order* ¶ 90 (the remedy requires only equal treatment, and Comcast could comply by repositioning its affiliated networks).

¹³⁰ *Wisconsin Gas*, 758 F.2d at 674.

moves Tennis Channel to a more broadly distributed tier, Comcast must pay Tennis Channel any additional compensation for broader carriage that the parties have already negotiated. To the extent the existing contract does not state how Tennis Channel should be compensated for broader carriage, we expect the parties to negotiate appropriate pricing terms.”¹³¹ It is open to question whether Comcast’s payment of license fees to Tennis Channel pursuant to an existing contract that the parties freely negotiated could be deemed an injury to Comcast at all. To the extent that it is, Comcast has fallen far short of demonstrating that the injury it claims to face is “both certain and great,” “actual and not theoretical.” That is particularly so because, even if Comcast were correct in contending that the *Order* requires it to pay additional licensing fees, Comcast has no shown that it would be barred from recovering those additional fees in the unlikely event that the *Order* is vacated on judicial review.¹³²

44. Comcast Systems With Little to No Spare Bandwidth That Are Not Currently Carrying Tennis Channel. Comcast claims that it will face a significant burden in complying with the *Order* on a small number of its systems that provide service to a very small proportion of its subscribers. These are systems that “do not currently carry Tennis Channel at all and that have little to no spare bandwidth available to launch new networks.”¹³³ These systems were not the principal focus of Comcast’s arguments before the ALJ and the Commission. Comcast asserts that in order to carry Tennis Channel on these systems, it “likely will be required to choose among several highly burdensome alternatives, including making large economic investments to increase channel capacity on many of these systems – investments that are not economically feasible and that Comcast would not otherwise make – delaying the launch of new networks, degrading the quality of existing services, or even ceasing to carry some well-established networks altogether.”¹³⁴ We believe the question whether Comcast will face significant burdens complying with the *Order* for these very small systems is a close one. Thus, in an effort to minimize any burden on Comcast while at the same time providing Tennis Channel with an effective remedy for Comcast’s unlawful discrimination, on the specific facts of this case, we have determined in the exercise of our equitable discretion to stay the effectiveness of the *Order* only as to these cable systems pending review by a court of appeals. Critical to our determination is that because of the very small number of systems and subscribers involved, grant of the stay will not deprive Tennis Channel of an effective remedy for Comcast’s carriage discrimination against it. We emphasize, in addition, the limited nature of this action. First, it applies only to the small number of specific systems Comcast describes in its stay petition (and accompanying declarations) that do not currently carry Tennis Channel and have inadequate bandwidth to add a new channel.¹³⁵ Comcast is directed to provide to Tennis Channel and to the Commission’s General Counsel a list specifically identifying the subject systems within five days of the date of release of this order. Failure to provide that information in a timely manner will result in automatic lifting of the stay without the necessity for further action by the Commission. Second, we emphasize that this action is justified by the particular facts presented by this case, including, in particular, that these small systems allegedly have little or no spare bandwidth available to launch new networks, and that they account for only [REDACTED] of Comcast’s total subscribers, thus ensuring that this limited stay does not deprive Tennis Channel of an effective remedy.

¹³¹ *Order* ¶ 92.

¹³² See *United Gas Improvement Co. v. Callery Props.*, 382 U.S. 223, 229 (1965) (“[a]n agency, like a court can undo what is wrongfully done by virtue of its order”); *Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62, 72 (D.C. Cir. 1996) (noting that an agency “may exercise its remedial authority to relieve a party from the ‘predicament’ caused by that party’s reliance upon” an invalid order).

¹³³ Pet. at 20. Comcast states that approximately [REDACTED] of its systems serving [REDACTED] subscribers, or approximately [REDACTED] of Comcast’s total subscribers fall into this category.

¹³⁴ *Id.*

¹³⁵ Pet. at 20; see Declaration of Jennifer Gaiski, ¶¶ 5, 17 (Pet. Exh. C); Declaration of Jay Kreiling, ¶¶ 6, 21-22 (Pet. Exh. D).

C. Harm to Others and Public Interest Considerations Weigh Against A Stay.

45. Finally, Comcast has failed to show that there would be no harm to others in granting a stay or that the public interest favors a stay. Comcast asserts that Tennis Channel would not be harmed by a stay because “a stay would merely maintain the status quo.”¹³⁶ If maintaining the status quo were justification for granting a stay request, every request would be granted because any grant of a stay maintains the status quo. But it is well settled that a stay of an agency order pending judicial review is an “extraordinary remedy.”¹³⁷ The Commission determined, on a full record, that Comcast has violated federal law and that Tennis Channel has been harmed by Comcast’s discrimination against it, and in favor of program channels affiliated with Comcast, in program carriage.¹³⁸ In his *Initial Decision*, the ALJ, after a full evidentiary hearing, reached the same conclusion. Tennis Channel has been, and continues to be, harmed by Comcast’s refusal to provide it with the broader carriage it provides Golf Channel and Versus. Comcast’s assertion that Tennis Channel cannot claim that continuing the status quo “will cause it cognizable injury” is without any basis.¹³⁹

46. Similarly, Comcast’s contention that the public interest favors a stay cannot withstand analysis. Its claim that it is “always in the public interest to prevent violation of a party’s constitutional rights,”¹⁴⁰ is simply a reiteration of its claim that a stay should be granted because any injury to a party’s First Amendment rights is irreparable. Both claims fail because implementation of the *Order* imposes no injury to Comcast’s First Amendment rights, as discussed above.

47. It further claims that the public “will be forced to bear unjustified burdens absent a stay” reflected in “the increased costs if Comcast is required to pay increased aggregate fees to Tennis Channel.”¹⁴¹ However, the only way the public would be “required” to pay increased fees would be if Comcast chose to increase the fees it charges its subscribers. As discussed above, it is undetermined to what extent Comcast will pay additional fees to Tennis Channel for broader carriage during the period of judicial review. Moreover, Comcast does not even state that it would increase its subscriber fees in order to recoup any additional fees it pays to Tennis Channel. Even assuming that Comcast *might* do so, such speculation does not justify issuance of the extraordinary remedy of a stay.

48. As Tennis Channel observes in its opposition, “Congress enacted Section 616 with the express goal of promoting competition and diversity in programming by preventing MVPDs from favoring their own networks over unaffiliated networks” and determined that “in light of the importance of the public interest goals underlying Section 616, Section 616 complaints should be resolved promptly through ‘expedited review.’”¹⁴² Particularly in light of the record developed in this proceeding, and the conclusions of the ALJ and the Commission, we agree with Tennis Channel’s assertion that “[i]t would be fundamentally at odds with these legislative and regulatory policy interests to allow further delay” by granting Comcast’s stay petition.¹⁴³

¹³⁶ Pet. at 22.

¹³⁷ See, e.g., *Program Carriage Order*, 26 FCC Rcd at 11549; *In the Matter of Amendment of Parts 73 & 74 of the Commissions Rules to Establish Rules for Digital Low Power Television*, 26 FCC Rcd 11227, 11228 (2011).

¹³⁸ See *Order* ¶¶ 83-87; *Initial Decision* ¶¶ 81-92.

¹³⁹ Pet. at 22.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Tennis Channel Opp. at 21.

¹⁴³ *Id.*

49. We reject Comcast's reliance on the Commission's earlier stay order in this proceeding as a justification for granting its petition here.¹⁴⁴ Grant of the earlier administrative stay was to permit the Commission an "adequate opportunity to examine the record and the ALJ's disposition of each issue closely."¹⁴⁵ Different considerations are at issue now that the Commission has completed its review, based on a full record. Moreover, Comcast's current request for a stay is not advanced by the Commission's observation in its prior order concerning "potential disruption to consumers and any affected third-party programmers."¹⁴⁶ Those concerns were primarily related to the ALJ's channel placement remedy and Comcast's further claims of disruption from having to move or drop existing channels to accommodate equal carriage for Tennis Channel. These concerns, however, are largely alleviated by the Commission's *rejection* of the ALJ's channel placement remedy and our adoption here of a limited stay with respect to the small number of systems that (according to Comcast) do not currently carry Tennis Channel and have inadequate bandwidth to add another channel.

IV. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended, Comcast's Petition for Stay IS GRANTED in part and DENIED in part as discussed above.

51. In addition, Comcast IS DIRECTED to provide to the Commission's General Counsel and to Tennis Channel a list specifically identifying systems that are subject to the administrative stay granted herein as described in Paragraph 44 above within five days of the date of release of this Order. Failure to provide that information in a timely manner will result in automatic lifting of the administrative stay granted herein without the necessity for further action by the Commission.

¹⁴⁴ See Pet. at 23.

¹⁴⁵ *Stay Order*, 27 FCC Rcd at 5616 ¶ 5.

¹⁴⁶ *Id.*

52. This action is taken under delegated authority pursuant to Sections 0.41 and 0.251(c) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Sean A. Lev
General Counsel

August 9, 2012

**STATEMENT OF COMMISSIONER AJIT PAI
ON GENERAL COUNSEL'S RULING ON COMCAST'S STAY REQUEST**

Re: *Tennis Channel, Inc., v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Order

Had Comcast's petition been presented to the full Commission, I would have voted to stay the Commission's Order for the reasons Commissioner McDowell and I set forth in our Joint Dissenting Statement.

12-1337

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Comcast Cable Communications, LLC, Petitioners

v.

**Federal Communications Commission and the
United States of America, Respondents**

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on August 16, 2012, I electronically filed the foregoing Opposition to Petitioner's Emergency Motion for a Stay with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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