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

THE TENNIS CHANNEL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 15-1067**
	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

MOTION FOR SUMMARY AFFIRMANCE

The Federal Communications Commission respectfully asks the Court to summarily affirm the *Order* on review in this case, *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 30 FCC Rcd 849 (2015) ("*Order*") (Attachment 1). As demonstrated below, the challenged *Order* faithfully carries out this Court's mandate in *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) ("*Comcast*"), and the merits supporting the Commission's action "are so clear that 'plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision.'" *Cascade Broadcasting Group, Ltd v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (quoting *Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir. 1985)). Accordingly, although this Court "rarely grant[s]" summary disposition, *Handbook of Practice and Internal*

Procedures at 36 (D.C. Cir. Nov. 12, 2013) ("*D.C. Circuit Handbook*"), summary affirmance is warranted here.

BACKGROUND

1. Section 616 of the Communications Act, 47 U.S.C. § 536, directs the FCC to adopt regulations to "bar a multichannel video programming distributor ('MVPD') such as a cable company from discriminating against unaffiliated programming networks in decisions about content distribution." *Comcast*, 717 F.3d at 983. "[V]irtually duplicating" the statutory text, the Commission's implementing regulations prohibit such discrimination when the effect is "to 'unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly.'" *Ibid.* (quoting 47 C.F.R. § 76.1301(c)); *see also* 47 U.S.C. § 536(a)(3).

In 2010, petitioner The Tennis Channel, Inc. ("Tennis Channel"), an unaffiliated sports programming network, filed an administrative complaint against Comcast Cable Communications, LLC ("Comcast"), contending that Comcast violated section 616 and the FCC's regulations "by refusing to broadcast Tennis [Channel] as widely (*i.e.*, via the same relatively low-priced 'tier' [of channels]) as it did its own affiliated sports programming networks, Golf Channel and Versus."

Comcast, 717 F.3d at 983; *see also id.* at 985.[1] An administrative law judge ("ALJ") ruled in favor of Tennis Channel and ordered Comcast to provide Tennis Channel carriage equal to that it was providing Golf Channel and Versus. *See Comcast*, 717 F.3d at 983-84. The Commission affirmed, *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd 8508 (2012) ("*2012 Order*"), and Comcast sought this Court's review.

2. Before this Court, Comcast presented three main challenges to the *2012 Order*: (1) that Tennis Channel's claim was untimely under the one-year statute of limitations for program carriage complaints prescribed in 47 C.F.R. § 76.1302(h); (2) that the Commission misconstrued the meaning of section 616, particularly in light of free speech rights protected by the First Amendment; and (3) that, in any event, the Commission failed to establish that Comcast had engaged in unlawful discrimination even under its own interpretation of the statute. *See Comcast*, 717 F.3d at 984. In separate concurring opinions, Judge Edwards found merit in Comcast's first (statute of limitations) challenge, *see id.* at 994-1007, and Judge Kavanaugh found merit in Comcast's second (statutory) challenge, *id*. at 987-94. The panel unanimously found, however, that it was unnecessary to "reach those issues" because, "even under the Commission's interpretation of § 616 (the

[1] Versus is now called NBC Sports Network, but (consistent with the *Order* on review and this Court's *Comcast* decision) we continue to refer to it as "Versus" for purposes of this litigation.

correctness of which [the Court] assume[d] for purposes of this decision)," neither the Commission nor Tennis Channel identified evidence of "unlawful discrimination" by Comcast. *Id.* at 984.

The Court expressly adopted Comcast's argument that "the Commission could not lawfully find discrimination because *Tennis [Channel]* offered no evidence that its rejected proposal [to be placed onto a tier with broader distribution] would have afforded Comcast *any* benefit." *Comcast*, 717 F.3d at 984 (emphasis added to "Tennis [Channel]"). The Court further determined that the record contained "nothing to refute Comcast's contention that its rejection of [Tennis Channel's] proposal was simply 'a straight up financial analysis.'" *Ibid.* (citing administrative record). Because there was "no dispute that [section 616] prohibits only discrimination *based on* affiliation," the Court held that Comcast's action "based on a reasonable business purpose" established that "there [was] no violation." *Id.* at 985. The Court therefore "[g]ranted" Comcast's petition for review, *id.* at 987. That petition had asked the Court to "hold unlawful, vacate, enjoin and set aside the [*2012 Order*]," Pet. for Review at 2, No. 12-1337 (D.C. Cir. Aug. 1, 2012) (Attachment 2).

Tennis Channel sought panel and *en banc* rehearing of the *Comcast* decision, arguing that the Court "erred in not remanding the case for further proceedings to determine whether" "evidence of foregone 'net benefit' to Comcast

… exists." Pet. for Reh'g at 11, No. 12-1337 (D.C. Cir. July 12, 2013) (Attachment 3). Tennis Channel asserted that "the case should be remanded for consideration, in light of the panel's decision, of whether Comcast violated section 616" under the standard the panel articulated. *Ibid.* (capitalization omitted). Tennis Channel argued, further, that "even if the existing record did not contain evidence of foregone 'net benefit,'" the case "should be remanded" to enable Tennis Channel to produce new evidence to that effect. *Id.* at 15. This Court summarily denied the rehearing request.[2]

3. On March 11, 2014, Tennis Channel filed with the Commission a "Petition for Further Proceedings and Reaffirmation of Original Decision" ("Petition to Reaffirm") (Attachment 4). In it, Tennis Channel argued that this Court in *Comcast* had created "new tests" for program carriage discrimination that the Commission had not previously articulated or applied. Petition to Reaffirm at ii, 3, 7. Tennis Channel asserted that the Commission, accordingly, was required to reopen the complaint proceeding to apply those "new tests" to the administrative record. *Id.* at 11-13. In this connection, Tennis Channel claimed that – contrary to this Court's ruling in *Comcast* – the existing record supported a finding that Comcast engaged in unlawful program carriage discrimination, *id.* at 13-26, but

[2] Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013); En Banc Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013). Tennis Channel also sought Supreme Court review, Pet. for Cert., No. 13-676 (U.S. Dec. 3, 2013), which the Court denied, 134 S. Ct. 1287 (2014).

argued, alternatively, that "if the Commission disagrees … it should – indeed, must – allow the parties to produce additional evidence that sheds light on the new tests raised by the court's opinion," *id.* at 26-27. *See generally Order* ¶ 6.

In the *Order* on review, the Commission denied Tennis Channel's petition and, "based on" this Court's finding in *Comcast* that there was "no evidence of unlawful discrimination under Section 616," denied Tennis Channel's program carriage complaint against Comcast. *Order* ¶ 3. The Commission first rejected Tennis Channel's contention that it should revisit the question whether record evidence supported a finding of unlawful discrimination because this Court allegedly had established "new tests" for assessing such discrimination. *Id.* ¶ 7. The Commission determined that, far from creating "new tests" for unlawful program carriage discrimination, this Court in *Comcast* "explicitly stated that it decided the case on the assumption that the Commission's interpretation of Section 616 was correct." *Ibid.* (citing 717 F.3d at 984). The Commission explained, accordingly, that when the Court held that the record contained no evidence of unlawful discrimination, it did so on the basis of existing law. *Ibid.* In light of these findings, and because this Court "neither invited nor directed the Commission to address on remand the evidentiary shortcomings identified in its decision," the Commission declined to do so. *Ibid.*

"For the same reasons," the Commission also rejected Tennis Channel's alternative demand that it reopen the administrative record to receive new evidence of alleged discrimination. *Id.* ¶ 8. The Commission found that Tennis Channel "had a full and fair opportunity to litigate its complaint," both before the agency and in court. *Ibid.* Thus, to the extent the Court's mandate in *Comcast* left the agency any discretion to reopen the record, the Commission determined that "the interest in bringing the proceeding to a close outweigh[ed] any interest in allowing Tennis Channel a second opportunity to prosecute its program carriage complaint." *Ibid.*[3]

4. Tennis Channel has responded to the *Order* with this petition for review under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), asserting generally that the *Order* is arbitrary and capricious, violates the Communications Act and related implementing regulations, fails to observe lawful procedure, and is unsupported by

[3] Relatedly, the Commission noted that Tennis Channel had sought to invoke 47 U.S.C. § 402(h) to support its argument that the agency was required to conduct further remand proceedings to resolve the complaint. *Order* ¶ 8 n.30. The Commission determined that it need not reach the question because it denied the petition "on the basis of [its] administrative discretion," but found that, to the extent that provision was applicable to this proceeding, it would not support Tennis Channel's request to reopen the record for new evidence. *Ibid.* "[U]nless otherwise ordered by the court," the Commission noted, section 402(h) requires the Commission to give effect to a court decision reversing an FCC order "on the basis of the proceedings already had and the record upon which said appeal was heard and determined." *Ibid.* (quoting section 402(h)).

substantial evidence. Pet. for Review at 2, No. 15-1067 (D.C. Cir. March 27, 2015) (Attachment 5).

ARGUMENT

This case raises a single straightforward question: whether the Commission's *Order* faithfully carries out this Court's mandate in *Comcast.* As we demonstrate below, that question can be answered affirmatively by looking to little more than the *Comcast* opinion and the *Order* responding to it. Accordingly, although this Court "rarely grant[s]" summary disposition, *D.C. Handbook* at 36, this is one of those rare, straightforward cases in which the merits "are so clear" that summary affirmance is warranted. *Cascade Broadcasting Group*, 822 F.2d at 1174.

Responding to the *Comcast* decision, the Commission denied Tennis Channel's program carriage complaint "based on the Court's conclusion that the [prior administrative] record contain[ed] no evidence that Comcast discriminated against [Tennis Channel] unlawfully under Section 616 of the Act and its implementing rules." *Order* ¶¶ 7, 10; *see also id.* ¶¶ 2-3. "For the same reasons" and because Tennis Channel already "had a full opportunity to litigate its complaint," the Commission also denied Tennis Channel's request to reopen the record, "[t]o the extent [the agency] ha[d] discretion" to do so at all. *Id.* ¶¶ 8, 11.

With nothing left to decide, the Commission thus "terminated" the proceeding. *Id.* ¶ 13.

These actions taken in the *Order* reasonably carried out the Court's mandate. By its terms, nothing in the *Comcast* decision suggests that the Court contemplated – let alone directed – further administrative proceedings on remand to produce a better explanation for the Commission's prior ruling or to develop additional evidence in support of that ruling. Rather, the Court simply "[g]ranted" (717 F.3d at 987) Comcast's request that the Court "hold unlawful, vacate, enjoin and set aside the [*2012 Order*]" (Pet. for Review 2, D.C. Cir. No. 12-1337).[4] Indeed, Tennis Channel itself interpreted the decision the same way when it claimed in its unsuccessful rehearing petition in *Comcast* that the Court "erred in not remanding the case for further proceedings to determine whether" the existing record contained pertinent evidence of unlawful discrimination, or, if not, to provide a

[4] When this Court intends to remand a case to the FCC for further proceedings, it typically does so expressly. *See*, *e.g.*, *FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692 (D.C. Cir. 2015) ("we remand for the Commission to determine whether there was substantial service …, and to consider anew FiberTower's requests for an extension or waiver of the substantial service requirement"); *Sorenson Commc'ns, Inc. v. FCC*, 765 F.3d 37, 52 (D.C. Cir. 2014) ("We remand [a] …portion of the Order to the Commission to consider whether an enhanced speed-of-answer requirement will increase providers' costs and, if so, whether having faster service is worth the concomitant increase in rates."); *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014) ("We remand the case to the Commission for further proceedings consistent with this opinion.").

new opportunity to develop such evidence. *See* Pet. for Reh'g at 11, 15, D.C. Cir. No. 12-1337.

Nor does context suggest that the Court intended the Commission to conduct remand proceedings to revisit the question whether evidence of unlawful discrimination exists – on either the existing record or a new one. Tennis Channel asserted in its Petition to Reaffirm that the Court in *Comcast* must have anticipated remand proceedings to revisit whether evidence supports a finding of unlawful discrimination, because the decision announced "new tests" for discrimination that neither the Commission nor the parties had an opportunity to apply. Petition to Reaffirm at ii, 3, 7, 11-13. But as the Commission determined, that claim is demonstrably mistaken because the Court expressly "decided the case on the assumption that the Commission's [existing] interpretation" of the statutory non-discrimination standard "was correct." *Order* ¶ 7; *see Comcast*, 717 F.3d at 984 ("even under the Commission's interpretation of § 616 (*the correctness of which we assume for the purposes of this decision*)," the record does not support Tennis Channel's unlawful discrimination claim) (emphasis added).[5] Because the Court

[5] What Tennis Channel characterized as "new tests" (*see* Petition to Reaffirm at 7-9) were merely "examples of the types of evidence that might have been adequate to prove" unlawful discrimination under the existing standard. *Order* ¶ 7 (citing *Comcast*, 717 F.3d at 986-87). And the Court made clear that the record contained "no such evidence." *Comcast*, 717 F.3d at 986; *see also ibid.* ("The parties do not even hint at this possibility [of showing that Comcast's losses from carrying Tennis Channel on a broader tier were the same or less than hypothetical losses

did not establish or apply a "new test[]" in its analysis of the record, Tennis Channel "had a full and fair opportunity to prosecute its program carriage complaint" the first time around, and there is no contextual basis to assume that the Court intended to give "Tennis Channel a second opportunity" to do so. *Order* ¶ 8.

Indeed, contrary to Tennis Channel's argument, context affirmatively supports the view that the Court did not remand the case to determine whether evidence of unlawful discrimination exists. In particular, the Court expressly reserved judgment on two questions that, if decided as proposed in two concurring opinions, would have independently resolved the case against Tennis Channel. *See Comcast*, 717 F.3d at 994-1007 (Edwards, J., concurring) (finding that Tennis Channel's complaint should be dismissed as time-barred); *id.* at 987-94 (Kavanaugh. J., concurring) (finding that the FCC erred in concluding that Section 616 may apply to a MVPD without market power); *id* at 984 (opinion for the Court) (declining to "reach those issues" because "Comcast prevail[ed]" on its argument that the record lacked evidence of unlawful discrimination). Considerations of judicial efficiency suggest that the Court would not have chosen to avoid ruling on one or more of these alternative bases for dismissing or denying

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from carrying Golf Channel or Versus on that tier], nor analyze its implications."); *id.* at 985 (Tennis Channel "offer[ed]" no "such analysis [of an offsetting benefit to Comcast] on either a qualitative or a quantitative basis."); *id.* at 987 ("Neither Tennis [Channel] nor the Commission has invoked the concept that an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose.").

Tennis Channel's complaint if the Court did not believe that its evidentiary holding finally disposed of the case.

In any event, even if the Court's mandate did not compel the Commission to end the case without reconsidering whether evidence of unlawful discrimination existed, given that "[t]he court neither invited nor directed the Commission to address on remand the evidentiary shortcomings identified in its decision," *Order* ¶ 7, it was certainly reasonable for the Commission to decline to do so. The Commission correctly determined that "Tennis Channel had a full and fair opportunity to litigate its complaint" – both before the agency and on judicial review (including requests for rehearing and for certiorari). *Order* ¶ 8. In those circumstances, "the interest in bringing the proceeding to a close outweigh[ed] any interest in allowing Tennis Channel a second opportunity to prosecute its program carriage complaint."[6]

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[6] *Order* ¶ 8 (citing *International Union of Mine, Mill and Smelter Workers v. Eagle-Pitcher Mining a& Smelting Co.*, 325 U.S. 335, 341 (1945) ("Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction."); and 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice….")).

CONCLUSION

For the foregoing reasons, the Court should summarily affirm the Commission's *Order*.

Respectfully submitted,

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May 12, 2015

ATTACHMENT 1

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

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

ORDER

Adopted: January 27, 2015 **Released: January 28, 2015**

By the Commission:

I. INTRODUCTION

1. In this Order, we deny a program carriage complaint filed by The Tennis Channel, Inc. ("Tennis Channel") alleging that Comcast Cable Communications, LLC ("Comcast"), a multichannel video programming distributor ("MVPD"), discriminated against it on the basis of affiliation in violation of Section 616 of the Communications Act of 1934, as amended ("the Act") and its implementing rules. We also deny a Petition for Further Proceedings and Reaffirmation of Original Decision[1] filed by Tennis Channel in the wake of the D.C. Circuit's decision in *Comcast Cable Communications, LLC v. FCC* ("Comcast decision").[2]

2. In the Comcast decision,[3] the United States Court of Appeals for the District of Columbia Circuit vacated a Commission order ("*MO&O*")[4] that held that Comcast had violated Section 616 of the Act,[5] and the Commission's program carriage rules[6] by relegating Tennis Channel (a cable

[1] Petition for Further Proceedings and Reaffirmation of Original Decision (filed Mar. 11, 2014) ("Petition").

[2] 717 F.3d 982 (D.C. Cir. 2013).

[3] *Id.*

[4] *See Tennis Channel, Inc., Complainant, v. Comcast Cable Communications, L.L.C., Defendant,* Memorandum Opinion and Order, 27 FCC Rcd 8508 (2012).

[5] 47 U.S.C. § 536(a)(3). Section 616 of the Act instructs the Commission, in relevant part, to establish regulations designed to:

> prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors.

Id.

[6] 47 C.F.R. § 76.1301(c).

network unaffiliated with Comcast) to a premium-pay programming tier on its cable systems, while more broadly distributing its affiliated sports networks, Golf Channel and Versus. The court overturned the decision on evidentiary grounds, ruling that the record in the proceeding failed to establish that affiliation had played a role in the level of carriage that Comcast had provided to Tennis Channel.[7]

3. In light of the D.C. Circuit's decision, in this Order, we: (i) reverse the Initial Decision in this matter and deny Tennis Channel's program carriage complaint based on the court's finding that there is no record evidence of unlawful discrimination under Section 616 of the Act and its implementing rules; and (ii) deny Tennis Channel's Petition for Further Proceedings and Reaffirmation of Original Decision. Below we set forth a brief history of the proceeding and explain the basis for our decision.

II. BACKGROUND

4. In July 2010, Tennis Channel, a video programming vendor, filed a complaint with the Commission alleging that Comcast, an MVPD, discriminated against it on the basis of affiliation in violation of Section 616 of the Act and its implementing rules.[8] In particular, it alleged that Comcast carries Tennis Channel, with which Comcast is not affiliated, on a tier with narrow penetration that is available only to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks, Golf Channel and Versus (now NBC Sports Network), on a tier with significantly higher penetration that is available to subscribers at no additional charge.[9]

5. In December 2011, following a full evidentiary hearing, an Administrative Law Judge ("ALJ") rendered an Initial Decision finding that Comcast discriminated against Tennis Channel on the basis of affiliation, and that such discrimination had the effect of restraining Tennis Channel's ability to compete fairly in violation of Section 616 of the Act and its implementing rules.[10] The ALJ, among other things, ordered Comcast to pay a monetary forfeiture and to carry Tennis Channel at the same level of distribution as Golf Channel and Versus.[11] Comcast appealed that decision to the Commission.[12] In July 2012, the Commission issued the *MO&O*, which largely affirmed the ALJ's decision.[13] Comcast filed a petition for review of the *MO&O* in the D.C. Circuit, asking the court to "hold unlawful, vacate, enjoin, and set aside" the Commission's order.[14] As noted, the D.C. Circuit, in May 2013, granted Comcast's petition for review.[15]

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[7] *See* 717 F.3d at 987.

[8] *See MO&O*, 27 FCC Rcd at 8509, ¶ 1.

[9] *Id.*

[10] *Id.*, ¶ 2.

[11] *Id.*

[12] In addition, Comcast separately filed an Application for Review of a decision by the Media Bureau finding that Tennis Channel's complaint was not barred by the program carriage statute of limitations. The Commission denied the Application for Review in the *MO&O*. *Id.* at 8519, ¶¶ 28-34.

[13] *See id.* at 8509, ¶ 3, 8519, ¶ 27. The Commission found, consistent with the ALJ's ruling, that Comcast had discriminated against Tennis Channel on the basis of affiliation and that such discriminatory treatment unreasonably restrained Tennis Channel's ability to compete against Comcast's similarly situated affiliates. In particular, the Commission agreed with the ALJ's finding that Tennis Channel, Golf Channel, and Versus are similarly situated networks, and that Comcast gave Golf Channel and Versus more favorable channel placement and broader carriage than Tennis Channel due to their affiliation with Comcast.

[14] 717 F.3d at 987.

[15] *See supra* n. 2. The D.C. Circuit had stayed the Commission's *MO&O* prior to vacating it. *See Comcast Cable Communications, LLC. v. FCC*, No. 12-1337, Order (D.C. Cir. Aug. 24, 2012).

6. In the wake of the D.C. Circuit's decision, Tennis Channel in March 2014 filed with the Commission a Petition for Further Proceedings and Reaffirmation of Original Decision.[16] In its Petition, Tennis Channel asserts that the D.C. Circuit's decision created "new tests" for program carriage discrimination that the Commission heretofore has not articulated or applied.[17] Thus, Tennis Channel argues, the Commission must issue a new order resolving its program carriage complaint that applies such "tests" to the record.[18] Tennis Channel asserts that the existing factual record is adequate to support a finding of discrimination under those tests.[19] In the alternative, Tennis Channel argues that should the Commission determine that it needs additional evidence to satisfy the court's evidentiary requirements, it should designate the issues requiring enhancement and reopen the record.[20]

III. DISCUSSION

7. We reverse the ALJ's Initial Decision and deny Tennis Channel's program carriage complaint based on the court's conclusion that the record contains no evidence that Comcast discriminated against it unlawfully under Section 616 of the Act and its implementing rules.[21] Tennis Channel claims that the court established "new tests" for determining whether an MVPD's denial of a request for carriage is unlawfully discriminatory and that the Commission thus must order additional briefing so that Tennis Channel may show that the record contains evidence sufficient to support grant of its complaint.[22] We disagree. The court explicitly stated that it decided the case on the assumption that

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[16] *See* Petition. Prior to filing its Petition with the Commission, Tennis Channel filed a petition in the D.C. Circuit for an *en banc* rehearing, which was summarily denied. *See* Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013). Tennis Channel then filed a petition in the U.S. Supreme Court for a *writ of certiorari* to review the D.C. Circuit's decision, which also was denied. *See* Order, No. 13-676 (U.S. Feb. 24, 2014).

[17] *See* Petition at ii, 3, 7.

[18] *See id.* at 11-13. Tennis Channel asserts that the Commission must establish a new briefing cycle that directs the parties to file limited proposed findings of fact and conclusions of law on the issues identified by the court. *Id.* at iii, 13-26.

[19] *Id.* at 13-26. Tennis Channel also argues that grant of its Petition is necessary "to give life to the [program carriage] condition imposed in the *Comcast-NBCU* merger order." *Id.* at 3-4.

[20] *Id.* at 26-27. Comcast filed an Opposition to Tennis Channel's Petition. *See* Comcast's Opposition to Tennis Channel's Petition for Further Proceedings and Reaffirmation of Original Decision (filed Mar. 18, 2014) ("Opposition"). Comcast argues, among other things, that because the court made a definitive determination that the record lacked evidence sufficient to support a finding of unlawful discrimination and rejected Tennis Channel's request for rehearing *en banc*, the Commission is barred from reopening the proceeding. *Id.* at 8-22.

[21] Because we are reversing the ALJ's decision on this basis, the remaining factual and legal issues presented by the record and raised in Comcast's exceptions are moot. In particular, the issue whether Tennis Channel's complaint was barred by the program carriage statute of limitations is moot because we deny the complaint based on the court's ruling. Thus, we dismiss Comcast's Application for Review in this proceeding.

[22] *See id.* at 1-2; Reply in Support of Petition for Further Proceedings and Reaffirmation of Original Decision (filed Mar. 28, 2014) at 1, 8 ("Reply"). In particular, Tennis Channel asserts that the Commission should order additional briefing so that it can show that the record contains the types of evidence that the court stated would have been sufficient to demonstrate program carriage discrimination. Tennis Channel characterizes such evidence as:

> (1) . . . evidence that Comcast had reason to expect a 'net benefit' in its distribution business from carrying Tennis Channel as broadly as Golf Channel or Versus; (2) . . . evidence that Comcast's distribution business incurred greater 'incremental losses' from carrying Golf Channel or Versus on a broader tier than it would incur from carrying Tennis Channel on such tier; or (3) evidence that Comcast's purported business justifications for [refusing to] carry Tennis Channel more broadly were merely 'pretextual cover' masking a discriminatory purpose to benefit its affiliated and competing services at Tennis Channel's expense.

Petition at 11-12.

the Commission's interpretation of Section 616 was correct,[23] and concluded that the record lacked any evidence to rebut Comcast's claim that broader carriage of Tennis Channel would yield no benefits for Comcast.[24] Contrary to Tennis Channel's assertion, the court did not alter the evidentiary standards by which a complainant shows a violation of Section 616, but simply provided examples of the types of evidence that might have been adequate to prove that broader carriage would have yielded net benefits to Comcast. Moreover, the court concluded that there was no evidence to support any of its hypothetical examples of how Tennis Channel might have proven its discrimination claim.[25] The court neither invited nor directed the Commission to address on remand the evidentiary shortcomings identified in its decision.[26] For these reasons, we reject Tennis Channel's assertion that the Commission must order additional briefing on the question whether the existing record satisfies purported "new tests" established by the court for unlawful program carriage discrimination, and deny Tennis Channel's complaint.

8. For the same reasons, we also deny Tennis Channel's Petition. In addition to the arguments noted above, Tennis Channel asserts in its Petition that, should the Commission conclude that additional evidence is needed to satisfy the court's evidentiary requirements, it should designate the issues requiring factual enhancement and reopen the record.[27] We decline to do so. To the extent the Commission has discretion to reopen the proceeding, we conclude that the interest in bringing the proceeding to a close outweighs any interest in allowing Tennis Channel a second opportunity to prosecute its program carriage complaint.[28] In this regard, we note that Tennis Channel has had a full and fair opportunity to litigate its complaint.[29] Moreover, we disagree with Tennis Channel's contention that the Commission is statutorily required to permit further briefing and submission of additional evidence.[30]

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[23] *See* 717 F.3d at 984 ("Comcast prevails with its third set of arguments – that even under the Commission's interpretation of § 616 (the correctness of which we assume for purposes of this decision), the Commission has failed to identify adequate evidence of unlawful discrimination.")

[24] *See id.* ("Comcast also argued that . . . Tennis Channel offered no evidence that its rejected proposal would have afforded Comcast *any* benefit. If that is correct, as we conclude below. . . ."). *See also id.* at 985 ("Tennis showed no corresponding benefits that would accrue to Comcast" from broader carriage of Tennis Channel); *id.* at 986 ("Not only does the record lack affirmative evidence along these lines, there is no evidence that such benefits exist."); *id.* at 987 ("[T]he record simply lacks material evidence that the Tennis proposal offered Comcast any commercial benefit. . . . Without showing any benefit for Comcast . . ., the Commission has not provided evidence that Comcast discriminated against Tennis on the basis of affiliation. . . . [N]one of [the Commission's evidence] establishes benefits that Comcast would receive if it distributed Tennis Channel more broadly. On this issue, the Commission has pointed to no evidence . . . .").

[25] *See id.* at 986-987 ("A rather obvious type of proof would have been expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis more broadly, or that Y number would leave Comcast in the absence of broader carriage, or a combination of the two, such that Comcast would recoup the proposed increment in cost. There is no such evidence. . . . Not only does the record lack affirmative evidence along these lines, there is evidence that no such benefits exist.").

[26] We note that Tennis Channel, in its petition for rehearing *en banc*, had argued that the court erred in not remanding the case to the Commission for further proceedings. As noted above, the court summarily denied that petition. *See* Tennis Channel Reply at 12 n. 33.

[27] *See* Petition at 26-27.

[28] *See International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 341 (1945) ("Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction."); *see also* 47 U.S.C. §154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . .").

[29] *See supra* n.16.

[30] Tennis Channel points to Section 402(h) of the Act in asserting that the court's vacatur necessarily operates as a remand to the Commission for further proceedings to resolve the complaint. *See* Petition at 11 n. 32. To the extent

(continued....)

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, that the Initial Decision in this matter **IS REVERSED.**

10. **IT IS FURTHER ORDERED** that Tennis Channel's Complaint in the above-captioned proceeding, **IS DENIED**.

11. **IT IS FURTHER ORDERED** that the Petition for Further Proceedings and Reaffirmation of Original Decision filed by Tennis Channel, **IS DENIED**.

12. **IT IS FURTHER ORDERED** that Comcast's Application for Review in the above-captioned proceeding **IS DISMISSED.**

13. **IT IS FURTHER ORDERED** that this proceeding **IS TERMINATED**.

14. This action is taken pursuant to authority in Sections 4(i), 4(j), 303(r) and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 536, and Sections 1.282 and 76.1302 of the Commission's rules, 47 C.F.R.§§ 1.282, 76.1302.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)
that Section 402(h) applies to this case, we note that such provision would in fact bar the Commission from reopening the proceeding because the court has neither ordered nor authorized the Commission to do so. *See* 47 U.S.C. § 402(h) ("In the event that the court shall render a decision and enter an order reversing the order of the Commission, . . . it shall be the duty of the Commission . . . to forthwith give effect thereto, and *unless otherwise ordered by the court*, to do so upon the basis of proceedings already had and the record upon which said appeal was heard and determined") (emphasis added). However, we need not resolve the question whether Section 402(h) applies here because we deny Tennis Channel's petition on the basis of our administrative discretion.

ATTACHMENT 2

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

COMCAST CABLE COMMUNICATIONS, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

Case No. 12-1337

PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a), Comcast Cable Communications, LLC ("Comcast") hereby petitions this Court for review of the order of the Federal Communications Commission ("FCC") captioned *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Memorandum Opinion and Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 12-78 (July 24, 2012) ("Order"). Because the FCC's Order contains confidential information subject to a protective order, the FCC issued both a redacted and an unredacted version of its Order. Comcast is attaching the redacted version of the Order as Exhibit A to this petition, and is concurrently filing the unredacted version of the Order under seal.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

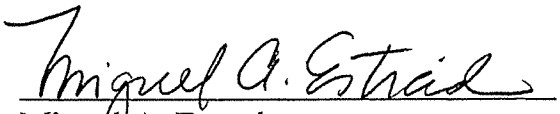
This action arises from an administrative complaint filed by Tennis Channel, Inc. against Comcast alleging violations of Section 616 of the Communications Act of 1934, 47 U.S.C. § 536, and rules promulgated by the FCC pursuant to that statute. Order ¶ 1. In its Order, the FCC concludes that Comcast violated those statutory and regulatory provisions. *Id.* ¶¶ 2-3. The Order requires Comcast to increase substantially its distribution of Tennis Channel, such that Tennis Channel will reach an equal number of Comcast's subscribers as two of Comcast's affiliated networks, Golf Channel and Versus (now NBC Sports Network). *Id.* ¶ 112. The FCC also orders Comcast to pay hundreds of thousands of dollars to the U.S. Treasury and what may amount to hundreds of millions of additional dollars to Tennis Channel. *Id.* ¶¶ 90, 92, 111.

Comcast seeks review of the Order on the grounds that it is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; is contrary to constitutional rights under the First and Fifth Amendments of the United States Constitution; violates the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder; and is otherwise contrary to law.

Accordingly, Comcast respectfully requests that this Court hold unlawful, vacate, enjoin, and set aside the Order, and that it provide such additional relief as may be appropriate.

Dated: August 1, 2012

Respectfully submitted,



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ATTACHMENT 3

No. 12-1337

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

COMCAST CABLE COMMUNICATIONS, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW FROM THE FEDERAL COMMUNICATIONS COMMISSION

INTERVENOR THE TENNIS CHANNEL, INC.'S PETITION FOR REHEARING OR REHEARING EN BANC

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July 12, 2013

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INTRODUCTION AND BACKGROUND

This case presents a question of exceptional importance: Whether proof of intentional discrimination may be based on evidence that the defendant had an unlawful motive and that its proffered reasons for the differential treatment were pretextual, or instead must be based on specific evidence that the discrimination caused the defendant to suffer an economic loss. By requiring evidence that the defendant suffered an economic loss, the panel departed from this Court's prior anti-discrimination decisions, ignored congressional intent, and erroneously rejected extensive findings made by the Federal Communications Commission ("FCC"). The Tennis Channel, Inc. ("Tennis Channel") respectfully petitions for rehearing en banc or panel rehearing.

1. In Section 616 of the Communications Act, Congress directed the FCC to adopt rules that prevent cable television systems and other multichannel video programming distributors ("MVPDs") from "discriminating in video programming distribution on the basis of affiliation" in ways that "unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." 47 U.S.C. § 536(a)(3). Congress made clear that the FCC and the courts should interpret Section 616 based on the "extensive body of law" that "address[es] discrimination in normal business practices." Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628, at 110 (1992).

After compiling a detailed factual record, the FCC determined that Comcast Cable Communications, LLC ("Comcast")—the largest MVPD in the United States—engaged in unlawful discrimination by consigning Tennis Channel to carriage on a pay-extra "Sports Tier" with a small number of subscribers, while providing far broader carriage to two similarly-situated and competing sports networks that it owns, Golf Channel and Versus (now called NBC Sports Network). The FCC based its finding of intentional discrimination on a range of evidence. *First*, Comcast's own executives admitted that Comcast-owned networks receive a "different level of scrutiny" and that Comcast affords "greater access" to networks that it owns. JA1392-93 & n.64. *Second*, Comcast favors Golf Channel and Versus over Tennis Channel even though the three networks are "virtually peas in a pod"—they have "almost identical" ratings in the areas in which they compete and attract viewers with similar demographic characteristics. JA213:14-19, 1404-05. *Third*, Comcast's programming business benefits from weakening Tennis Channel's ability to compete for programming and advertisers. Versus and Tennis Channel have "a history of repeatedly sharing or seeking rights to the same sporting events," including the [redacted], and Golf Channel and Versus compete with Tennis Channel for the same pool of advertisers and viewers. JA1294-95, 1329, 1404-05. *Fourth*, Comcast's carriage decisions show a clear pattern of discrimination: its wholly-owned networks are

carried on broad tiers, while no network on Comcast's pay-extra Sports Tier, including Tennis Channel, is affiliated with Comcast. JA1403. Comcast carries Tennis Channel at [redacted] of its average market penetration level, while carrying Golf Channel and Versus at rates that are well above their overall market penetration levels. JA1411-12.

The FCC also determined that Comcast's proffered business justifications for refusing to provide broader carriage of Tennis Channel were pretextual. Comcast asserted that its refusal was based on a cost-benefit analysis, but the FCC found that Comcast in fact made no effort to analyze the benefits its distribution business could obtain from Tennis Channel's proposal for broader carriage. Moreover, Comcast provided broad carriage to Golf Channel and Versus without performing any analysis of the costs and benefits to its distribution business of doing so. The FCC also affirmed the Administrative Law Judge's finding that a supposed poll of Comcast's regional distribution managers was merely "a ploy to shore up its defense strategy having sensed imminent future litigation and not to gauge the interest of its local systems in repositioning Tennis Channel." JA1327-28, 1394, 1416. In fact, Comcast rejected Tennis Channel's proposal before it had even received the results of its supposed survey. JA1327-28.

2. Notwithstanding these findings, the panel vacated the FCC's order on the ground that the Commission had not identified evidence that Comcast would have

benefitted from distributing Tennis Channel more broadly. The panel purported to base its decision on the FCC's own interpretation of Section 616, which recognizes that MVPDs may "treat[] vendors differently based on a reasonable business purpose" without violating Section 616. Slip op. 6. Under this standard, according to the panel, the FCC was required to credit a Comcast executive's self-serving and unsupported assertion that Comcast's actions were based on "a straight up financial analysis," *id.* at 4, unless the evidence showed that Comcast chose not to provide broader carriage to Tennis Channel even though it could "expect a net benefit" from doing so, *id.* at 7. Without according any deference to the FCC, the panel erroneously determined that the agency's finding of unlawful discrimination could not stand. *Id.* at 10.

ARGUMENT

I. The Court Should Grant Rehearing En Banc To Decide Whether Intentional Discrimination Claims Require Proof That The Defendant Suffered An Economic Loss Because Of The Discrimination.

The panel's decision is a serious departure from anti-discrimination law that merits review by the full Court. Under that body of law, which governs the interpretation of Section 616, *see supra* p. 1, a defendant that engages in intentional discrimination cannot escape liability simply because the evidence does not establish that it gave up an economic benefit by engaging in discrimination against the plaintiff. If that were the law, a business that hired job applicants on

the basis of race or gender would escape liability unless a rejected applicant could prove that the intentional discrimination reduced the defendant's profits. In fact, the law is just the opposite: the possibility that discrimination is profitable to the defendant, while equal treatment costs it money, is no excuse for discrimination. *See, e.g.*, *Int'l Union, United Auto., Aerospace and Agr. Implement Works of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) ("The extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.").

Because direct evidence of intentional discrimination is seldom available, proof of intentional discrimination must often rest on circumstantial evidence. *See, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). Here, the record includes not only direct admissions by Comcast executives that they favor their own networks, but also evidence that Comcast's proffered business justifications for rejecting Tennis Channel's proposal were pretextual. Under established anti-discrimination law, this evidence provides a sufficient basis for finding intentional discrimination. *See, e.g.*, *Evans v. Sebelius*, __ F.3d __, 2013 WL 2122072, at *3 (D.C. Cir. May 17, 2013). Yet the panel deemed this evidence irrelevant in the absence of evidence that Comcast would have benefited from broader distribution of Tennis Channel. Slip op. 4-9.

The panel concluded that evidence of a forgone "net benefit" was necessary to refute the assertion that Comcast's treatment of Tennis Channel was based on "a straight up financial analysis." *Id.* at 4, 7. But the relevant question is not whether a cost-benefit analysis *could* have justified Comcast's actions; the question is whether Comcast's treatment of Tennis Channel *actually* was motivated by a cost-benefit analysis or by forbidden discrimination on the basis of ownership. By requiring proof that a cost-benefit analysis would not support Comcast's actions—while ignoring the Commission's finding that this justification was pretextual—the panel departed from this Court's prior anti-discrimination decisions, which hold that "the issue is not the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers." *Fischbach v. D.C. Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (quotation marks omitted); *see also George v. Leavitt* 407 F.3d 405, 414 (D.C. Cir. 2005) ("an employer's reason need not be false in order to be pretextual").

By requiring specific evidence of a forgone "net benefit," the panel also departed from the many decisions holding that a plaintiff may rely on a wide range of evidence to refute a defendant's proffered non-discriminatory justification. This Court has repeatedly held that a plaintiff "may show pretext in a number of ways, including by offering evidence of more favorable treatment of similarly situated persons who are not members of the protected class." *Royall v. Nat'l Ass'n of*

Letter Carriers, AFL-CIO, 548 F.3d 137, 144 (D.C. Cir. 2008); *see also Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494-95 (D.C. Cir. 2008). Rather than demanding the sort of evidence that the panel required here, this Court has made clear that a finding of intentional discrimination may be based on "the total circumstances of the case," including "(1) the plaintiff's *prima facie* case; (2) any evidence the plaintiff presents to attack the [defendant's] proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff." *Evans*, 2013 WL 2122072, at *3 (quotation marks and citations omitted). This is precisely the type of evidence on which the Commission based its finding of discrimination. JA1402-17.

The panel's decision is also contrary to both congressional intent and the FCC's interpretation of Section 616. Congress decided that cable companies could own program networks so long as they do not operate in ways that stack the deck against independent programmers. *See* Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 27 (1991) (hereinafter "Senate Report") (recognizing "appeal" of prohibiting vertical integration "altogether" but opting to "focus on ensuring competitive dealings between programmers and cable operators and between programmers and competing video distributors" by, among other things, requiring nondiscriminatory treatment). Contrary to the panel's suggestion, the FCC has never said that an MVPD's actual reasons for

discrimination are "irrelevant" in the absence of independent evidence that the discrimination has caused economic harm to the MVPD. Differential treatment may be justified by a valid business purpose, but it must be the defendant's *actual* reason for that treatment. The panel's ruling—that evidence of an unlawful motive is irrelevant absent evidence that the discrimination causes actual harm to the defendant—gets anti-discrimination law exactly backwards.

The panel minimized the FCC's finding that Comcast's cost-benefit justification was "pretextual" by stating that the FCC's "actual claim is that the cost-benefit analysis was too hastily performed to justify Comcast's rejection of Tennis [Channel]'s proposal, thus supporting an inference of discrimination." Slip op. 10. In fact, the FCC meant what it said. It cited evidence that Comcast's polling of its regional managers was not merely hasty—Comcast rejected Tennis Channel's proposal before the results were even in—but a sham arranged and supervised by Comcast's lawyers. In addition, the FCC found that Comcast provided broad carriage to Golf Channel and Versus (and paid them much higher licensing fees than it would have paid to Tennis Channel) without ever analyzing the net benefits to Comcast's distribution system, or to Comcast as a whole.

The panel's decision has great practical importance. The decision requires the Commission to focus solely on the economic consequences of expanding Tennis Channel's carriage for Comcast's cable distribution business, and to ignore the

evidence that Comcast's programming businesses (*i.e.*, Golf Channel and Versus) benefit substantially from Comcast's decision to restrict its carriage of Tennis Channel. The decision thus ignores the very problem that prompted Congress to enact Section 616—that vertically-integrated MVPDs will take advantage of their role as distributors to stifle competition in programming.

Moreover, the panel's decision allows MVPDs to apply a double standard that will eviscerate Section 616. According to the panel, the FCC could not find unlawful discrimination unless it had evidence that Comcast would derive a net benefit from broader carriage of Tennis Channel. But the record shows that Comcast granted extremely broad carriage to Golf Channel and Versus without conducting any analysis to show that Comcast would benefit from this level of carriage. Indeed, Comcast granted broad coverage to Versus at a time when Comcast's own executives viewed the network as "a crappy channel [that was] dead in the water." JA1403-04. By insisting that the FCC perform an economic analysis that Comcast itself did not perform and by applying an economic standard to independent programmers that Comcast does not apply to its own networks, the panel authorized discrimination in violation of the clear intent of Congress.

The panel cites *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, ¶ 22 (2010) ("*MASN*"), as evidence that it merely followed the FCC's own interpretation of

Section 616. But *MASN* did not require evidence of a forgone "net benefit" to the MVPD in order to prove unlawful discrimination. Instead, the FCC said that evidence of an MVPD's "economic incentives to discriminate . . . does not support a finding of liability where . . . the MVPD's reasons for denying carriage are reasonable and supported by the record." *Id.* Unlike the evidence here, the evidence in that case led the FCC to determine that the MVPD's decision "was driven by factors other than a desire to force *MASN* out of business." *Id.* The FCC did not say that evidence of a "net benefit" to the MVPD is necessary to prove unlawful discrimination.

The panel stated that "[a] rather obvious type of proof" of a net benefit to Comcast "would have been expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis more broadly, or that Y number would leave Comcast in the absence of broader carriage," such that Comcast would recoup the increased licensing fees that it would pay to Tennis Channel. Slip op. 8. But Congress expressly recognized that "the cable operator has an incentive to put on programming that increases subscribership and decreases churn," and yet it nevertheless chose to ban discrimination based on ownership. Senate Report at 24. In any event, the panel's statement fails to recognize what the FCC has repeatedly acknowledged—that only a few networks (not including Golf Channel, Versus, or Tennis Channel) are "must-have" networks for distributors.

See, e.g., *In the Matter of Revision of the Comm'n's Program Access Rules*, 27 FCC Rcd 12605, 12639 & n.205 (2012). Apart from these few "must-have" networks, an MVPD's decision to add or drop a single network (or move it to a different tier) generally does not cause large numbers of customers to switch from one MVPD to another. MVPDs nevertheless pay substantial licensing fees to scores of networks that are not "must-have," because MVPD customers desire a wide range of options (even if they regularly watch only a few channels), in much the same way that customers at an all-you-can-eat buffet pay for a wide choice of menu items but eat only a few of them. The panel's opinion thus calls for a type of proof that is inconsistent with the marketplace in which Comcast and other MVPDs compete. More importantly, it imposes a legal standard that is contrary to anti-discrimination law, that is based on assumptions flatly inconsistent with the FCC's expert conclusions, and that undermines the goals of Section 616 by effectively authorizing MVPDs to engage in intentional discrimination against independent networks. The panel's ruling should be reviewed by the full Court.

II. Alternatively, The Case Should Be Remanded For Consideration, In Light Of The Panel's Decision, Of Whether Comcast Violated Section 616.

The panel not only erred in requiring evidence of a forgone "net benefit" to Comcast, but it also erred in not remanding the case for further proceedings to determine whether such evidence exists. Because the Commission did not view

this evidence as necessary to a finding of unlawful discrimination, it made no finding as to whether Comcast would have received a "net benefit" from broader distribution of Tennis Channel. As the expert agency authorized by Congress to implement Section 616, the FCC should now consider whether Tennis Channel can satisfy this new "net benefit" test.

The panel stated that its economic test could be satisfied based on evidence of the "benefits that Comcast would receive if it distributed Tennis more broadly," or on evidence "that the incremental losses from carrying Tennis in a broad tier would be the same as or less than the incremental losses Comcast was incurring from carrying Golf and Versus in such tiers." Slip op. 8, 10. According to the panel, "[t]here is no such evidence." *Id.* at 8. That is incorrect.

The record contains substantial evidence from which the FCC could find that Comcast violated Section 616 under the "net benefit" test. For example, economist Hal Singer testified that Comcast would benefit at least as much by broadly distributing Tennis Channel as it does by broadly distributing Golf Channel and Versus. JA1128-30. As Dr. Singer explained, because of Tennis Channel's low licensing fee, "Comcast would need only a trivial benefit to justify carriage of Tennis Channel on Comcast's basic tier," and Comcast could obtain that benefit in numerous ways, including through increased advertising and subscriber revenues,

or through "lower expenditures on the license fees of other networks whose prices would be disciplined by Tennis Channel's improved ability to compete." *Id.*

Dr. Singer also provided evidence of the benefits of broad carriage of Tennis Channel by extending an economic analysis initially performed by economist Austin Goolsbee in connection with the merger of Comcast and NBCUniversal. JA1091-93. That analysis shows that Comcast carries Tennis Channel more broadly in markets where it faces more competition from other MVPDs, which demonstrates that Comcast itself believes that broader carriage of Tennis Channel is beneficial to attract and retain customers in competitive markets. *Id.*

The evidence also showed that Versus and Golf Channel benefit from Comcast's refusal to grant Tennis Channel broader carriage. Versus competes with Tennis Channel for rights to major tennis events, and all three networks compete for the same pool of advertisers. In addition, by limiting Tennis Channel's distribution, Comcast can hold Tennis Channel below the number of viewers needed to attract national advertising campaigns, which also prevents Tennis Channel from becoming a more serious competitor. Comcast clearly understood as much: The evidence showed that it believed Tennis Channel was not viable over the long term if it remained on the Sports Tier. JA744-46, 1170-71. Although the panel recognized that a reasonable business purpose "obviously

exclud[es] any purpose to illegitimately hobble the competition from Tennis," slip op. 6, it ignored the extensive evidence that this was exactly Comcast's purpose.

Other evidence showed that, although Tennis Channel's licensing fee per subscriber is far lower than the fees charged by Golf Channel or Versus, the ratings of all three channels and their viewer demographics (*e.g.*, viewers' age and income) are very similar. As the panel recognized, the evidence showed that Comcast views the licensing fee as "generally the most important factor" in carriage decisions. *Id.* at 6. Although the panel viewed Tennis Channel's relatively low licensing fee as a "clear negative," *id.* at 7, charging a lower price to deliver a comparable number and type of viewers is in fact a clear *positive*.

Despite acknowledging that Tennis Channel has a lower "cost per ratings point" than Golf Channel and Versus, the panel stated that the FCC's discussion of this evidence is "mere handwaving" unless accompanied by "evidence that the lower cost per ratings point is correlated with changes in revenues." Slip op. 8. Such evidence is in the record. For example, Comcast itself uses cost per rating point figures to show the value of Comcast-owned networks such as Golf Channel and Versus to other MVPDs, suggesting that its distribution business receives a similar value from carrying these networks. Tennis Channel Exh. 82.

Finally, the evidence showed that other MVPDs carry Tennis Channel more broadly than Comcast. JA1349. This evidence demonstrates that MVPDs without

an incentive to discriminate based on affiliation have concluded that broader carriage of Tennis Channel provides a "net benefit." Based on this evidence and the evidence that Comcast's carriage decisions for sports program services correlate with its ownership interests, the FCC could reasonably conclude that Comcast refused to carry Tennis Channel more broadly based on affiliation.

In any event, the case should be remanded even if the existing record did not contain evidence of a forgone "net benefit." The panel identified types of proof that would satisfy its "net benefit" test (*e.g.*, "expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis more broadly"), but it properly left open the possibility that other types of proof could also suffice. Slip. op. 8. It also recognized that arguments about evidence of unlawful discrimination by MVPDs "involve complex and at least potentially sophisticated disputes." *Id.* at 4. The panel at least should have remanded the case for further consideration in light of its decision.

CONCLUSION

The petition for rehearing en banc should be granted, and the full Court should decide whether intentional discrimination claims require proof of a forgone "net benefit." Alternatively, the case should be remanded for reconsideration, in light of the panel's decision, of whether Comcast violated Section 616.

Respectfully submitted,

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July 12, 2013

ATTACHMENT 4

Public Copy -- Sealed Material Deleted

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

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

To: The Commission

PETITION FOR FURTHER PROCEEDINGS AND REAFFIRMATION OF ORIGINAL DECISION

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March 11, 2014

SUMMARY

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

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

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

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

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

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

To: The Commission

PETITION FOR FURTHER PROCEEDINGS AND REAFFIRMATION OF ORIGINAL DECISION

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

[7] *Id.* ¶¶ 51, 56.

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

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

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

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[8] *Id.* ¶¶ 52–55.

[9] *Id.* ¶ 65.

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

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

[12] *Id.* ¶ 45.

[13] *Id.* ¶ 46.

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

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

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[14] *Id.* ¶ 69.

[15] *Id.* ¶ 77.

[16] *Id.* ¶ 112.

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

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

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

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

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

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

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

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

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[20] *Id.*

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

[22] *Id.*

[23] *Id.*

[24] *Id.* at 986.

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

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

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

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

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

[27] *Id.*

[28] *Id.*

[29] *Id.*

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[39] Order ¶ 52.

[40] *Id.* ¶¶ 53, 55.

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

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

[41] Tennis Channel Ex. 108.

[42] Order ¶ 55.

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

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

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

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

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

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

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

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

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

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[49] Order ¶ 71.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[57] Order ¶ 79.

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

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

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

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

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[60] Order ¶ 80.

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

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

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

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

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

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

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

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

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

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

[67] Initial Decision ¶ 59.

[68] Singer Written Direct ¶ 20.

[69] *Id.* ¶ 20 & Table 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[76] Donnelly Tr. at 2550:3–21.

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

CONCLUSION

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

Respectfully submitted,

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March 11, 2014

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

CERTIFICATE OF SERVICE

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

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/s/Elizabeth Canter

ATTACHMENT 5

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

THE TENNIS CHANNEL, INC., *Petitioner*,	)	
v.	)	No. 15-1067
FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, *Respondents.*	)	

PETITION FOR REVIEW

The Tennis Channel, Inc. ("Tennis Channel") hereby petitions for review of the order of the Federal Communications Commission ("FCC") captioned *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 15-7 (released Jan. 28, 2015) ("Order").

Venue is proper in this Court under 28 U.S.C. § 2343.

This petition arises from a program carriage complaint filed by Tennis Channel, a cable television programming network, against Comcast Cable Communications, LLC ("Comcast"), a vertically integrated cable company. Order ¶ 1. Tennis Channel's complaint alleged, and an Administrative Law Judge's Initial Decision had found, that with respect to the terms of its carriage of Tennis Channel, Comcast violated Section 616 of the Communications Act, 47 U.S.C.

§ 536, and the FCC's rules, by discriminating against Tennis Channel and in favor of Comcast's affiliated networks Golf Channel and Versus (now NBC Sports Network) because of their affiliation, and that this discrimination had the effect of unlawfully restraining Tennis Channel's ability to compete fairly. Order ¶¶ 1, 4–5. A previous FCC decision had affirmed the ALJ's Initial Decision and ordered Comcast to provide Tennis Channel with carriage on its distribution network equal to that which it accorded Golf Channel and Versus. Order ¶¶ 2, 5. In 2013, this Court vacated the FCC's decision. Order ¶ 2. In the Order, the FCC has declined to address the "evidentiary shortcomings" identified in this Court's prior decision, reversed the ALJ's Initial Decision, and denied Tennis Channel's complaint. Order ¶¶ 3, 7.

Tennis Channel seeks review of this Order under 28 U.S.C. §§ 2342(1) and 2344, 47 U.S.C. § 402(a), and Rule 15(a) of the Federal Rules of Appellate Procedure. Pursuant to 5 U.S.C. § 706, Tennis Channel alleges that the challenged Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; violates the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder; is issued without observance of procedure required by law; and is unsupported by substantial evidence.

Accordingly, Tennis Channel respectfully requests that this Court hold unlawful, vacate, enjoin, and set aside the Order, and that it provide such additional relief as may be appropriate.

Respectfully submitted,

March 27, 2015

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ADDENDUM
(Certificate As To Parties)

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

THE TENNIS CHANNEL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 15-1067**
	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), respondent Federal Communications Commission respectfully submits this certificate of parties, rulings, and related cases:

I. Parties, Intervenors, and Amici.

The parties are:

Petitioner

The Tennis Channel, Inc.

Respondents

Federal Communications Commission
United States of America

Intervenors

Comcast Cable Communications, LLC

There currently are no amici.

II. Rulings Under Review

The ruling under review is *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Order, 30 FCC Rcd 849 (2015).

III. Related Cases

This Court granted Comcast Cable Communications, LLC's petition for review of a previous FCC order in the same proceeding in Case No. 12-1337, *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013). The FCC is not aware of any case pending in any other court that involves substantially the same issues as this case.

Respectfully submitted,

/s/ *Laurence N. Bourne*

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May 12, 2015

15-1067

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

The Tennis Channel, Inc., Petitioners

v.

Federal Communications Commission
and the United States of America, Respondents

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on May 12, 2015, I electronically filed the foregoing Motion for Summary Affirmance 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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